This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HDI
HL 470C %

Digitized by Google

INDIA

HARVARD LAW LIBRARY

Received OCT 9 1909

Digitized by Google

24

Digitized by Google

Digitized by Google

DESAI'S

HAND-BOOK OF CRIMINAL CASES

BEING

A Verbatim Reprint of all Criminal Cases

REPORTED IN

THE INDIAN LAW REPORTS FOR THE YEARS

1900 TO 1906

viz,

CAL. Vols. 27–33.
BOM. Vols. 24–30.
MAD. Vols. 23–29.
ALL. Vols. 22–28.

IN TWO VOLUMES

VOL. II.

PUBLISHED BY

B. R. DESAI,

High Court Pleader and Law Reporter.—BARODA.

(*Author of Desai's Index of Cases* 1811—1904).

Price Rs. 14. (*for both the Vols.*) **Postage Extra.**

Printed at

The LAKSHMI VILAS and VIDYA VILAS Printing Presses.

BARODA.

1907.

IN
580
DES

Digitized by Google

OCT 9 1909

Digitized by Google

PREFACE.

There is perhaps no branch of learning in which Precedents carry so much weight and importance as they do in Law. But these require to be closely and accurately studied in the original before they can be made serviceable ; otherwise, as often happens, they prove the most treacherous guides imaginable. Of course, this is no revelation to practising lawyers, but it requires to be particularly borne in mind at a time when " Digests " and " Indexes " of all sorts are being multiplied in every quarter with an amazing rapidity. The spectacle is not quite uncommon in law-courts, where a case cited from one of these Digests as an authority for a particular proposition, proves on closer scrutiny anything but an authority for it, or worse still, an authority the other way. The only way by which one can avoid coming in such humiliating predicament is to study case-law from full reports. Hence the utility of a book like the present *a verbatim Reprint of the original reports.*

2. As there is no knowing what new and unforeseen points may develop during the course of an argument, the truly "practical" lawyer is always anxious above all, to arm himself with all possible means of offence and defence. In other words, he would have, by his side, the entire case-law if possible. To render some useful service in this direction is the humble object of the present publication. The impracticability of carrying the hundred and twenty volumes of the Indian Law Reports in court on every occasion may be allowed to be a sufficient justification for separately publishing the Criminal cases in a few handy volumes. Seven years ago Mr. Cranenburgh published in five volumes the Criminal Cases that appeared in the Indian Law Reports from 1876 to 1899. The present Hand-book is an effort in the same direction being *a verbatim Reprint* of all the Criminal cases reported in the Indian Law Reports for 1900 to 1906 and it is hoped, the Legal profes-

Digitized by Google

sion will welcome it as it did the first effort. The Book is bound in two separate volumes, the first contains I. L. R. Cal. vols. 27 to 33, and I. L. R. All. vols. 22 to 28; while the second comprises I. L. R. Bom. vols. 24 to 30, and I. L. R. Mad. vols. 23 to 29. As in these handy volumes are collected together the criminal cases that lie scattered over the 28 volumes of the last seven years of the Indian Law Reports it is expected to be equally serviceable to those who possess the I. L. R., as well as to those that do not.

It is hardly necessary to say that a book of reference like the present is practically of little use without proper Notes and an exhaustive Index. No pains, therefore, have been spared to make this part of the Hand-book as complete as could be desired. Each series of the Reports is supplemented by(1) An exhaustive subject-Index; (2) A Table of cases; and (3) A statement of corresponding pages. Moreover where a case has been subsequently judicially dealt with, such subsequent cases are noted down with their effect just after the headnote.

Palace Road,
BARODA.
August 1907.

B. R. DESAI.

Digitized by Google

TABLE OF CASES (Criminal)

I. L. R. Madras. Vols. XXIII to XXIX. (1900 to 1906)

(The References are to the Pages of this book, Madras Series.)

Abdul Azeez Sahib v. Cuddapah Municipality ... 254
Abu Bakar v. The Municipality of Negapatam ... 406
Adams v. Emperor 283
Alagirisamy Naidu v. Balakrishnasami Mudaliar 201
Algarasawmi Tevan v. Emperor 373
Alingal Kunhinayan v. Emperor 378
Annakumaru Pillai v. Muthupayal ... 335
Anusoori Sanyasi In Re ... 353
Arunacheilam Chettiar v. Chidambaram Chetti .. 386
Arunuga Tegundan ... 227
Balambal In re ... 248
Bandanu Atchayya v. Emperor 315
Bangaru Asari v. Emperor ... 309
Batakala Pottiavadu In re ... 205
Belagal Ramacharlu v. Emperor 253
Bell v. The Municipal Commissioners for the City of Madras 142
Byravalu Naidu In the matter of 220
Chekutty v. Emperor ... 246
Chenna Malli Gowda v. Emperor 314
Chennanagoud and another In re 225
Chinnathambi Mudali v. Salla Gurusamy Chetty ... 377
Dorasamy Pillai v. Emperor. ... 304
Emperor v. Chellan ... 382
" v. Cherath Choyi Kutti 230
" v. Chinna Kaliappa Gounden ... 390
" v. Chinnapayan ... 414
" v. Edward William Smither ... 187
" v. Jonnalagadda Venkatrayudu ... 380
" v. Kasuppana Pallai... 408
" v. Muthukomaran ... 332
" v. Palaniappavelan ... 407
" v. Ramasawmy Raju... 410
" v. Ravalu Kesigadu ... 218
" v. Venkanna Prabhu... 252
Eranholi Athan v. King-Emperor 213
Eroma Variar v. Emperor ... 300
Govindu and another In Re ... 281
Guzzala Hanuman v. Emperor 250
H. K. Beauchamp v. G. M. J. Moore. ... 202
Ismal Rowther v Shunmugavelu Nadan ... 405
Jagannadha Rao v. Kamaraju ... 61
John Martin Sequeira v. Luja Bai ... 183
Kader Batcha v. Kader Batcha Rowthan ... 412
Kalagava Bapiah In Re .. 305
Kalimuthu v. Emperor. ... 254
Kamatchinathan Chetty v. Emperor ... 375
Kandasami v. Soli Goundan ... 23
Kannookaran Kunhamad v. Emperor ... 251
Karuppana Servagaran v. Sinna Gounden ... 257
King-Emperor v. Alagarisami Pathan ... 174
" v. Alexander Allan ... 177
" v. Antakke ... 100
" v. Ayya Annasamy Aiyar and others 175
" v. Ayyan ... 102
" v. Balu Kuppayyan ... 171
" v. C. Srinivasan ... 183
" v. Gopalasamy ... 186
" v. Krishnayya ... 173
" v. Krishna Ayyar ... 96
" v. Mohiuddin Sahib... 138
" v. Takasi Nakayya ... 98
" v. Thammana Reddi ... 181
" v. Tirumal Reddi ... 79
Kotamraju Jenkatrayadu v. Emperor ... 355
Krishna Reddi v. Subbama ... 42
Krishnasami Pillai v. Emperor 219
Kuppammall In the matter of ... 416
Mahomed Abdul Mennan v. Panduranga Row ... 372
Mallappa Reddi v. Emperor ... 313
Manavala Chetty v. Emperor ... 426
Meyyan v. Emperor ... 249
Mohideen Abdul Kadir v. Emperor ... 315
Municipal commissioners for the City of Madras v. Major Bell... 106
Muthiah Chetti v. Emperor ... 409
Muthukudam Pillai In re ... 229
Narayanaswami Naidu v. Emperor ... 425

Digitized by Google

Pachai Ammal in re ... 228
Palagan In the matter of ... 206
Pampapati Sastri v. Subba Sastri 14
Paree Kunhammed In re ... 215
Parimanam Pillai v. Chairman, Municipal Council, Ootacamund 16
Pattikadan Ummaru v. Emperor 232
Perumal v. Municipal Commissioners for the City of Madras 9
Ponnusami In Re ... 418
Queen-Empress v. Abdulla Saheb 56
" v. Allan ... 51
" v. Aakanna ... 13
" v. Chenchayya ... 27
" v. Chenchi Reddi ... 54
" v. Chinna Pavuchi ... 1
" v. Dorasami Ayyar ... 76
" v. Ganapathi Vannianar 28
" v. Gangayya ... 77
" v. Hanumantha Reddi... 21
" v. Kuniyil Raru ... 74
" v. Kuppumuthu Pillai... 68
" v. Lakshmanna ... 69
" v. Munda Shetti ... 37
" v. Pandara Tevan ... 30
" v. Papa Sani ... 6
" v. Peelimuthu Tevan... 39
" v. Rama ... 31
" v. Ramasami ... 71
" v. Sankaralinga Kone... 25
" v. Somasundaram Chetti 3
" v. South ... 34
" v. Subrahmaniar Ayyar 49
" v. Venkataramanna ... 20
" v. Venkatasami Naidu.. 19
" v. Virasami .. 70
" v. Yamana Rao .. 67
Raghunatha Pandaram v. Emperor .. 222
Ramakrishna Reddi v. Emperor 283
Ramanadhan Chetti v. Murugappa Chetti ... 33
Ramasamy Chetty In Re ... 330
Ramaswami Gounden v. Emperor 317
Ramaya Naika In the matter of 243
Rangacharlu v. Emperor .. 411
Rattigadu v. Konda Reddi ... 58
Rayan Kutti v. Emperor ... 297
Regula Bheemappa v. Emperor 236
Runga Ayyar v. Emperor ... 413
Sami Ayya v. Emperor ... 255
Sangilia Pillai v. The District Magistrate of Trichinopoly ... 180
Sevakolandai v. Ammayan ... 238
Sinagaraju Nagabhushanam ... 248
Sreeman Kumara Tirumalraja Bahadur Rajah of Karvetnagar v. Sowcar Lodd Govind ... 421
Subbamma In the matter of ... 310
Subba Reddi v. Munshoor Ali Saheb ... 36
Subrahmania Ayyar v. King-Emperor ... 112
Subudhi Rantho v. Balarama Pudi 257
Suppa Tevan v. Emperor ... 281
Suri Venkatappayya Sastri v. Madula Venkanna ... 332
Suryanarayana Row v. Emperor 388
Tammi Reddi In the matter of 308
Tangi Joghi v. Hall 98
Thandraya Mudaly v. Emperor 199
Thomas v. Emperor ... 419
Vemuri Seshanna In re ... 245
Venkatesa Ayyangar In Re ... 231
Venkatrama Chetti v. Emperor 351
Vijiraghava Chariar v. Emperor 259
V. Shanmugam Chetty v. Pennappa Mudaly ... 224
Vythianada Tambiran v. Mayandi Chetty ... 415

Digitized by Google

Table of Cases (Criminal)

I. L. R. Bombay *Vols. XXIV to XXX* (1900 to 1906)

(The references are to the pages of this book, Bombay Series).

Balgangadhar Tilak In Re 26 Bom. 785 .. 107
Cawasji Merwanji Shroff v. The G. I P. Ry. Co. 26 B. 609 .. 100
Chhotalal Lallubhai v. Nathabhai Bechar 25 Bom. 151 .. 27
Dadabhai Jamsedji In Re 24 Bom. 293 .. 6
Emperor v Alloomiya Husan 28 v. Bom. 129 .. 141
" v. Bal Gangadhar Tilak 28 Bom. 479 .. 160
" v. Bankatram Lachiram 28 Bom. 533 .. 174
" v. Bhaskar Balwant Bhopatkar 30 Bom. 421 247
" v. Budhoobai 30 B. 126 231
" v. Datto Hanmant Shahapurkar 30 Bom. 49 .. 227
" v. Dwarkadas Dharamsey 30 Bom. 392 .. 245
" v. Hussein Noor Mahomed 30 Bom. 348 .. 238
" v. Jamsetji Cawasji Cama 27 Bom. 551 .. 122
" v. Jethalal Hurlochand 29 Bom. 449 .. 212
" v. Jusub Ally 29 B. 386 206
" v. Kondiba Dhondiba Powar 28 Bom. 412 .. 158
" v. Kothia valad Navalya Bhil 30 Bom. 611 .. 257
" v. Lakhamsi Malsi 29 Bom. 264 .. 204
" v. Lakshman Raghunath 26 Bom. 558 .. 98
" v. Maganlal Dulabhai 28 Bom. 346 .. 156
" v. Malgowda Basgowda 27 Bom. 644 .. 136
" v. Nadirsha H. E. Sukhia 29 Bom. 35 .. 195
" v. Purshottam Kara 26 Bom. 418 .. 88
" v. Rampratap Maguiram 29 Bom. 423 .. 209
" v. Robert Comley 29 Bom. 575 .. 224
" v. Sherufalli Allibhoy 27 Bom. 135 .. 119
" v. Tribhovandas Brij Bhukandas 26 Bom. 533 90
" v. Varjivandas alias Kalidas Bhaidas 27 B. 84 111
" v. Walia Musaji 29 B. 226 202
" v. Wallace Flour Mill Co. 29 Bom. 193 .. 198
" v. Walli Mussaji 26 B 641 105
" v. Waman Shivram Damle 27 Bom. 626 .. 125
Goverdhandas Meghji In Re 27 Bom. 130 .. 116
Govind Hanmant In re 25 B 48 20
Imperatrix v. Ratnya 25 B. 667 52
Imperatrix v. Rudra 25 B. 45 ... 18
Khimji Jairam In Re 24 B. 75 .. 1
King-Emperor v. Babya Bhiva 25 Bom. 712 .. 72
" v. Bala 25 Bom 675 .. 57
" v. Jayram 25 Bom. 694 69
" v. Malhar Martand Kulkarni 26 Bom. 193 ... 81
" v. Parbhushankar 25 Bom. 680 ... 60
" v. Sada 26 Bom. 150 ... 76
" v. Sakharam Pandurang 26 Bom. 50 .. 73
" v. The chief officer of the Ss. "Mushtari" 25 Bom. 636 .. 51
Lakshman Govind Nigude In the matter of 26 Bom. 552 .. 94
Muthur Lalbhai 25 B. 702 79
Municipal Commissioner for the City of Bombay vs. Hari Dwarkoji In re 24 Bom. 125 2
Municipal Commissioner Bombay v. Mathurabai 30 Bom. 558 . 250
Pandurang Govind In Re 24 Bom. 527 .. 14
Pandurang Govind Pujari and others In re 25 Bom 179 .. 37
Queen-Empress v. Anant Puranik 25 Bom 90 ... 21
" v Baku 24 Bom. 1287 ... 3
" v. Basvanta 25 Bom. 68 33
" v. Hussein Haji 25 Bom, 422 ... 42
" v. Narayan 25 Bom, 543 46
" v. Tyab Alli 24 Bom. 4 . 11
Rattansee Purshottum In Re 24 Bom, 471 ... 12
Radha Krishna Joshi v. Kisna Shridhar 26 Bom. 289 .. 85

Digitized by Google

Statement of Corresponding pages.

I. L. R. Madras. Vol.	Page.	Corresponding page of this Book.
XXIII	151	1
,,	155	3
,,	159	6
,,	164	9
,,	203	18
,,	205	13
,,	210	14
,,	213	16
,,	220	19
,,	223	20
,,	225	21
,,	540	23
,,	544	25
,,	626	27
,,	632	28
,,	636	30
XXIV	13	31
,,	45	33
,,	70	34
,,	81	36
,,	121	37
,,	124	39
,,	136	42
,,	161	49
,,	195	51
,,	238	54
,,	262	56
,,	271	58
,,	284	61
,,	305	67
,,	317	68
,,	318	69
,,	319	70
,,	321	71
,,	337	74
,,	414	76
,,	417	77
,,	523	79
,,	641	96
,,	660	98
,,	662	100
,,	675	102
XXV	15	106
,,	61	112
,,	143	138
,,	457	142
,,	525	171
,,	534	173
,,	546	174

I. L. R. Madras. Vol.	Page.	Corresponding page of this Book.
,,	624	175
,,	627	177
,,	659	180
,,	667	181
,,	671	183
,,	726	183
,,	729	186
XXVI	1	187
,,	38	199
,,	41	201
,,	43	202
,,	49	205
,,	55	206
,,	98	213
,,	116	215
,,	124	218
,,	125	219
,,	127	220
,,	130	222
,,	137	224
,,	139	225
,,	188	227
,,	189	228
,,	190	229
,,	191	230
,,	193	231
,,	243	232
,,	249	236
,,	394	238
,,	419	243
,,	421	245
,,	454	246
,,	463	248
,,	464	248
,,	465	249
,,	467	250
,,	469	251
,,	470	252
,,	471	253
,,	475	254
,,	477	254
,,	478	255
,,	480	257
,,	481	257
,,	554	259
,,	592	281
,,	598	283
,,	607	283
,,	640	297

I. L. R. Madras Vol.	Page.	Corresponding page of this Book.
,,	656	300
XXVII	52	304
,,	54	305
,,	59	308
,,	61	309
,,	124	310
,,	127	313
,,	129	314
,,	237	315
,,	238	315
,,	271	317
,,	510	330
,,	525	332
,,	531	332
,,	551	335
XXVIII	17	351
,,	37	353
,,	90	355
,,	255	372
,,	304	373
,,	308	375
,,	310	377
,,	454	378
,,	565	380
XXIX	89	381
,,	91	382
,,	97	386
,,	100	388
,,	126	390
,,	149	405
,,	185	406
,,	187	407
,,	188	408
,,	190	409
,,	192	410
,,	236	411
,,	237	412
,,	331	413
,,	372	414
,,	373	415
,,	375	416
,,	517	418
,,	558	419
,,	561	421
,,	567	425
,,	569	426

I. L. R. Bom. Vol.	Page	Corresponding page of this Book.
XXIV	75	1
,,	125	2
,,	287	3
,,	293	6
,,	423	11
,,	471	12
,,	527	14
XXV	45	18
,,	48	20
,,	90	21
,,	151	27
,,	168	33
,,	179	37
,,	422	42
,,	543	46
,,	636	51
,,	667	52
,,	675	57
,,	680	60
,,	694	69
,,	702	70
,,	712	72
XXVI	50	73
,,	150	76
,,	193	81
,,	289	85
,,	418	88
,,	533	90
,,	552	94
,,	558	98
,,	609	100
,,	641	105
,,	785	107
XXVII	84	111
,,	130	116
,,	135	119
,,	551	122
,,	626	125
,,	644	136
XXVIII		
,,	129	141
,,	346	156
,,	412	158
,,	479	160
,,	533	174
XXIX	35	195
,,	193	198
,,	226	202
,,	264	204

I. L. R. Bom Vol.	Page.	Corresponding page of this Book.
,,	386	206
,,	423	209
,,	449	212
,,	575	224
XXX	49	227
,,	126	231
,,	348	238
,,	392	245
,,	421	247
,,	558	250
,,	611	257

Digitized by Google

THE
INDIAN LAW REPORTS

Madras Series Vol. 23.

CRIMINAL CASES.

1899 *Nov.* 29, 30. **I. L. R. 23 Mad. 151.**

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

QUEEN-EMPRESS, *v.* CHINNA PAVUCHI AND OTHERS.*

EVIDENCE ACT—Act I of 1872, s. 30—Confession by one of several persons jointly tried for the same offence—Plea of guilty by person so confessing—Criminal Procedure Code—Act V of 1898, s. 271—Discretion to continue trial after plea of guilty.

The trial of an accused person does not necessarily end if he pleads guilty. Under section 271 of the Code of Criminal Procedure, where an accused pleads guilty, "the plea shall be recorded," and the accused "may be convicted" thereon; but evidence may be taken in sessions cases as if the plea had been one of "not guilty," and the case decided upon the whole of the evidence including the accused's plea. When such a procedure is adopted the the trial does not terminate with the plea of guilty, and therefore a confession by the person so pleading may be taken into consideration under section 30 of the Indian Evidence Act 1872, as against any other person who is being jointly tried with him for the same offence. A trial does not strictly end until the accused has been either convicted or acquitted or discharged.

(NOTE:—This case is Approved of in I. L. R. 23 All. p. 53 and Referred to in 10 M. L. J. 147.)

Three persons being tried on a charge of murder, the second and third accused gave information to the Magistrate which led to the discovery of jewels which had belonged to the deceased and had been worn by her immediately before the murder. The third accused then attempted to commit suicide and while in hospital made a full a confession to the Taluk Magistrate, stating how the murder had been committed by himself and the first and second accused. On the following day, the second accused made a similar confession to the Taluk Magistrate. These confessions were repeated before another Magistrate who held the preliminary enquiry. Before the Sessions Court, the second accused adhered to his confessions and pleaded guilty, but the third accused retracted his, alleging that he had been induced to make them by police torture. The trial of the second accused before the Sessions Court continued notwithstanding his plea of guilty. The first accused did not at any time confess, nor was any of the murdered woman's property traced to his possession. The Sessions Judge and the assessors, accepting the evidence of four prosecution witnesses and the two confessions, convicted all the three accused of murder and they were sentenced to death.

The accused appealed.

Subrahmania Sastri for accused No. 1.—The confession of the second accused was wrongly relied on. Under section 30 of the Evidence Act the Court may take into consideration the confession of one of more persons who are being tried jointly for the same offence, but here the second accused was

* Referred Trial No. 55 of 1899.

Digitized by Google

no longer on his trial, he having pleaded guilty. See *Queen-Empress* v. *Lakshmayya Pandaram (1)*.

Kuppusami Ayyar for accused Nos. 2 and 3.

Mr. *N. Subrahmanyam* for the Crown.—Though an accused pleads guilty, his plea need not necessarily be accepted. If accepted, and he is convicted on his plea, possibly his trial ends and his evidence might not be receivable under section 30 of the Evidence Act. But under section 271 of the Code of Criminal Procedure it is in the discretion of the Court to convict on the plea or not, though it is imperative that the plea should be recorded. Here, the Sessions Judge recorded the plea, but the trial proceeded and the second accused actually cross-examined witnesses and was still on his trial throughout. He was still therefore being jointly tried with the first accused and his confession was properly received in evidence as against first accused. If *Queen-Empress* v. *Lakshmayya Pandaram (1)* lays down that a trial necessarily comes to an end with a plea of guilty, it goes too far: and that is shown by the unreported case referred to in *Queen-Empress* v. *Pahuji (2)* which latter case was relied on in *Queen-Empress* v. *Lakshmayya Pandaram (1)*. But this question was not before the Court in *Queen-Empress* v. *Lakshmayya Pandaram (1)* as there the plea of the accused seems to have been in fact accepted and his trial ended.

JUDGMENT.—(After stating the facts their Lordships continued).—It has been urged by the Vakil for the first accused that the confessions of the second accused before the Magistrate and the Sessions Court, ought not to be considered as against the first accused, on the ground that when the second accused pleaded guilty before the Sessions Judge his trial must be taken to have terminated, and he was therefore no longer a person who was being "jointly tried" with the first accused, so as to fall within the rule laid down in section 30 of the Indian Evidence Act. The rule is that "when more persons than "one are being tried jointly for the same offence and a confession made by one "of such persons affecting himself and some other of such persons, is proved, "the Court may take into consideration such confession as against such other "person, as well as against the person who makes such confession." The Vakil for the first accused contends that the trial ends with the plea of guilty, and in support of this view he has referred us to the observation of Boddam, J., to that effect in *Queen-Empress* v. *Lakshmayya Pandaram* (1). The actual procedure adopted by the Magistrate in that case does not appear from the report, and the learned Judge upon the evidence found that the then appellant was not guilty. The observation relied on by the present appellant's Vakil follows as an additional reason for acquitting the accused. If the learned Judge intended to lay down as a proposition of law that the trial of an accused person necessarily ends as soon as he pleads guilty, we could not agree with the proposition; for under the Criminal procedure Code the Court is not bound to convict an accused person on his plea of guilty. The Code (section 271) only says that "the plea shall be recorded, and he may be convicted thereon." As a matter of practice in Sessions trials—especially in murder cases—many Judges, as we think very properly, prefer not to act on the plea of guilty, but proceed to take the evidence just as if the plea had been one of not guilty, and decide the case upon the whole evidence, including the accused's plea. When this procedure is adopted it is obvious that the trial does not terminate with the plea of guilty, and this view is in accordance with the decision of the Bombay High Court in the case referred to and distinguished

(1) I.L.R., 22 Mad., 491. (2) I. L. R., 19 Bom., 195.

Digitized by Google

in *Queen-Empress* v. *Pahuji* (2), to which the learned Judge refers in *Queen-Empress* v. *Lakshmayya Pandaram* (1). Strictly speaking a trial does not come to an end until the accused has been either convicted or acquitted or discharged. The proper course therefore to be adopted when an accused person pleads guilty is either to convict him on his plea and remove him from the dock, in which case his trial would be manifestly at an end so as to warrant his being called as a witness for or against any persons who had been accused along with him; or else to allow the trial to go on as if the plea had been one of not guilty. When this is done it is clear that the trial does not end with the plea of guilty, and therefore any confession made by the person so pleading could be taken into consideration under section 30 of the Indian Evidence Act as against any other person who was being jointly tried with him for the same offence.

The only case in which there may be a doubt is where neither of these courses has been explicitly adopted, but the accused who has pleaded guilty is left in the dock merely to see what the evidence will show as against him, though the court intends ultimately to convict him on the plea of guilty. In such a case we should be inclined to hold that it would not be fair to allow his confession to be considered as against his co-accused for that would be, in effect, to comply with the forms of justice while violating it in substance; compare *Reg* v. *Gardner* (3). It is not, however, necessary to pursue this subject further, for in the present case it is clear that the trial of the second accused continued, notwithstanding his plea of guilty. His Vakil crossexamined the witnesses, the accused himself was examined in the usual course at the end of the evidence for the prosecution, and the opinion of the assessors was taken as to his guilt. In these circumstances we have no doubt but that his confessions may be considered as against the first accused.

The result is that we agree with the Sessions Judge and the assessors in finding all the accused guilty of murder. We dismiss their appeals and confirm the sentences of death passed upon them by the Sessions Judge.

1899 *August* 24, *Sept* 14, 19. **I. L. R. 23 Mad. 155.**

Before Mr. Justice Subrahmania Ayyar (Officiating Chief Justice) and Mr. Justice O' Farrell.

QUEEN-EMPRESS, *v.* SOMASUNDARAM CHETTI.*

Stamp Act—1 of 1879, ss. 61, 67—Defrauding Government of stamp revenue by a contrivance or device not otherwise specially provided for—Receipt of unstamped document—Abetment of an offence under section 61 of Stamp Act, 1879—Penal Code—Act XLV of 1860, s. 40.

Two letters were written to petitioner in which the writer recommended him to advance sums of money to the bearers of the letters and bound himself to repay those sums, if lent, in case of default on the part of the borrowers. The loans were made by petitioner, who kept the letters. A prosecution having been subsequently commenced against petitioner under section 67 of the Stamp Act, 1879, for defrauding Government of stamp revenue by an illegal device, and he having been convicted on the ground that when the loans were granted the documents became letters of guarantee and as such liable to stamp duty:

(1) I. L. R., 22 Mad., 491. (2) I. L. R. 19 Bom., 195. (3) 9 Cox Cr. C. 332.

* Criminal Revision Case No. 244 of 1899.

Digitized by Google

HELD, that the execution of a document which on its face required to be and was not stamped, could not be said to be an act "contrivance or device not specially provided for by this Act or any other law for the time being in force" ; and that punishment for the act of the executant of such a document, if it were punishable at all, was provided for under section 61 of the Stamp Act, 1879, and it could not therefore be dealt with under section 67.—Also that the act of a person receiving an unstamped document might amount to abetment of an offence, having regard to section 61 of the Stamp Act, 1879, and to the definition of an "offence" in section 40 of the Indian Penal Code, and if so, would be an act provided for by "any other law for the time being in force," and so not within the terms of section 67 of the Stamp Act. 1879.

PETITIONER had been second accused in a charge, under section 67 of the Stamp Act I of 1879, of defrauding Government of stamp revenue by illegal devices. The first accused in the case had written to the second accused two letters in which he recommended second accused to lend Rs. 400 and Rs. 500 to the bearers of the letters and bound himself to repay those sums, if lent, in case of default on the part of the borrowers. The loans were made and second accused kept the letters, which were not stamped. At a subsequent enquiry, held in connection with the assessment of income-tax, the letters were produced and a prosecution ordered under section 67 of the stamp Act, I of 1879, for defrauding Government of its stamp duty by an illegal device. The accused were convicted and sentenced to pay fines of Rs. 100 and 200, respectively, with terms of imprisonment in default of payment.

Against these convictions both accused appealed. The Sessions Judge allowed the appeal of the first accused, holding that his letters to second accused to give loans to certain persons and binding himself to make good the loans in a stated contingency could have no force against him, unless and until the loans were made. He referred to *Narayanasami Mudaliar* v. *Lokambalammal* (1) as laying down that " acceptance of the offer made in the letter was necessary before any obligation could be said to arise." He found no proof that first accused knew that the loans had been made or that he was aware that an obligation had arisen in connection with the letters. With regard to second accused, the Sessions Judge held that inasmuch as he knew that the loans had been made it was his duty to call upon first accused to stamp the letters which had become letters of guarantee. From his omission to do so and from the other circumstances which led to his prosecution the Sessions Judge held that second accused had wilfully acted fraudulently with intent to cause loss to Government. He dismissed the appeal by second accused and affirmed his conviction and sentence.

(I) Civil Revision Petition No. 247 of 1896 (unreported). Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Subordinate Judge of Kumbakonam in Small Cause Suit No. 78 of 1896. The suit was for the recovery of Rs. 225 borrowed from plaintiff by defendant's deceased husband on the following letter, which was conveyed to plaintiff by one Souriraja Mudaliar, referred to therein:—" (To plaintiff) :—As I have to purchase the sembalai paddy which . . . . has settled for me with . . . . in . . . . , you will send Rs. 200 through Souriraja Mudaliar. I will send these two hundred rupees with interest according to mera rate at Rs. 2-1-4 per cent. per mensem, and have it credited in this letter on cadjan ; and get it back. Should there be a delay in your sending, the bandy will return in vain. You will have to send without delay." This letter was signed by defendant's deceased husband. The Subordinate Judge dismissed the suit, which was not defended, on the ground that the letter was an unstamped promissory note containing terms similar to the document in *Channamma* v. *Ayanna*, (I. L. R., 16 Mad., 283), and inadmissible in evidence. The Court, [COLLINS, C. J., and SHEPHARD, J.], on 29th January 1897, delivered the following JUDGMENT :—"There can be no doubt that in the letter the defendant's husband "merely asked for a loan of money. The letter does not amount to a promise, and no obli-"gation would have arisen unless the addressee had consented to comply with the "request and to lend the money. Acceptance on the plaintiff's part of the offer made in the

Digitized by Google

Against this order the second accused preferred this criminal revision petition.

Balamukunda Ayyar for accused No. 2.—The letters written to the petitioner are mere proposals and not completed agreements and do not require to be stamped. *Dhondbhat Narharbhat* v. *Atmaram Moreshvar* (1) and *Narayanasami Mudaliar* v. *Lokambolammal* (2). The terms of the document alone must be looked to and no external circumstances can be considered in determining whether it requires to be stamped. Nor can the letters be fairly described as devices or contrivances within the meaning of section 67 of the Stamp Act merely because they are unstamped. Intent to defraud cannot be inferred from the failure to stamp a document. Section 61 expressly provides for the punishment of persons executing or signing a document chargeable with duty without the same being duly stamped, but the petitioner here did none of the acts referred to in that section. *Channamma* v. *Ayyanna* (3) was also referred to.

Mr. N. *Subrahmanyam* for the Crown.—The documents contain promises to pay money, as the writer says that he will be responsible for the repayment of the loan, when it is given. If the letters had been written in pursuance of a request by petitioner he would have been concerned in a contrivance or device coming within section 67. The habitual practice by the petitioner of this contrivance which the Judge refers to would establish guilty intention under section 67.

JUDGMENT.—The petitioner is the recipient of a letter which requests that a loan may be granted to a certain person, and that when this is done the writer will be responsible for the amount of the loan, if the borrower does not repay it. Both the petitioner and the writer of the letter were prosecuted under section 67 of the Stamp Act and convicted. On appeal the writer of the letter was acquitted by the Sessions Judge on the ground that no obligation had attached under the letter at the time it was written. The conviction of the petitioner was, however, upheld on the view that when the loan was granted the document became a letter of guarantee and therefore liable to stamp duty as an indemnity bond. In the view we take of the case, section 67 of the Stamp Act has no application.

The execution of a document which on its face requires to be, and is not, stamped cannot be said to be an "act, contrivance or device not specially provided for by this Act or any other law for the time being in force."

There can be no device or contrivance if the document is what on its face it purports to be, and the act of the executant, if punishable at all, is provided for under section 61 of the Stamp Act and cannot therefore fall under section 67.

"letter was necessary before any obligation could be said to arise. Whereas if the letter were "equivalent to a promissory note, it would follow that on mere proof of the writing and signa-"ture, the plaintiff would have been entitled to recover. We cannot understand how such a "letter can be construed as a promissory note or how the request of the writer to send the "letter back can make any difference. The terms of the letter in Channamma v. Ayyanna, "(I. L. R., 16 Mad., 283) are not quite the same as they are in the present case. The case "more closely resembles that of Dhondbhat Narharbhat v. Atmaram Moreshvar. (I. L. R., 13 "Bom., 669). We must reverse the decree. There must be a decree for plaintiff for amount "claimed with interest and costs throughout."

(1) I. L. R., 13 Bom., 669.
(2) Civil Revision Petitiom No. 247 of 1896 (unreported)—vide note p. 4 of this book.
(3) I. L. R., 16 Mad., 283.

Digitized by Google

The act of the person receiving the unstamped document may amount to abetment of an offence, under section 61 (see definition of ' offence, ' section 40, Indian Penal Code), and would then be " an act provided for by any other law for the time being in force "—viz, the Penal Code—and equally not within the terms of section 67 of the Stamp Act.

We must therefore reverse the conviction and sentence and the order of the Sessions Court in appeal and direct that the fine if levied be refunded.

1899 *August* 31, **I. L. R. 23 Mad. 159.**

Before Mr. Justice Boddam and Mr. Justice Moore.

QUEEN-EMPRESS, *v.* PAPA SANI.*

PENAL CODE—Act XLV of 1860, s. 373—Obtaining a girl under the age of 16 for purposes of prostitution—Evidence of intent.

In a charge against a dancing girl under section 373 of the Indian Penal Code for having purchased a young girl with intent that she would be used for the purpose of prostitution or knowing it to be likely that she would be so used, evidence was given of the fact of purchase for a consideration and that numerous other dancing girls residing in the neighbourhood were in the habit of obtaining girls and bringing them up as dancing girls or prostitutes, and that there were no instances of girls brought up by dancing girls ever having been married. On its being contended that there was no evidence of intent to support a conviction under section 373 of the Indian Penal Code :

Held, that there was evidence before the Court to support the conviction.

(NOTE :—This case is followed in I. L R. 23 All. 124.)

FIRST accused, a dancing girl, was charged before a Deputy Magistrate, under section 373, for buying a girl of five years of age from her mother with the intention of using her or knowing it to be likely that she would be used for the purpose of prostitution. Second accused was charged with having abetted the said offence. The mother subsequently complained that she had given the child to first accused to be reared up for a family life but, finding that she was being reared for the purpose of prostitution, had demanded the return of the child, which was refused. The evidence showed that first accused paid Rs. 60 to the complainant and obtained the child from her in the house of the second accused, who was also present and settled the bargain and handed the money to the complainant. The further evidence was set out by the Deputy Magistrate as follows :—" From the evidence above alluded to and from the admission of the first accused, it is clear that she bought the girl from her mother for a consideration. The next and the most important question for decision is with what intention was the purchase made. Although it may be notorious that the daughters of dancing girls or girls brought up by them when they have no children generally become dancing girls or prostitutes, still the law presumes their intention to be innocent till the contrary is proved, and requires evidence in each case that the intention or knowledge of the likelihood or probability of the girl obtained becoming a prostitute was present at the time of the transaction. This is not capable of direct proof and can only be inferred from the surrounding circumstances. Such evidence is available in this case. Prosecution fifth witness Venkaji Rao, a landholder and

* Criminal Revision Case No. 298 of 1899,

Digitized by Google

merchant of Adoni town, states that he knew the first accused from her infancy. One Hulugasani, a dancing girl, had no children. She brought up four girls obtained from others and the first accused is the eldest of them. All the four girls became dancing girls or prostitutes. These facts are admitted by the first accused herself. The witness further states that there are forty dancing girls' houses in Adoni and that their chief source of income is prostitution. He adds that the dancing girls of this town who have no daughters of their own get girls from others and bring them up and eventually make them dancing girls or prostitutes and he gives several instances in this town of girls obtained and brought up having become prostitutes. He swears that there is no instance of girls brought up by dancing girls having been regularly married, and that the dancing girls derive good incomes by bringing up girls in preference to boys. He states also that the dancing girls commit prostitution with those who pay them. Prosecution sixth witness Subbayya more or less corroborates the above witness. He adds that dancing girls when they get old obtain girls and bring them up to follow their profession and that good-looking girls are generally bought. He gives instances and says that the girls so brought up are never married. The first accused admits that she and three other girls were brought up as prostitutes by another prostitute and that she has no children nor has any of her foster-sisters any children. She is now forty years old and she says she carried on prostitution for about twenty years. She wishes us to believe that being disgusted she gave up her profession and took to money-lending by which she lives. She admits she bought, or, as her pleader would put it, obtained a girl for a consideration. She says she intended to obtain a boy in adoption and to get the girl married to him, so that both of them might inherit her property. This is very laudable if true or probable. " The defence was that the child had been obtained with the object that it should be brought up as a daughter. The Magistrate dealt with this as follows:—" She called seven witnesses for her defence. First defence witness, a woman from Bellary, says that first accused came and asked her to give to her her sister's grandson, but that his father refused to give. Second defence witness is called to support her. Fourth defence witness says he was asked by the first accused to give to her his concubine's son but he did not. Fifth defence witness was asked to give up his nephew, but he did not. These are people of no position and can be got for nothing. Second and third defence witnesses say that some girls brought up a boy and got him married. Seventh defence witness is the first accused's foster sister and is called to prove that she has confined herself to one man. Even if we take all the defence to be true, it does not prove much. . . . Although first accused was defended by three pleaders they were not able to prove or point out one single instance of a girl brought up by a dancing girl having been regularly married. On the contrary fifth and sixth prosecution witnesses say that there were no such instances but there have been many instances of girls so brought up having become prostitutes. From a careful consideration of the foregoing facts the Court has no hesitation in finding that first accused bought the girl with intent that she shall be used for the purpose of prostitution or knowing it to be likely that she would be so used. " He also found the second accused guilty of abetment, and sentenced both accused to be kept in simple imprisonment till the rising of the Court, and imposed a fine of Rs. 200 on first accused, and of Rs. 50 on second accused, with three months' rigorous imprisonment in default in each case.

Against these convictions both accused appealed on the ground that the accused should not have been convicted on the evidence of the habits prevai-

Digitized by Google

ling amongst other dancing girls, and that the intent necessary to constitute an offence under section 373 of the Indian Penal Code had not been proved. On this point the Sessions Judge said:—" The sole question for determination in appeal is whether appellant intended at the time of purchase to use the girl eventually, but during minority, as a prostitute, or knowing it to be likely that she would be so used; or whether she bought her intending to adopt her and get her respectably married. . . .

I was referred to a dictum of Muttusami Ayyar. J. in *Queen-Empress* v. *Ramanna* (1) to show that dancing girls do occasionally adopt *bonà fide*. The argument is unsound. It is both common sense and law that in such cases the rare exception in the matter of intention must be affirmatively proved by those who assert it (see Evidence Act, section 106). And, in a similar and recent case, the Calcutta High Court has laid it down that once the prosecution has proved a probability of future prostitution during minority, it is for the defendant to show that defendant's intention was exceptional and different; *Deputy Legal Remembrancer* v. *Karuna Baistobi* (2). In the present case the *primâ facie* likelihood of prostitution (and more is not required for conviction under section 373 of the Indian Penal Code) was very great indeed; and that likelihood must have been present in the minds of all parties to the bargain. The child is smart and pretty; it was sold for a sum which to its disreputable beggar mother must have seemed very large; it was sold to a prostitute who herself had been brought up from her childhood to be a prostitute; there is nothing to show that appellant has any special means or property so as to make it worth her while to adopt a girl to inherit that propery.....And no case is provd that in Adoni or Bellary a girl so purchased was ever brought up respectably. This is a very strong *prima facie* case for the prosecution, and the evidence put forward to rebut it is worthless. I have no doubt that the girl was bought in order to be trained up to follow appellant's profession. " He dismissed the apepeals and characterised the sentences as extraordinarily lenient.

Notices were served on both accused to show cause why their sentences should not be enhanced; and first accused presented this criminal revision petition against the conviction.

Mr. *R. F. Grant*, for first accused, contended that the evidence of intent was insuficient to support the conviction. Under section 373, the intention of the accused must be proved, and the evidence of the customs of other dancing girls was no evidence of such intention. He referred to *Queen—Empress* v. *Ramanna* (1) in which Mr. Justice Muttusami Ayyar pointed out that it would be no offence if the intention were that the girl should be brought up as a daughter, and that when she attained her age she should be allowed to select either to marry or follow the profession of her prostitute mother. He also cited *Venku* v. *Mahalinga* (3) as showing that intention is a question of fact and law and must be made out properly, and referred *Deputy Legal Remembrancer* v. *Karuna Baistobi* (2)

Mr. *D. Chamier* for second accused.

Mr. *N. Subrahmaniam* in support of the conviction and of the application for enhancement.

JUDGMENT.—We are of opinion that there was legal evidence before the Courts sufficient to justify the conviction. It is proved by the purohit of the

(1) I. L. R., 12 Mad., 273. (2) I. L. R., 22 Calc., 164. (3) I. L. R., 11 Mad., 393.

Digitized by Google

first accused, who has known her since infancy; that the first accused was herself in her infancy acquired by a dancing girl, was brought up to become and became a dancing girl; that it is the practice among dancing girls to acquire children for the purpose of bringing them up as dancing girls, and that there is no case known to him of a girl so acquired being married. The first accused lived the life of a dancing girl for twenty years and she gave a large sum of money, viz., Rs. 60 for this girl at the age of five years; who is said to be good-looking. There is no suggestion that the first accused acquired the girl for the purpose of adopting her. In these circumstances it seems difficult to arrive at any conclusion other than that arrived at by the Courts below. We must therefore dismiss the criminal revision petition.

The Courts below, however, whilst convicting the accused, the first accused of purchasing and second of abetting her in purchasing this child for immoral purposes, inflicted only a nominal sentence of imprisonment of one day upon each; but fined the first accused Rs. 200 and the second accused Rs. 50. We think these sentences are wholly inadequate and should be enhanced.

The crime is a very bad one and should be dealt with as such. In this case, however, for the reasons given by the lower Courts, that hitherto among dancing girls it has not been considered wrong, much less a crime, we do not think it necessary to do more than increase the term of imprisonment given by the lower Court from one day in the case of the first accused to six months' rigorous imprisonment, and in the case of the second accused to three months' rigorous imprisonment and we vary the sentences accordingly. The fines remain.

1899 *August.* 24, 30. *Sept.* 4, 12. **I. L. R. 23 Mad. 164.**

Before Mr. Justice Subrahmania Ayyar (Officiating Chief Justice), Mr. Justice Moore and Mr. Justice O'Farrell.

PERUMAL [ACCUSED], PETITIONER, *v.* MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS [COMPLAINANTS], COUNTER-PETITIONERS.*

City of Madras Municipal Act (Madras)—Act I of 1884 *s.* 307—*Prohibition against depositing stable refuse in a street—Deposit of stable refuse in dust-bin—Liability of person so depositing.*

By the first clause of section 307 of the City of Madras Municipal Act, 1884, the president of the municipality "shall provide in the streets of the city suitable and sufficient dust-bins for the temporary deposit of dust, dirt, ashes, kitchen refuse and other inoffensive matter excepting building, stable and garden refuse which shall be removed by the owner thereof." By the second clause of the same section "whoever, after such provision has been made, deposits any of the said matters or any building, stable or garden refuse in any street, pavement or verandah of any building" . . . . . is rendered liable to fine. Petitioner having deposited stable refuse in one of the dust-bins provided in accordance with the Act was charged before a Magistrate and fined under the latter clause of the said section :

Held, that the dust-bin was not a part of the street and that the throwing of stable-refuse

---

* Criminal Revision Case No. 176 of 1899, under criminal Procedure Code, sections 435 and 439, praying the High Court to revise the order of Sultan Mohidin Sahib, Presidency Magistrate, Black Town, Madras, in Calendar Case No. 7159 of 1899.

Digitized by Google

into the dust-bin was not a deposit of such refuse in the street so as to constitute an offence under the said section.

PETITIONER was charged at the Presidency Magistrate's Court, Black Town, Madras, with having deposited stable refuse in a dust-bin in a street in the municipality, contrary to section 307 of the City of Madras Municipal Act I of 1884 [Madras]. He admitted having thrown the stable refuse into the dust-bin, but contended that it was not an offence within the meaning of the section. The Magistrate held that as stable refuse was not inoffensive matter a person throwing it into a dust-bin would be liable. He convicted the petitioner and imposed a nominal fine.

The accused preferred this petition.

Virabhadra Mudaliar for the petitioner.

Mr. *Allan Daly* for the complainants.

[The arguments appear from the judgments.]

SUBRAHMANIA AYYAR, OFFG. C. J.—In this case the petitioner was convicted by the Magistrate under section 307 of the City of Madras Municipal Act (I of 1884) for having deposited stable refuse in a municipal dust-bin in a street. The section runs as follows:—

"The President shall provide in the streets of the city suitable and suffi-
" cient dust-bins for the temporary deposit of dust, dirt, ashes, kitchen refuse
" and other inoffensive matter excepting building, stable and garden refuse,
" which shall be removed by the owner thereof."

"Whoever, after such provision has been made, deposits any of the said
" matters or any building, stable or garden refuse in any street, pavement or
" verandah of any building, on any ground between the building and the street
" or on any public quay, jetty or landing-place or on any part of a river bank,
" whether above or below high-water mark, or on any part of any private
" premises or land without the consent of the owner or occupier thereof shall
" be liable to a fine not exceeding rupees ten for each offence."

On behalf of the petitioner it was contended that the act complained of is not punishable under the section and the argument in support of that contention was this:—To bring the present case within the language of the second paragraph quoted above, the word 'street' should be understood to be inclusive of the parts thereof which are occupied by dust-bins. If that construction be adopted, a deposit in a dust-bin of even dust, dirt, ashes or kitchen refuse must be treated as an offence. But that must be absurd since the deposit of such matter in a dust-bin is distinctly authorised by the first paragraph. Therefore the term 'street' in the second paragraph should be taken to be exclusive of the sites of dust-bins and it follows that somehow the Legislature failed to impose a penalty on persons who deposit stable refuse in dust-bins.

Now, according to the first paragraph of the section, building, garden or stable refuse is, by clear implication, prohibited from being deposited in dust-bins. And the clause "the President shall provide in the streets of the city suitable and sufficient dust-bins," makes it clear that, so far as that paragraph goes, 'street' does include even those parts in which dust-bins may be erected. How can the same term, in the next paragraph, be, in the absence of indubitable indications to the contrary, taken in a different sense? Nor does the view that 'street' means the same thing in both the paragraphs necessarily involve the absurdity sought te be imputed to the Legislature. For, if the paragraphs are read together, as they undoubtedly must be, the meaning, so

Digitized by Google

far as we are here concerned, is exactly what it would be, had the Legislature, out of abundant caution, inserted after the words 'said matters' in paragraph 2, the clause 'save as aforesaid' or words to that effect. And the meaning is any person, who deposits dust, dirt, ashes, kitchen refuse or other inoffensive matter, not being building, stable or garden refuse, in a street except in a dust-bin and a person who deposits building, stable, or garden refuse in any part of a street inclusive of the sites of dust-bins shall be liable to the prescribed penalty.

This seems to be the proper view to take having regard to the principle laid down by the Judicial Committee in "*The Gauntlet* (1)" where their Lordships observe:—

"No doubt all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common sense meaning of the language used, and the Court is not to find or make any doubt of or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."

I would, therefore, dismiss the petition.

O'FARRELL, J.— The petitioner has been convicted under section 307 of the Act (I of 1884) and Mr. Daly, who appears for the municipality, admits that if that section does not apply, there is no other that does. Mr. Daly also admits, what appears to have been doubted by the Magistrate, that stable refuse is, within the terms of the section, inoffensive matter. We have then to see whether the deposit of 'building, stable or garden refuse' in a dust-bin, primarily intended for 'dust, dirt, ashes, kitchen refuse and other inoffensive matter' is an offence within the terms of the second clause of the section. Now it appears to me that no one reading the second clause by itself would be likely to contend that it was, and that the view which is put forward by the municipality is based upon the prohibition supposed to be implied in the concluding words of the first clause. It is then sought to make out that to deposit stable refuse in a dust-bin standing in a street, or on any ground between a building and a street, is the same thing as to deposit it in the street or on the ground. This appears to me to be an entirely non-natural use of language which in itself is simple and plain. It is open also to the fatal objection, in my opinion, that the section makes no distinction between the deposit of the different kinds of matters, and that if it is an offence to deposit stable refuse in a dust-bin, it is equally an offence to deposit therein 'dust, dirt, ashes or kitchen refuse'—the very things for which the dust-bin is provided. It appears to me impossible to avoid this absurd conclusion except on the supposition 'ground' or 'street' means one thing when used in connection with 'dust, dirt, ashes, &c.,' and another thing when applied to 'garden or stable refuse.' This method of interpretation appears to me to be extremely forced, and I think the only other conclusion possible is that the deposit of stable manure, &c., in a dust-bin

(1) L. R., 4 P. C., 184 at P. 191.

Digitized by Google

is not intended to be made an offence by this section of the Act. The conclusion is strengthened by a comparison of the wording of section 312, where the deposit, in a receptacle for night-soil, of other matter is made an offence in language which is plain and unambiguous. There is no reason why similar language should not have been used in section 307 if it was intended to make the act now under consideration an offence. It appears to me that what the former part of the section (307) primarily had in view was not to create offences, but to define the duties of the President, and that the concluding words ' excepting building, stable and garden refuse, which shall be removed by the owner thereof ' were inserted to make it clear that it was no part of the duty of the President to provide receptacles for the temporary deposit of such refuse. I may also, I think, point out that the deposit of stable or garden refuse in a street or other public place, where it may be carried about by the wind or washed by rain into drains or sewers (compare section 317) is a more serious matter than depositing it in a receptacle not properly intended for it. The latter act can do no great harm. It may have been some such considerations as these which induced the Legislature not to make the act an offence. However this may be, I am of opinion that the case, whether by accident or intention, has not been provided for, and I would allow the petition, set aside the conviction and direct that the fine levied be refunded.

[Under section 439, paragraph i, Criminal Procedure Code, the case was laid before Mr. Justice Moore, and his Lordship heard it and, after taking time for consideration, delivered the following judgment :—]

JUDGMENT.—The question for decision is as to whether a person who deposits stable refuse in a municipal dust-bin erected in a street can be convicted of an offence under the latter clause of section 307 of Madras Act I of 1884. The former clause of this section provides that the president of the municipality shall provide in the streets of the city suitable and sufficient dust-bins for the temporary deposit of dust, dirt, kitchen refuse and other inoffensive matter excepting building, stable and garden refuse which, it is directed, shall be removed by the owner thereof. The present petitioner has been convicted by a Magistrate under the latter clause of this section because he deposited stable refuse in a municipal dust-bin. That clause, however, does not relate to the deposit in a dust-bin of matter not allowed to be thrown there, but merely renders it penal to deposit any of the matters for the receipt of which the President is bound to erect dust-bins as well as building, stable and garden refuse in any street, pavement or verandah of any building or in certain other places there mentioned among which dust-bins are not specified. It is, however, now urged in support of the conviction that it should be held that a dust-bin is a part of the street and that such being the case any one who throws stable refuse into a dust-bin should be considerd to have deposited such refuse in the street. To read the section in this manner would, in my opinion, be to strain its language in a somewhat violent manner. It is further perfectly clear that the Legislature cannot have intended that such an interpretation should be put on this clause for, if this were done, it would be illegal to deposit in a street dust-bin not only stable refuse, &c., but also dust, ashes, &c., *i.e.*, the very articles for the reception of which the bins are ordered to be provided. Section 308, clause 2, of the Act makes it an offence to deposit any offensive matter in a dust-bin, but has no similar provision with regard to inoffensive matter of any description and the first clause of section 307 lays down that, in so far at all events as these sections of the Act are concerned, stable refuse is inoffensive matter. For these

Digitized by Google

reasons, I agree with O'Farrell, J., in the decision arrived at by him and would accordingly direct that the conviction of the petitioner be set aside and that the fine imposed on him, if it has been collected, be refunded.

[Under sections 439, and 429, Criminal Procedure Code, the judgment of Mr. Justice Moore prevailed and operated as the decision of the Court.]

Messrs. *Barclay, Orr & David*—Attorneys for the complainants

---

1899 *Sept.* 28. **I. L. R. 23 Mad. 205.**

Before Mr. Justice O'Farrell and Mr. Justice Michell.

QUEEN-EMPRESS *v.* ANKANNA AND ANOTHER.*

Criminal Procedure Code—Act V of 1898, *ss.* 195, 476—*Order by Deputy Magistrate sanctioning prosecution—Complaint by Deputy Magistrate—Jurisdiction of Sessions Court to interfere.*

A Deputy Magistrate having decided that certain witnesses, [who had given evidence before himself and before two other Magistrates on different occasions relating to charges of rioting and causing hurt] had wilfully committed perjury on one occasion or another, ordered them to be prosecuted for perjury and bound them over to take their trial. The Sessions Judge set aside the said order, deeming it undesirable that sanction to prosecute should be given under the circumstances:

Held, that whether the Deputy Magistrate had intended to pass an order under section 476 or to make a complaint under section 195 [1] *(b)* of the Code of Criminal Procedure, the Sessions Judge had no power to interfere: also that the power of revoking given under section 195 *(b)* is only in respect of sanction, and not of complaints.

PETITION to revise an order of a Sessions Judge setting aside an order of a deputy Magistrate binding over two persons who had given evidence in a criminal case to appear for trial on a charge of perjury. The Deputy Magistrate in his order said that the two witnesses in question had been examined by himself in a case of rioting and hurt on 25th and 26th March 1898, respectively, when they had deposed to the same facts that they had previously deposed to before another Magistrate on 17th August 1896, relating to the same offences. The evidence last referred to had been given within three months of the occurrence. In July and August 1897 the said witnesses had been examined by a third Magistrate, also with reference to the same occurrence. In the examination in July 1897 they denied all knowledge of the affair: whilst in August 1897, they admitted the correctness of their previous depositions given on 17th August 1896. The Deputy Magistrate held it to be clear from these conflicting and contradictory depositions that the witnesses had wilfully perjured themselves on one occasion or another and ordered them to be prosecuted for perjury under section 195 of the Code of Criminal Procedure. He bound them over to appear to take their trial for an offence under section 193 of the Indian Penal Code. On a petition being presented to the Sessions Court, the order of the Deputy Magistrate was set aside, the Acting Sessions Judge treating it as an order granting sanction to prosecute the said witnesses for statements between which no substantial contradiction existed. He considered it undesirable that sanction to prosecute should be given under the circumstances.

This criminal revision petition was preferred on behalf of Government, on the ground that the Acting Sessions Judge had acted without jurisdiction in setting aside the Deputy Magistrate's order; that there was no order granting

* Criminal Revision Case No. 238 of 1899.

Digitized by Google

sanction under section 195 of the Code of Criminal Procedure, as had been assumed by the Acting Sessions Judge; that the order of the Deputy Magistrate was in fact passed under section 476 of the Code of Criminal Procedure; and that the Acting Sessions Judge had no power to set aside or interfere with proceedings passed under that section.

The Acting Public Prosecutor (*Sankaran Nayar*) for the Crown.

Mr. *John Adam* for accused No. 1.

Accused No. 2 was not represented.

JUDGMENT.--It is not quite clear whether the Deputy Magistrate intended to pass an order under section 476, Criminal Procedure Code, or to make a complaint under section 195 (1) (*b*). In either case Sessions Judge had no power to interfere with this order. This is conceded as regards section 476, Criminal Procedure Code by Mr. Adam who appears for the first accused, and it is equally clear, we think, as regards a complaint under section 195 (1) (*b*).

The power of revoking given under section 195 (*b*) is only in respect of sanctions and not in respect of complaints. We set aside the order of the Sessions Judge, dated 21st April 1899, and restore that of the Deputy Magistrate, dated 12th December 1898.

1899 *Sept.* 29, *Oct.* 5. **I. L. R. 23, Mad. 210.**

Before Mr. Justice O'Farrell and Mr. Justice Michell.

PAMPAPATI SASTRI (COUNTER-PETITIONER), PETITIONER, *v.* SUBBA SASTRI (PETITIONER), COUNTER-PETITIONER.§

Criminal Procedure Code—Act V of 1898, s. 195—Sanction for prosecution—Notice to person to prosecute whom sanction is sought—Proceedings before Sessions Court—proper exercise of discretion.

A Sessions Court when granting sanction to prosecute under section 195 of the Code of Criminal Procedure should so frame the proceedings before it as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not. Although notice is not invariably necessary in cases under the section referred to, the grant of an order sanctioning prosecution is a judicial act, and there may be circumstances—(such as in those cases in which there has been a difference of opinion as to the desirability for granting sanction)—in which a proper discretion cannot be said to have been exertised unless the persons sought to be prosecuted have been given an opportunity to be heard.

An order of a Sessions Judge, sanctioning a prosecution, containing nothing from which the High Court could conclude that he had directed his mind to the real question in such cases, namely, whether there was a *prima facie* case on which a prosecution could be instituted with a fair chance of success, the High Court revoked the sanction.

(NOTE:—This case is Referred to in I. L. R. 26 Mad. 593.)

THE material portions of a petition to a Sessions Judge upon which sanction to prosecute had been granted were as follows:—"In the Sessions Case No. 14 of 1899 the counter-petitioner was the first prosecution witness. He said in his evidence:—'*(a)* We and his sister's husband Timmappa attended on him (Venkatadri Bhat) during his illness. *(b)* A year before his death Venkatadri had lost the top joint of his right thumb from leprosy. He had lost all his nails. He could not hold a pen. *(c)* On the 10th of May 1895 I was attending him from 6 to 10 P.M. *(d)* I heard of this will for the first time when he (Subba Sastrulu) presented it in Court with a petition for probate. *(e)* I was friendly with deceased. *(f)* He (Venkatadri Bhat) had been suffering from leprosy for three years. For a year before his death he was entirely

§ Criminal Miscellaneous Petition No. 70 of 1899.

Digitized by Google

unable to write. (*g*) During his last illness Hakim Dada Sahib was giving medicine to him. (*h*) Before Dada Sahib, Kunti Kondappa gave medicine to deceased. He has become mad. (*i*) There was never any dispute between me or my father and deceased or his father. (*j*) He (Venkatadri Bhat) got food from us. (*k*) The delirium began on the evening of Wednesday or Thursday. Dada Sahib was treating him at the time. (*l*) She (Pattamma) was not treating him during his illness. (*m*) It (the will) was not shown to me on the second day. (*n*) I first went to the house of Rajeswara Sastri for medicine when I heard of Venkatadri's illness. (*p*) He came and prescribed medicine for Venkatadri during three days. Afterwards Krishna Sastri treated Venkatadri for two days. (*q*) After Krishna Sastri, Kunti Kondappa treated him (Venkatadri Bhat) fer three days. (*r*) For eight days after removal of the corpse the house remained in my possession. (*s*) On the 9th while we were absent at a ceremony first defendant put twenty Mussalmans at the door and kept us out.' All these statements are false, proved to be false by the evidence of some of the disinterested prosecution witnesses and many of the defence witnesses and known by the counter-petitioner to be false. The statements are further falsified by the probabilities of the case, and can still further be proved to be false by evidence to be adduced in the case. The petitioner (Subba Sastri) prays that sanction may be accorded to prosecute the counter-petitioner for offences under sections 193 and 195 of the Indian Penal Code."

The Acting Sessions Judge allowed two days for the return of notice to the counter-petitioner, which was, in fact, not served. He then passed the following

ORDER.—" I sanction the prosecution of Pampapati Sastri under sections 193 and 195, Indian Penal Code, with reference to the aforesaid statements made by him on oath in Sessions Case No. 14 of 1899."

Against this above order the counter-petitioner now preferred this criminal miscellaneous petition.

Mr. *Allan Daly* and *Venkataramana Ayyar* for the petitioner.

S. Subrahmania Ayyar for the counter-petitioner.

JUDGMENT.—The Acting Sessions Judge of Bellary has sanctioned the prosecution of the petitioner and three others for offences under sections 193 and 195, Indian Penal Code, in regard to statements made before him in Sessions Case No. 14 of 1899. The application for sanction sets out *seriatim* the statements alleged to be false, and avers that they are so and are proved to be so by the evidence of other witnesses, (who are not particularised) and by the probabilities also not specifically set out.

The Judge originally considered notice to the counter-petitioners to be necessary, but he unfortunately only allowed the short space of two days for the return of the notices. They were not served, the counter-petitioners being absent from their usual places of residence, and the Sessions Judge accorded sanction without issuing any further notice.

His order was in these terms:—" I sanction the prosecution of Pampapati Sastri under sections 193 and 195, Indian Penal Code with reference to the aforesaid statements made by him on oath in Sessions Case No. 14 of 1899."

It was held by the High Court of Calcutta in *Kedarnath Das* v. *Mohesh Chunder Chuckerbutty* (1) that a subordinate Court granting sanction to prose-

(1) I.L.R., 16 Calc., 661.

Digitized by Google

cute under section 195, Criminal Procedure Code, should so frame the proceedings before it as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not and that if this is not done the High Court will revoke the sanction. It was further held that in the circumstances the lower Court did not exercise a proper discretion in not giving the party against whom sanction was sought notice of the application.

We concur generally in these views of the Calcutta High Court. No doubt it has been held that notice is not invariably necessary in cases under section 195, Criminal Procedure Code (see *Queen-Empress* v. *Sheik Bean.* (1) But it was also held in that case that sanctioning a prosecution was a judicial act, and having regard to the peculiar circumstances of the present case and the fact that a previous District Judge had come to a different conclusion from the Acting Sessions Judge in regard to its main features, we think it was certainly one in which a proper discretion could not be said to be exercised unless the parties sought to be prosecuted were given an opportunity to be heard. That was clearly also the opinion of the Acting Sessions Judge in the first instance. There is nothing in the Acting Sessions Judge's order sanctioning the prosecution from which we can come to the conclusion that he ever directed his mind to the real question in such cases, viz., whether there was a *prima facie* case, on which a prosecution could be instituted with a fair chance of success. We have been referred by the learned Vakil for the counter-petitioner (petitioner in the lower Court) to certain passages in the judgment in the sessions case (which however forms no part of the records in these proceedings) but all they appear to show is that the Judge was not prepared to rely upon the evidence of the counter-petitioners (petitioners here) as a basis for the conviction of the then accused before him. That is not a sufficient ground for sanctioning a prosecution for giving false evidence. In the circumstances we resolve to revoke the sanction accorded by the Acting Sessions Judge, but we do so without prejudice to any further application the counter-petitioner may think proper to make in the matter.

1899 *Dec.* 21, **I. L. R. 23 Mad. 213.**

Before Mr. Charles Arnold White, Chief Justice, and Mr. Justice Benson.

PARIMANAM PILLAI (ACCUSED), PETITIONER, *v.* CHAIRMAN, MUNICIPAL COUNCIL, OOTACAMUND. (COMPLAINANT), COUNTER-PETITIONER.*

District Municipalities Act (Madras)—Act IV of 1884, Bye-law No. 48—District Municipalities Act Amendment Act (Madras)—Act III of 1897—Covering a drain without Municipal permission.

A bye-law of a municipality had been framed under the powers conferred by an Act of 1884 as amended by an Act of 1897, and was to the following effect :—" No public drain shall be covered without the permission of the municipal council." It had come into force in 1890. Prior to its coming into operation an earlier bye-law had substantially the same terms. An occupier of premises, who had covered a drain during the subsistence of the earlier bye-law, was charged with having committed an offence under the later bye-law, and contended by way

(1) I.L.R., 10 Mad., 232.

* Criminal Revision Case No. 477 of 1899.

Digitized by Google

of defence that he could not be convicted inasmuch as the act complained of had been committed before the passing of the Act under which the complaint was laid. He was convicted by a Bench of Magistrates :

Held, that the conviction was right.

Per ARNOLD WHITE, C. J.—The bye-law applies to all drains which existed in a covered state at the time when it came into operation. The word " shall " is used throughout the bye-law in the imperative, and not with reference to time, and this is the sense in which it is used in the bye-law in question.

Per BENSON, J.—A bye-law similar in terms to that under which the accused had been convicted having been in existence under the then Municipal Act at the time when the accused first covered the drain in question, the liability then incurred by him continued, under the General Clauses Act (Madras) unaffected by the passing of the present Municipal Act. The contention that the accused could not be convicted because the act complained of was committed before the present Municipal Act was passed, therefore, failed.

PARIMANAM PILLAI was charged before a Bench of Magistrates at Ootacamund with covering a drain without permission, in contravention of bye-law No. 84 framed under Madras Act IV of 1884 as amended by Madras Act III of 1897. He pleaded not guilty, and stated that the said drain had been covered with the plank now upon it for thirteen years and that there had been no interference with the drain or its cleansing. He said the plank had been placed where it was for the safety of the people coming to the bazaar, and that the municipality had done the same in several places. The Bench found that the municipal drain in front of the bazaar had been covered with a plank which had been there placed without municipal permission, and that the officials of the municipality had directed its removal. A fine of Rs. 10 was imposed, and the accused was ordered to remove the plank.

The accused preferred this petition.

Mr. *W. Barton* for the petitioner.

Mr. *J. H. M. Ryan* for the complainant.

ARNOLD WHITE, C. J.—The bye-law in question was made under the powers conferred by Act IV of 1884 as amended by Act III of 1897. The bye-law is as follows:—" No public drain shall be covered without the permission of " Municipal Council. " This bye-law came into force in 1890. The petitioner contends that the bye-law in question has no application where a public drain was in fact covered at the time the bye-law came into operation. It is to be observed that an earlier bye-law made under the law in force prior to the coming into operation of Act IV of 1884 is in the same terms as the existing bye-law with the exception that the earlier bye-law required the permission of the municipal council to be a written permission. It would seem therefore that the existence of this covered drain was a contravention of the law as it stood prior to the coming into operation of the bye-law in question.

On the question of the construction of the bye-law of 1890—the bye-law now in question—I am of opinion that it applies to all drains which existed in a covered state at the time the bye-law came into operation. The word " shall " is used throughout the bye-laws as the imperative " shall "—and not with reference to time—and this is the sense, in my view, in which it is used in the bye-law in question. What the bye-law means is:—It is unlawful for a public drain to be covered without the permission of the municipal council.

I think the conviction was right and that the petition ought to be dismissed.

Digitized by Google

BENSON, J.—A bye-law similar in terms to that under which the petitioner has been convicted was in existence under the then Municipal Act at the time, some 13 years ago, when, according to the petitioner, he first covered the drain in question. The liability then incurred has continued, and is, under the Madras General Clauses Act, unaffected by the passing of the present Municipal Act. The argument therefore that the petitioner can not be convicted because the action complained of was committed before the present Municipal Act was passed fails.

I would refuse to interfere with the conviction.

1899 *Dec.* 7, 15. **I. L. R. 23 Mad. 203.**

Before Mr. Justice Shephard and Mr. Justice Benson.

TANGI JOGHI (ACCUSED), *v.* HALL (COMPLAINANT).*

Criminal Breach of Contract Act—Act XIII of 1859, *s.* 2—*Money advanced on account of work to be performed—Loan on condition that the workman should enter into contract of service.*

A workman agreed in writing to work for the proprietors of an estate for four years and one month, from 1st March 1899 to 31st March 1903, for an initial advance of one Rupee, which was not to be repaid till after the expiration of the agreement. The same person subsequently obtained an advance of Rs. 10, to be re-imbursed by a monthly deduction of one rupee from his wages. He worked from 1st March 1899 till 18th September 1899 when he ceased to work, leaving in all a sum of Rs. 5 to be accounted for in the adjustment of the total advance. He was subsequently charged and convicted under section 2 of the Criminal Breach of Contract Act XIII of 1859 :

Held, that the initial advance of one rupee was not money advanced on account of work to be performed, but rather a loan made without interest on the condition that the workman would enter into a contract of service for the duration of the loan ; and that the Criminal Breach of Contract Act, 1859, was inapplicable to this case ;

that, with reference to the ten rupees to be repaid out of wages, the Act applied, and an order should be made directing the workman to work until the expiration of the term of the contract on account of which this sum had been advanced.

BY a written agreement entered into with the proprietors of the Mountain-Glen Estate, the accused, one Tangi Joghi and two others, agreed to work on that estate for a period of four years and one month, commencing from 1st March 1899 to 31st March 1903, for an initial advance of one rupee each in respect of which it was expressly stipulated that it should not be repaid till after the expiration of the agreement. The accused obtained subsequently an advance of Rs. 10, to be re-imbursed by a monthly deduction of one rupee from the wages, which were fixed at Rs. 8 per mensem, and worked on the estate from 1st March 1899 until the 18th September 1899 when he ceased to work, (owing it was said, to family difficulties), leaving in all a sum of Rs. 5 to be accounted for in the adjustment of the total advance. The accused was subsequently charged and convicted by a Stationary Sub-Magistrate under section 2 of the Criminal Breach of contract Act XIII of 1859—and was ordered to complete the contract until 31 March 1903 and to pay Court costs (Rs 1-4-0).

The parties were not represented.

JUDGMENT.—We agree with the District Magistrate that the sum of Rupee 1 given to the defendant on the date of the agreement was not "money advanced on account of work to be performed." It was rather a loan made

* criminal Revision Case No. 466 of 1899

Digitized by Google

without interest on the condition that the defendant would enter into a contract of service for the duration of the loan, viz., four years and one month.

The provisions of Act XIII of 1859 are therefore inapplicable to this loan (see Proceedings of the Madras High Court, dated 9th January 1880, No. 39 (1), and *Queen-Empress* v. *Kandappa Goundan* (2).

As regards the sum of Rs. 10 advanced on the same date and to be repaid out of wages earned by instalments of one rupee in each month, it is not clear why this sum should not be regarded as " money advanced on account of work to be performed." The case is similar to *The Queen* v. *Tulukanam* (3), in which it was held that the provisions of Act XIII of 1859 were applicable. The term of the contract, on account of which this sum of Rs. 10 was advanced, is not clearly stated in the papers, but apparently it was for ten months, as that was the time required to work off the advance at Rupee 1 per mensem. The order of the Magistrate should, therefore, have directed the defendant to work until the 31st December 1899 instead of until the 31st March 1903. We modify the order accordingly.

1899 *July* 12, **I. L. R. 23 Mad. 220.**

Befor Mr. Justice Subrahmania Ayyar (Officiating Chief Justice).

QUEEN-EMPRESS *v.* VENKATASAMI NAIDU*

Abkári Act (Madras)—Act I of 1886, s. 56 (b)—License to keep toddy shop—Failure to keep shop open—Omission not constituting an act.

By section 56 (*b*) of the Abkàri Act (Madras), 1886, whoever, being the holder of a license or permit granted under the Act, " does any act in breach of any of the conditions of his license or permit not otherwise provided for in this Act " may be punished with fine or imprisonment or with both. The holder of a license to keep a shop for the sale of toddy having been convicted for failing to keep his shop open, in breach of one of the conditions of the license.

Held, that even if the licensee was under an obligation to keep open his shop (which did not appear to be the case), an omission to do so did not amount to an act in breach of the conditions of the license ; and that the conviction must in consequence be set aside.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure. The holder of a license to keep a shop for toddy was convicted by a second-class Magistrate under section 56 (*b*) of the Abkári Act I of 1886, (Madras), for having failed to keep his shop open, in breach of one of the conditions of the license granted to him. The Acting District Magistrate being of opinion that the conviction was against the ruling in *Queen-Empress* v. *Karuppan* (4) referred the case to the High Court.

---

* Criminal Revision Case No. 220 of 1899.

(1) Weir's Criminal Rulings, 3rd Ed., P. 455. (2) Weir's Criminal Rulings, 3rd Ed., P. 456. (3) I. L. R., 7 Mad., 131.

(4) Criminal Revision Case No. 382 of 1895 (unreported). Case referred for the orders of the High Court, under section 438 of the Code of Criminal Procedure, by the Acting District Magistrate of Malabar. By section 26 (*a*) of the Abkári Act I of 1886, (Madras), a Collector is empowered to cancel or suspend any license or permit granted under it " if any fee or duty payable by the holder thereof be not duly paid." By section 56 (*b*), whoever, being a holder of a license or permit granted under the Act, " does any act in breach of any of the conditions of his license or permit not otherwise provided for in the Act, may be punished, on conviction, with fine or imprisonment or with both." A second-class Magistrate convicted the holder of a license to keep a toddy shop on the ground that he had failed to pay the kist for five months on the dates prescribed by the license for such payments. The conviction

Digitized by Google

Under section 56 (*b*) whoever, being the holder of a license or permit granted under the Act, " does any act in breach of any of the conditions of his license or permit not otherwise provided for in this Act, " may be punished with fine or imprisonment or with both.

The parties were not represented.

JUDGMENT.—There is nothing, so far as I can see, to show that the licensee was bound to keep a shop. Further, even if he was bound to keep one, an omission to do so does not amount to an act in breach of the conditions of the license. The conviction is therefore set aside. The fine levied should be refunded to the accused.

1899 *August*, 31, *sept*, 1. **I. L. R. 23. Mad. 223.**

Before Mr. Justice Boddam and Mr. Justice Moore.

QUEEN-EMPRESS *v.* VENKATARAMANNA.*

Criminal Procedure Code—Act V of 1898, ss. 195, 476—Penal Code—Act XLV of 1860, s. 193—Intentionally giving false evidence at a judicial proceeding—Preliminary enquiry by a Magistrate.

At a preliminary enquiry held by a Sub-divisional Magistrate, at the direction of the District Magistrate, into the circumstances of a complaint against the police, a witness made a false statement on oath. Notice was subsequently issued calling upon the said witness to show cause why sanction should not be granted for his prosecution. The Magistrate having held that the witness was bound to tell the truth at the said enquiry and having granted sanction for his prosecution under section 193 of the Indian Penal Code :

Held, that the enquiry before the Magistrate in the course of which the alleged offence was committed was not a judicial proceeding within the meaning of section 193 of the Indian penal Code, and the witness could not be convicted under that section.

PETITION to revise an order of the Sub-divisional Magistrate of Chittoor sanctioning the prosecution of the petitioner for making a false statement before the said Magistrate. A preliminary enquiry was held by the said Sub-divisional Magistrate, at the direction of the District Magistrate, into the circumstances of a complaint of bribery which had been brought against an Inspector of Police and a village Magistrate. At that enquiry petitioner was examined as a witness and made statements on oath on matters connected with the complaint. The said statements being contradictory, petitioner was called upon to explain them, when he said he had not spoken the truth at first, for reasons that he proceeded to give. Notice was then issued to petitioner to show cause why sanction for his prosecution should not be granted for having made on oath the aforesaid contradictory statements at the said enquiry. On cause being shown it was argued on petitioner's behalf that no sanction should be accorded, inasmuch as the enquiry was merely a departmental one, and was not a judicial proceeding within the meaning

* Criminal Miscellaneous Petition No. 81 of 1899.

purported to be under section 56 (*b*) of the Abkári Act I of 1886, (Madras). The form of licese granted to the licensee contained provisions for the punctual payment of fees and for the procedure to be followed in case of default, and by it the Collector was further empowered in case of breach of any of the conditions of the license either to impose a fine or to cancel the license. The Court, (SHEPHARD, J.), delivered the following judgment on 27th August 1895:—" There was an omission or default on the part of the license-holder, but there was no act done by him in breach of the conditions of his license. The prosecution was a most improper one. The conviction is set aside and the fine, if paid, must be refunded."

Digitized by Google

of section 193, of the Indian Penal Code. The Sub-divisional Magistrate said:—"I was enquiring into the truth or otherwise of a criminal complaint under the directions of the District Magistrate, with a view to ascertain whether there was a *primâ facie* case, so that if there was one, the District Magisrate might sanction the Police Inspector's prosecution. The witness was bound to state the truth . . . . My opinion is that the statements he made are false. According to his own showing he made false statements touching serious matters. I sanction his prosecution for an offence under section 193 of the Indian Penal Code and resolve to send up the case to the District Magisrate under section 476 of the Code of Criminal Procedure."

The witness preferred this petition.

Mr. *C. Krishnan* for the petitioner.

Mr. *N. Subrahmanyam* for the Crown.

JUDGMENT.—The petitioner made a false statement on oath before the Deputy Magisrate during an enquiry he had been ordered to make for the purpose of ascertaining whether the District Magistrate should grant sanction under section 197, Criminal Procedure Code, and thereupon the Deputy Magistrate sent him before the District Magistrate under section 476, Criminal Procedure Code, for committing an offence under section 193, Indian Penal Code. The present petition is to set aside this order on the ground that the enquiry in the course of which the false statement was made was not a "judicial proceeding," but was merely a departmental enquiry in which there was no authority to administer an oath.

Under section 197, Criminal Procedure Code, the Government or some officer empowered in that behalf by the Government can alone grant the sanction required thereby and for that purpose the Government or the officer to whom the power is delegated must in some way inform his mind as to whether or not he ought to grant sanction, but there is no provision in the Criminal Procedure Code or Indian Penal Code indicating how he is to do so. Unless he is authorised by some provision of law to inform his mind by holding a judicial enquiry himself or by another there is no authority in him or the person acting for him to administer an oath and the enquiry is merely a departmental enquiry. There is no such provision of law, and therefore the enquiry before the Deputy Magistrate in the course of which the alleged offence was committed was not a judicial proceeding within section 193, Indian Penal Code and the petitioner cannot be convicted under that section. Whether he has been guilty of an offence under any other section is not a question which we should go into upon this enquiry and we therefore confine ourselves to saying that we think the order complained of is wrong and must be set aside.

1899 *August.* 30. **I. L. R. 23 Mad. 225.**

Before Mr. Justice Boddam and Mr. Justice Moore.

QUEEN-EMPRESS *v.* HANUMANTHA REDDI AND OTHERS §

Criminal procedure Code—Act V of 1898, s. 436—Fresh inquiry after improper discharge of accused persons—Jurisdiction of Sessions Judge after acquittal.

§ Criminal Revision Case No. 157 of 1899.

Digitized by Google

Charges under sections 304 and 147 of the Indian Penal Code were brought by the Police against certain accused in the court of a Deputy Magistrate, who took all the evidence for the prosecution but went on furlough without passing any order of committal or otherwise. His successor, considering the evidence insufficient to support the charges, altered them to charges under sections 325 and 147 of the Indian Penal Code, and after hearing evidence for the defence acquitted the accused. The Sessions Judge considering the alteration in the charges improper at such a stage ordered a fresh inquiry into the offence :

Held, that the Sessions Judge had exercised a jurisdiction not conferred upon him by law and that his order for a fresh inquiry must be set aside.

(*Note*:—This case is considered in I. L. R. 24, Mad. 136.)

SEVEN persons having been charged by the police at the Court of a Deputy Magistrate with culpable homicide and rioting under sections 304 and 147 of the Indian Penal Code, 1860, all the evidence in support of the prosecution was taken. The Deputy Magistrate then went on furlough without passing any order as to committal of the accused or otherwise. On the case being taken up by his successor the accused did not require the prosecution witnesses to be recalled. The charges were then altered to those of grievous hurt and rioting under sections 325 and 147 respectively, on the ground that the evidence was insufficient to support charges under the two first-mentioned sections. Witnesses for the defence were then examined and judgment pronounced, in which the case was held to be extremely suspicious and doubtful, and the accused were acquitted. On the case coming before the Sessions Court in revision, the Judge said :—" This was originally register No. 4 of 1898 on the file of the Deputy Magistrate, the police having charged the accused under section 304 of the Indian Penal Code. All the evidence for the prosecution had been heard, and the case was ready for committal. But the Magistrate went on furlough without passing orders and his successor, evidently at the instance of the accused, changed the charges to sections 325 and 147 of the Indian Penal Code. This was improper at such a stage on his part, and the reasons he gives for the change are very flimsy." The Sessions Judge then dealt with the facts, and concluded by ordering, under section 436, proviso (*b*), of the Criminal Procedure Code, that the Magistrate should hold a fresh inquiry regarding the offence, and that the District Magistrate be asked to transfer the case from the file of the Deputy Magistrate who had decided it, to some other Magistrate—to whom he gave directions as to further evidence that ought to be taken.

The accused preferred this criminal revision petition.

Mr. *R. F. Grant* for petitioners.

The Crown was not represented.

JUDGMENT.—The jurisdiction exercised by the Sessions Judge is a jurisdiction not conferred upon him by law.

The accused had not been discharged when the Sessions Judge interfered and under section 436, Criminal Procedure Code, it is only in such an event that he has jurisdiction to interfere. This has been decided in *Baijanath Pandey* v. *Gauri Kanta Mandal* (1) with which we agree.

We must therefore allow this criminal revision petition and set aside the order of the Sessions Judge.

---

(1) I. L. R. 20 Calc. 633.

Digitized by Google

1899 *Dec.* 13,14 **I. L. R. 23 Mad. 540.**

Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Benson.

KANDASAMI CHETTI (COMPLAINANT), PETITIONER, *v.* SOLI GOUNDAN (ACCUSED No. 2), COUNTER-PETITIONER.*

Criminal Procedure Code—Act V of 1898, s. 197—Charge against village magistrate for alleged offence while acting not in a judicial capacity—Sanction.

A village magistrate having been apprised of a disturbance in his village forcibly separated the combatants, one of whom thereupon preferred a charge against him of causing hurt. The complaint was taken by the sub-Magistrate upon his file without any previous sanction of the Government or other authority mentioned in section 197 of the Code of Criminal Procedure. The village magistrate raised the objection that the prosecution could not legally be proceeded with until such sanction had been first obtained. The Sub-Magistrate held that such sanction was unnecessary and kept the case on his file and commenced to enquire into it. The village magistrate presented a petition to the District Magistrate raising the same ground of objection, whereupon the District Magistrate quashed the whole of the proceedings, holding that the Sub-Magisrate had no jurisdiction to try the case against a village officer without sanction having been first obtained:

Held, that sanction was not necessary under section 197 of the Code of Criminal Procedure. The village magistrate, while preventing an offence, was not acting in the capacity of a Judge, or a public servant not removeable from office without the sanction of Government, and therefore the section referred to had no application.

Held also, that the order of the District Magistrate quashing the proceedings of the Sub-Magistrate was passed without jurisdiction.

Semble, that a village magistrate exercising jurisdiction, and trying an offender under Regulation XI of 1816 is a Judge within the meaning of section 197 of the Code of Criminal Procedure and section 19 of the Indian Penal Code.

PETITIONER had filed a complaint against one Soli Goundan, the Village Magistrate of kasba Udamalpet, and others, on the ground that they had caused hurt to him. He said that while he and others were having an altercation the village magistrate arrived upon the scene and asked them to desist, and though they obeyed, he hit petitioner on the shoulder and told others to do the same. The Stationary sub-magistrate of Udamalpet took the complaint upon his file. Objection was then made by the village magistrate that the charge could not be prosecuted against him until sanction should first be obtained under section 197 of the Code of Criminal Procedure. The Stationary Sub-Magistrate held that sanction was not necessary. The village magistrate then presented a petition to the District Magistrate under sections 455 and 528 of the Code of Criminal Procedure, in which he admitted that he had attempted to separate the petitioner from another man, while a disturbance was going on, and in doing so pulled him by his hair. He further contended that as village magistrate it was his duty to so interfere and quell a disturbance. He claimed that the Stationary Sub-Magistrate was wrong in holding that sanction was not necessary under section 197 of the Code of Criminal Procedure and concluded his petition to the District Magistrate as follows:—

"That your petitioner respectfully ventures to point out that section 197, Code of Criminal Procedure, is one meant specially for the benefit and protection of public officials, who, in the discharge of their public duties, cannot always please all parties, and that the object of such section is to prevent frivolous and vexatious, complaints against public servants in the discharge of their duties, and that some special enquiry must be held before subjecting public

* Criminal Revision Case No. 323 of 1899

Digitized by Google

servants to criminal prosecutions for acts done in the discharge of their duties. That the officer to whom is delegated the power of deciding whether or not to sanction the prosecution of village magistrates, under section 197, Code of Criminal Procedure, is the District Magistrate, and it is therefore that the petitioner comes to this Court. That ordinarily, a departmental enquiry is held and a report made so that the Court may have materials to decide whether any and what offences have been committed, and if a prosecution is desirable, or called for. That in this case no such enquiry has been held, and your petitioner has been gravely prejudiced thereby.

.....Your petitioner, therefore, respectfully prays that under section 435, Code of Criminal Procedure, the records of the case may be called for, and under section 528, Code of Criminal Procedure, the case may be withdrawn to the file of this Court, and if this Court is of opinion that the prosecution of the petitioner should be proceeded with, then that a departmental enqniry should be held, before determining whether sanction should be accorded under section 197, Code of Criminal Procedure, and that in the meantime proceedings may be stayed."

On this petition the District Magistrate passed the following order quashing the Stationary Sub-Magistrate's proceedings:—" The Counsel (Mr. C. V. Narasayya) for petitioner asked that the records in Calendar Case No. 78 of 1899 on the file of the Stationary Sub-Magistrate of Udamalpet be sent for that it might be seen if the trial of petitioner was a legal one in that he was being prosecuted for acts done in his official capacity. Petitioner states that he interfered as village magistrate to prevent a disturbance, seizing a certain man by his top-knot to do so. The man so seized charged petitioner with causing hurt. Tne Stationary Sub-Magistrate of Udamalpet took cognizance of the case, although a petition was put in before the Sub-Magistrate in which petitioner claimed that he acted as a village magistrate, and therefore that sanction was necessary before he could be tried. The Sub-Magistrate on this petition passed an order saying:—The question is whether in preventing or repressing crime he can use force..... in his capacity of a village magistrate.' The Village Officers' Code says :—' It is their duty (village magistrates') to strive by all means to prevent the commission of offences.' This is what the petitioner claims he did. The Sub-Magistrate goes on to say ' if he found the rioting imminent, he ought to have reported to the authorities.' Considering that it is alleged a breach of the peace was going on, this reasoning is futile. For this reason the Sub-Magistrate thinks he did not act in his magistarial capacity. This is not a sufficient reason to take it for granted that petitioner's objection is not a *bonâ fide* one, when the Sub-Magistrate himself states that the question was one of what powers the petitioner could use in ' preventing or repressing crime ' which assumes that he did act to prevent or repress crime. The Sub-Magistrate had no jurisdiction, he is trying a case of whether petitioner exceeded his powers as village magistrate, for which he has no sanction. All his proceedings in regard to petitioner are quashed."

Against the latter order, the complainant preferred this petition to the High Court.

Hon. Mr. *E. Norton* and *Kasturiranga Ayyangar* for complainant.
Mr. *J. G. Smith* (for Acting Public Prosecutor for the Crown.
Sivasami Ayyar for accused No. 2.

JUDGMENT.—The order of the District Magistrate quashing the proceed-

Digitized by Google

dings of the Sub-Magistrate was clearly passed without jurisdiction. Their is no provision of law which gives a District Magistrate power to interfere in this way. His proper course was to have reported the case for the orders of the High Court, if interference was considered necessary. This is indeed conceded, but it is urged on behalf of the accused that the High Court, as a Court of revision, should, while setting aside the District Magistrate's order, also quash the proceedings of the Sub-Magistrate as illegal for want of the necessary sanction under section 197, Code of Criminal Procedure. We might, no doubt, take this course if the proceedings of the Sub-Magistrate were illegal, but we do not think that they were so.

The village magistrate was neither a Judge, nor a public servant not removeable from office without the sanction of Government. It may be that a village magistrate exercising jurisdiction and trying an offender under the Regulation (XI of 1816) is a Judge within the meaning of section 197, Code of Criminal Procedure, and section 19, Indian Penal Code; but in the present case he was, it is alleged, preventing an offence, not trying an offender and illustration (*d*) to section 19, Indian Penal Code, makes it clear that in such capacity he is not a Judge.

Section 197, Code of Criminal Procedure, therefore, has no application, and it is not suggested that the village magistrate is otherwise protected from prosecution without sanction.

We, therefore, set aside so much of the District Magistrate's order as purports to quash the proceedings of the Sub-Magistrate. The latter should proceed with the case according to law.

1900 *Feb.* 2. **I. L. R. 23, Mad. 544.**

Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

QUEEN-EMPRESS *v.* SANKARALINGA KONE AND ANOTHER.§

Criminal Procedure Code—Act V of 1898, s. 161—Examination of witnesses by the Police—Legal obligation to speak the truth—Refusal to answer questions—Liability to punishment under section 176, 179, and 187 of the Indian Penal Code.

A refusal to answer questions asked by a Police officer under section 161 of the Code of Criminal Procedure is not punishable under section 176, 179, and 187 of the Indian Penal Code.

APPEAL against an order of discharge. A complaint was made against two persons to the effect that the Inspector of Police had been to in-

---

* In *Queen-Empress* v. *Appigadu*, (Criminal Revision Case No. 199 of 1899), relating to the construction of the same section, Sir SUBRAHMANIA AYYAR, OFFG. C.J., and O'FARRELL, J., on 27th July 1899, passed the following ORDER :—" The accused was charged in the alternative with making a false statement to a Police officer investigating under section 161, Criminal Procedure Code, or with making a false statement before the Magistrate on solemn affirmation, the charge being based on the irreconcilability of the two statements. Under the present Criminal Procedure Code, section 161 (2), which reverts to the language of the Code of 1872, a person is no longer bound by law to tell the truth when questioned by a Police officer ; (see *Empress* v. *Kassim Khan* (8 C.L.R. 300 ; I.L.R., 7 Calc., 121). A conviction in the alternative cannot, therefore, be sustained, nor can we consider the suggestion of the Deputy Magistrate that he intended to find that the statement before the Second-class Magistrate was false, looking to the way in which the charge was framed. We set aside the conviction and sentence and order the fine, if levied, to be refunded. "

§ Criminal Appeal No. 723 of 1899.

Digitized by Google

vestigate a case of cattle theft and questioned the accused about the occurrence, and that they were not willing to give any statement before the Inspector as they had sent a petition to the Joint Magistrate to try the case himself. It was contended that the accused had committed an offence punishable under section 179, Indian Penal Code, of refusing to answer a public servant authorised to question. The Magistrate by whom the case was tried, after taking evidence, said:—" It is clear that the two accused persons before the Court refused to answer the questions put to them by the Police Inspector. Their action in refusing to answer the questions is very improper and calls for some punishment. The wording of section 179, Indian Penal Code, however, does not permit me to punish the accused persons. The section runs thus:—(he quoted it). Under section 161, sub-section (2), Criminal Procedure Code (Act V of 1898), such persons are bound to answer all questions put to them by a Police officer. They are not legally bound to answer ' truly ' such questions. The Procedure Code of 1882 contained such a provision, which has been explicitly omitted in the new Code of 1898. When the Procedure Code was thus amended no corresponding amendment was made in section 179, Indian Penal Code. It has, therefore, to be concluded that a man cannot be punished under section 179, Indian Penal Code, unless he be legally bound to speak the truth. The prosecution has not shown me any other provision of law under which the accused can be dealt with. In these circumstances I consider that no case has been made out against the accused, and discharge them under section 245, Criminal Procedure Code."

Against this order of discharge an appeal was preferred by the Public Prosecutor.

The Acting Public Prosecutor *(C. Sankaran Nayar)* for the Crown.

The accused were not represented.

JUDGMENT.—The question in this case is whether a person who is examined under section 161 of the Code of Criminal Procedure by a Police officer making an investigation under chapter XIV of the Code, and who refuses to answer the questions put to him, can be punished under section 179 of the Penal Code as a person " legally bound to state the truth." The Code of 1882 contained the word " truly " after the word " questions " in sub-section (2) of section 161. This word has been omitted in the Code of 1898. Section 118 of the Code of 1872, which corresponds to section 161 of the present Code, did not contain the word " truly." We are of opinion that under the law as it now stands, a person who is examined under section 161 of the Code of Criminal Procedure is not " legally bound to state the truth." The legal obligation to speak the truth when so examined no doubt existed under the Act of 1882; but the effect of the omission of the word " truly " has been to do away with this legal obligation.

In the case of *Empress v. Kassim Khan* (1) a Full Bench of the Calcutta High Court decided that the words " shall be bound to answer all questions " in section 119 of the Code of 1872 did not constitute an " express provision of the law to state the truth " within the meaning of section 191 of the Indian Penal Code. The reasoning upon which this decision is based is, in our judgment, clearly applicable to the present case. We do not think that a person who refuses to answer when examined under section 161 of the Criminal Procedure Code can be said to commit an offence either under section 176 (see the

(1) 8 C. L. R., 300; I. L. R., 7 Calc., 121.

Digitized by Google

case of *The Queen* v. *Luckhee Singh* (1)) or section 187 of the Indian Penal Code.

The appeal is dismissed.

1900 *Feb.* 2. **I. L. R. 23 Mad. 626.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

QUEEN-EMPRESS *v.* CHENCHAYYA AND OTHERS.*

Criminal Procedure Code–Act V of 1898, s. 248–Withdrawal of complaint–"Complainant."

A complaint having been made to the police, the latter caused charges to be preferred under sections 143 and 504 of the Indian Penal Code against certain accused. The person who had complained to the police subsequently filed a petition praying the Second-class Magistrate to withdraw the charges under section 248 of the Code of Criminal Procedure. The Magistrate permitted the withdrawal and directed the accused to be set at liberty:

Held, that the order was bad, there being no "complainant" in the case and that consequently the Magistrate in purporting to act under section 248 had exceeded his powers.

APPEAL by the Public Prosecutor against the following order of acquittal of sixteen accused persons, purporting to be passed by a Second-class Magistrate under section 248 of the Code of Criminal Procedure:—"Complainant Mocherla Ramayya having satisfied the Court that there are sufficient grounds for withdrawing his complaint, the Court permits the same and directs that they be set at liberty under section 248 of the Criminal Procedure Code." This order had been passed on the petition of M. Ramayya as follows:—"Petition on behalf of the complainant most respectfully showeth:—(1) That the complainant has instituted a charge under section 143 of the Indian Penal Code against the accused; (2) that the complainant is unwilling to proceed with the case against the accused; and (3) that the complainant therefore prays this Honourable Court might be pleased to permit him to withdraw the charge against the accused under section 248, Criminal Procedure Code." The Magistrate had taken cognizance of the case against the accused under sections 143 and 504 of the Indian Penal Code, upon the report of the police, made in consequence of a complaint to them by the said M. Ramayya.

Mr. *N. Subrahmaniam*, for the Acting Prosecutor, for the Crown.

Sivasami Ayyar for accused No. 1.

JUDGMENT.—In this case we are constrained to hold that the order of the Magistrate permitting the case to be withdrawn is bad on the ground that there is no "complainant" in the case and that consequently the Magistrate, in purporting to act under section 248 of the Code of Criminal Procedure, has acted in excess of his powers. It has been argued that, for the purposes of section 248, "complainant" has not the restricted meaning of a person who files a "complaint" as defined by section 4 of the Code of Criminal procedure, and that it applies to a person who sets the police in motion by making a complaint to them. *Primâ facie* this seems a reasonable construction to place upon the word. But, reading sections 248 and 249 of the Code of Criminal Procedure together, it seems impossible to come to any other conclusion than that section 249 was intended to apply to cases instituted otherwise than upon

---

* Criminal Appeal No. 744 of 1899.

(1) 12 W. R., (Cr. R.), 23.

Digitized by Google

"complaint" and that section 248 was intended to apply to cases instituted upon "complaint." In the present case there was no "complaint," because it is clear from the record that the Magistrate took cognizance of the case upon the police report. We accordingly allow the appeal and we remit the case to the Magistrate in order that he may deal with it according to law.

1900 *Feb.* 7. **I. L. R. 23 Mad. 632.**

Before Mr. Justice Shephard and Mr. Justice Davies.

QUEEN-EMPRESS *v.* GANAPATHI VANNIANAR AND OTHERS.*

Criminal Procedure Code—Act V of 1898, ss. 269 (1), 536 (2)—Order directing trial by jury—"Particular class of offences"—Revocation of order—Jury case tried by assessors—Omission to take objection before finding recorded—Validity of trial.

By section 269 of the Code of Criminal Procedure the local Government may, with the previous sanction of the Governor-General in Council, by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may, with the like sanction, revoke or alter such order.

In the "Fort St. George Gazette," dated 30th August 1899, it was notified that, whereas by orders previously made the trial of persons charged with certain offences should, in certain districts of the Presidency, including that of Tinnevelly, be by jury; and whereas disturbances known as the anti-Shanar disturbances had taken place in the districts of Tinnevelly and Madura, and certain persons stood committed for trial and others might thereafter be similarly committed in connection therewith, the Governor in Council, with the previous sanction of the Governor-General in Council, directed, under section 269 of the Code of Criminal Procedure, that the said previous orders be revoked as regards the persons referred to, and that such persons should be tried with the aid of assessors and not by jury.

Certain persons having been so tried for offences under sections 148, 454, 395 and 323 of the Indian Penal Code, one assessor gave it as his opinion that none of them were guilty: the other assessor finding some of them not guilty. The Additional Sessions Judge convicted and sentenced all the accused, whereupon the objection was taken, on appeal, in the High Court, that the trial should have been by jury and not with the aid of assessors and that the conviction should therefore be set aside. The objection was not taken at the trial:

Held, that the omission to take objection to the trial before the Court had recorded its findings was fatal to the contention now urged that the trial was invalid.

Held further, that even assuming that objection had been duly taken, the offences connected with the outbreak had been rightly treated as a "class of offences," and that it was competent to the Government, with the consent of the Governor-General in council, to revoke the previous notification so far as it related to that class.

APPEAL from a conviction by the Additional Sessions Judge of Tinnevelly Division. The accused had been tried for the offences of rioting armed with deadly weapons, house-breaking and theft, dacoity and voluntarily causing hurt under sections 148, 454, 395 and 323 of the Indian Penal Code. In the opinion of the first assessor none were guilty. The second assessor found two only of the accused guilty. The Judge found all guilty and passed the sentences now appealed from. The trial was held by the Additional Sessions Judge with the aid of assessors, instead of by a jury, in pursuance of the following notification published in an extra-ordinary issue of the "Fort St. George Gazette," dated 30th August 1899:—"Whereas His Excellency the Governor in Council has, by orders made from time to time under the powers conferred upon him in that behalf, directed that the trial before Courts of Session of persons charged with offences under certain sections of the Indian Penal Code should, in certain districts of the Presidency including the district of Tinnevelly, be by jury:

* Criminal Appeal No. 730 of 1899.

Digitized by Google

"And whereas riots and disturbances, known as the anti-Shanar riots and disturbances, have recently taken place in the districts of Tinnevelly and Madura and certain persons now stand committed for trial to a Court of Session in Tinnevelly charged with offences under the said sections, or some of the said sections, in connection with the said riots and disturbances, and other persons may hereafter be charged with offences under the said sections, in connection with the said riots and disturbances, and committed for trial to the said Court of Sessions:

"His Excellency the Governor in Council, under the powers conferred upon him by section 269 of the Code of Criminal Procedure, 1898, and all other powers and authorities enabling him in that behalf, and with the previous sanction of the Governor-General in Council, is pleased to direct and hereby directs that the orders hereinbefore referred to shall be revoked as regards the persons who now stand committed for trial as aforesaid to the Court of Session in Tinnevelly and as regards any other persons who may hereafter be charged with offences under the said sections, or any of the said sections, in connection with the said riots and disturbances, and be committed for trial to the said Court of Session, but not further or otherwise:

"And His Excellency the Governor in Council, under the powers aforesaid and with the like sanction, is pleased to further direct and hereby directs that the trial of the persons who now stand committed for trial to the said Court of Session as aforesaid, or who may hereafter be committed for trial to the said Court of Session as aforesaid, shall be with the aid of assessors and not by jury."

In the opinion of the first assessor none of the accused were guilty. The second assessor found that only two were guilty. The Judge, differing from the assessors, convicted all the accused, and sentenced them to different terms of imprisonment.

The accused preferred this appeal.

V. Krishnasami Ayyar and *K. Srinivasa* for the accused.

The Acting Advocate-General (Sir *V. Bhashyam Ayyangar*) and the Acting Public Prosecutor (*C. Sankaran Nayar*) in support of the conviction.

JUDGMENT.—It is objected on behalf of the appellants that the trial of this case ought to have been by the Sessions Judge and a jury, and not by the Judge and assessors, and that for that reason the conviction must be set aside. The appellants' vakil admits that the objection was not taken at the trial, but contends that inasmuch as his clients have been prejudiced by the alleged error the trial is invalid notwithstanding the language of section 536 (2) of the Criminal Procedure Code. His clients are prejudiced, as he contends, because the opinion of the assessors was in their favour and that opinion, if it had been taken in the form of a verdict from a jury, would have been conclusive as far as regards the facts. In other words he contends that full effect is to be given to the words of the sub-section only in the case in which the assessors agree with the Judge in finding the prisoner guilty.

If it had been the intention of the Legislature so to limit the operation of the sub-section, we think they would have used words such as are used in the next section 537 to make it clear that the omission to take the objection at the trial is to conclude the prisoner only in the case above stated. We think the omission is fatal to the appellants' contention, and for that reason alone should have to overrule it.

Digitized by Google

But the Advocate-General being desirous of having the main point settled has argued this case on the assumption that the objection was duly taken. The contention on the main point is that the "class of offences" referred to in section 269 of the Criminal Procedure Code must be ascertained according to some classification recognized by the Legislature—such as is found in the Penal Code, *e.g.*, offences against the State, against the person, or in the Criminal Procedure Code, *e.g.*, bailable offences, cognizable offences. There is no reason shown for putting this narrow construction on the words. No reason is suggested why offences should not be classified according to the persons who commit them, *i.e.*, the offences, the offenders, or according to the person or property against whom or which the offences are committed, or in regard to the particular occasion in connection with which they are committed. Thus, the fact of offences having been committed by old offenders or members of criminal tribes, or having been committed against women or against public property, would afford reasonable ground for a classification.

Here, the fact with reference to which the distinction is made is the fact of an outbreak having taken place directed against a certain section of the population. The offences connected with the outbreak are treated as a class of offences, and in our opinion rightly so. It was accordingly competent to the Government with the consent of the Governor-General in Council to revoke the previous notification so far as it related to that class.

On the merits, we see no reason to doubt the truth of the case for the prosecution. The appeal is dismissed.

1900 *Feb.* 12. **I. L. R. 23 Mad. 636.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

QUEEN-EMPRESS *v.* PANDARA TEVAN (AND ANOTHER). *

Criminal Procedure Code—Act V of 1898, s. 209—Examination of accused before committal—Discretion of Magistrate.

It is the duty of a Magistrate, before committing accused persons for trial, to examine them for the purpose of enabling them to explain any circumstances appearing in the evidence against them. The effect of section 209 of the Code of Criminal Procedure is that it is not left to the discretion of the Magistrate who intends to commit to examine the accused. He is bound to examine them, and if he makes an order of commitment without such examination the order is irregular.

PETITION to revise an order committing certain accused persons for trial. In a preliminary enquiry against the petitioners, who were charged with having committed offences under sections 456 and 395 of the Indian Penal Code, the Special Magistrate, after taking the evidence of eight prosecution witnesses, formed the conclusion that a *primâ facie* case had been made out and committed the accused for trial before the Sessions Court on charges under sections 148, 454, 436 and 397 of the Indian Penal Code. The accused were not examined before committal, and one of them filed an affidavit to that effect adding that they had waited for an opportunity to make statements, and that such statements by way of explanation would have satisfied the Magistrate that committal was unnecessary.

Against this order of committal the accused preferred this criminal revision petition.

* Criminal Miscellaneous Petition No. 8 of 1900.

Digitized by Google

Mr. *W. Barton*, (for Mr. *John, Adam*,) for petitioners.

Mr. *N. Subrahmaniam*, (for the Acting Public Prosecutor) on behalf of the Crown.

JUDGMENT.—In our opinion, it was the duty of the Magistrate, before committing the accused persons for trial to have examined them for the purpose of enabling them to explain any circumstances appearing in the evidence against them. The effect of section 209 of the Code of Criminal Procedure is that it is not left to the discretion of a Magistrate who intends to commit to examine the accused person. He is bound to examine him, and if he makes an order of commitment without examining him the order is irregular.

Before, however, we can quash the order of commitment, we have to be satisfied that the irregularity has occasioned a failure of justice.

We have carefully considered the evidence before the Magistrate, and having regard to the nature of this evidence and also to the fact that the accused persons have allowed four months to elapse before applying to quash the order, we cannot say that any failure of justice has been occasioned and we accordingly dismiss the application.

VOL. XXIV.

1900 *Feb.* 8,13 **I. L. R. 24 Mad. 13.**

Before Mr. Justice Shephard and Mr. Justice Davies.

QUEEN-EMPRESS *v.* RAMA. §

Reformatory Schools Act—Act VIII of 1897, ss. 8, 9, 11, 13, 16—Youthful offenders—Periods of detention allowable under the Act—Finding by Magistrate as to age—Form of order—Exact period of detention.

A District Magistrate before whom the case of a youthful offender came, under the provisions of section 9 of the Reformatory Schools Act, 1897, found the accused to be thirteen years of age, sentenced him to six months' rigorous imprisonment, and directed that in lieu of undergoing that sentence he should be detained in a Reformatory school for a period of five years, unless he should attain the age of eighteen years at an earlier date:

Held, that the order was wrong, inasmuch as it failed to fix the exact period of detention.

Semble, that in some cases it may not be necessary to ascertain the exact age of the offender. If he be not over fifteen, a period of three years may be rightly fixed ; if not over eleven, a period of seven years may be fixed without further enquiry. But in cases in which enquiry is necessary in order to fix the period, as when the offender is over eleven, and the Magistrate wishes to make the period as long as possible, he must find, as well as he can, the exact age of the offender, and is not at liberty to leave the decision of the question to the Reformatory officials.

The effect of the notification published by Government regulating the periods for which youthful offenders may be sent to Reformatory schools in the Madras Persidency, is to fix a minimum period of five years for all cases in which such a period is legally possible ; namely, in all cases where the offender is not over thirteen at the date of conviction. It was not intended to prevent the Magistrate from fixing a period short of five years, but not short of three years, in the case of a boy over thirteen.

---

§ Criminal Revision Case No. 15 of 1900.

Digitized by Google

THE District Magistrate of Bellary passed the following sentence:—" Rama *alias* Honnura *alias* Kala has been tried by the Town Sub-Magistrate for an offence under section 379 of the Indian Penal Code and is now sent before this Court under section 9 of Act VIII of 1897 as the Sub-Magistrate considers the accused to be a proper person to be an inmate of a Reformatory school. The accused is a boy of thirteen years of age. The facts proved before the Sub-Magistrate show that in broad day light and in the open bazaar the accused with some other boys picked the pocket of an individual who was purchasing vegetables in the market. The boys were caught at once and the money (Rs. 3) stolen was recovered. The accused had been twice convicted of stealing already. In Calendar Case No. 50 of 1898 on the file of the Town Sub-Magistrate he was convicted under section 379 of the Indian Penal Code and sentenced to receive twenty stripes. In Calender Case No. 6 of 1899 on the same file he was convicted of an offence under section 380 of the Indian Penal Code and sentenced to receive thirty stripes. The first offence was committed on 28th February 1898; the second on 30th December 1898. The present case of theft committed on the 15th instant shows that the previous punishments have not had a deterrent effect on this youthful offender. I agree with the Sub-Magistrate in thinking that he is a proper person to be sent to a Reformatory. The accused was sent under my orders to the District Medical and Sanitary officer who certifies that he is about thirteen years of age. I have ascertained from the Superintendent, Chingleput Reformatory, that there is room in that institution for this boy. I now find the accused guilty of an offence under section 379 of the Indian Penal Code, and sentence him to six months' rigorous imprisonment. In lieu of undergoing this sentence, I direct under sections 8 and 9 of Act VIII of 1897 that the accused be detained at the Chingleput Reformatory school for a period of five years, unless he shall attain the age of eighteen years at an earlier date."

The records were called for by the High Court.

The Acting Public Prosecutor (*C. Sankaran Nayar*) for the Crown.

SHEPHARD, J.—The question is whether a direction that a youthful offender shall be " detained in a Reformatory school for a " period of five years, unless he shall attain the age of eighteen years " at an earlier date " is a direction which should properly be made under the provisions of Act VIII of 1897. In respect to time the Act lays down three rules;—First, the youthful offender must be a boy under the age of fifteen years at the date of his conviction. In the present case the Magistrate finds that the boy is thirteen years old. Then the Act says the period of detention in the school must not be less than three years and, lastly, that the period must not exceed seven years. In order to give effect to these rules the Magistrate is directed by section 11 of the Act to enquire into the question of age and, after taking such evidence as may be deemed necessary, to record a finding thereon stating the boy's age as nearly as may be, and, as it appears from section 13, the Magistrate is to state the age in his order of detention. The finding is final in the sense that it cannot be altered on appeal or revision (section 16). But in case the Magistrate should have made a mistake and understated the age in the order for detention, it is competent to the local Government on the motion and report of the commission of visitors or Board of management to order the removal of the boy if and when he is found to have attained the age of eighteen years. As a general proposition it is clearly the duty of a Magistrate when pronouncing a sentence to define precisely the nature of the sentence intended. Generally, the sentence, like the decree in a civil case ought, I apprehend, to be self-con-

Digitized by Google

tained, so that the functionary who has to execute it should have nothing to do but obey the directions given without making any inquiry on his own account. There are no words in the Act that I can find to indicate that the Magistrate acting under section 8 of the said Act is not to proceed in accordance with this principle. In some cases it is not necessary to ascertain the exact age of the boy. So long as he is not over fifteen, the Magistrate may rightly fix a period of three years, or if the boy is not over elven, he may safely fix a period of seven years without further enquiry. But if enquiry is necessary in order to fix the period as it would be when the boy is over eleven and the Magistrate wishes to make the period as long as possible, then I think the Magistrate must find, as well as he can, the exact age of the boy, and he is not at liberty to leave the decision of the question to the Reformatory officials. If this is the Magistrate's duty under the Act, I do not think the notification of Government can or does make any difference. As I read the notification the intention was to fix a minimum of five years for all cases in which such a period was legally possible, that is, in all cases where the boy was not over thirteen at the date of conviction, and I do not think it was intended to prevent the Magistrate from fixing a period short of five years, but not short of three years in the case of a boy over thirteen. If the notification is intended to fix an absolute minimum of five years the direction of the Magistrate contravenes it, because he does not find that the boy is under thirteen. I think he was right in directing the detention of the boy in a Reformatory school, but wrong in not fixing the exact period. The Magistrate is directed to amend his order of detention in accordance with this judgment.

DAVIES, J.—I concur.

1900 *April*. 10. **I. L. R. 24 Mad. 45.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

RAMANADHAN CHETTI (PETITIONER) *v.* MURUGAPPA CHETTI (COUNTER-PETITIONER). §

Criminal Procedure Code—Act V of 1898, s. 144—Order to abstain from interfering with the management of a temple until the eviction of another person—Legality of order.

An order passed under section 144 of the Code of Criminal Procedure directed a person (1) not to interfere with the management of a certain temple, (2) until another person should be duly evicted from the management by due course of law :

Held, that the first portion of the order was a direction to " abstain from a certain act " within the meaning of those words as used in section 144 of the Code of Criminal Procedure; but that the latter portion contravened the provisions of sub-section (5) of that section and that to that extent the order was made without jurisdiction.

PETITION for the revision of an order of a Head Assistant Magistrate passed under section 144 of the Code of Criminal Procedure. The order was as

---

§ Criminal Revision Case No. 543 of 1899,

Government of India Notification, No. 1076, dated 30th June 1887 :—In exercise of the power conferred by section 22 of the Reformatory Schools Act V of 1876, the Governor-General in Council made the following rule for regulating the period for which courts and Magistrates in the Madras Presidency may send youthful offenders to a Reformatory school :—" No boy shall be sent to a Reformatory school, if under ten years of age, for a less period than seven years ; if over ten years of age, for a less period than five years, unless he shall sooner attain the age of eighteen years."

Digitized by Google

follows :—" Notice under section 144, Code of Criminal Procedure.—Whereas it has been made to appear to me that you, N. K. A. Ramanadhan Chetti of Devikottah, are interfering with the management of a kovil at Kottoor village by one Murugappa Chetti of Devikottah by trying to forcibly evict him from the kovil under the aid of a riotous mob and thus causing or about to cause serious disturbance to public tranquillity, likely to result in riot or affray, I do hereby direct you not to interfere with the management of the kovil at Kottoor by the said Murugappa Chetti who is reported to be now managing it and cause disturbance and strictly warn and enjoin you not to take any part in any manner whatever until the said Murugappa Chetti is duly evicted from the kovil management by due course of law. Given under my hand and the seal of the Court, this 22nd day of September 1899."

Petitioner contended that the Magistrate had no power to pass such an order under section 144.

Venkataruma Sastri for *Sivasami Ayyar* for petitioner.

Counter-petitioner was not represented.

JUDGMENT.—In this case the petitioner was directed " not to " interfere with the management " of a certain " kovil." In our judgment this is a direction to " abstain from a certain act" within the meaning of these words as used in section 144 of the Code of Criminal Procedure. The order, therefore, so far as this point is concerned, was not made without jurisdiction. The case is distinguishable on the facts from the case of *Anunda Chandra Bhuttacharjee* v. *Carr Stephen* (1).

The order directed the petitioner to abstain from taking any part in the management until the counter-petitioner was duly evicted from the management by due course of law. This contravenes the provisions of sub-section (5) of section 144, and to this extent the order was made without jurisdiction. We accordingly set aside so much of the order as directs that the order shall remain in force until the counter-petitioner is evicted from management.

1900 *July* 25. **I. L. R. 24. Mad. 70**

Before Mr. Justice Benson and Mr. Justice Moore.

QUEEN-EMPRESS *v.* SOUTH AND OTHERS.*

Criminal Procedure Code—Act V of 1898, s. 195—Penal Code—Act XLV of 1860, s. 188—Epidemic Diseases Act—Act III of 1897—Disobedience to an order promulgated by Government—Sanction for prosecution.

Certain persons were charged with having disobeyed an order promulgated by Government under the Epidemic Diseases Act (III of 1897), and were acquitted on the ground that the prosecution required, under section 195 of the Code of Criminal Procedure, the previous sanction of the public servant who had promulgated the order. Sanction had, in fact, been granted by the Chairman of the Municipality in which the order was disobeyed, but the Magistrate held that such Chairman was not the public servant who had promulgated the order, and that it was not shown that he had been specially empowered to grant the sanction :

Held, that the order of acquittal was wrong. Inasmuch as the order in question had been promulgated by Government and not by any public servant, no sanction was required.

APPEAL by the Public Prosecutor against an acquittal. The facts of the case appear from the judgment of the Acting Joint Magistrate of Kistna, which

* Criminal Appeal No. 551 of 1899.

(1) I.L.R., 19 Calc., 127.

Digitized by Google

was as follows :—The accused Mr. J. South, District Traffic Superintendent, Southern Mahratta Railway Guntur, is charged with an offence punishable under section 188, Indian Penal Code, in that he disobeyed an order lawfully promulgated to present himself for examination under the Plague Rules. Mr. South's case has been transferred to my file, as he has claimed to be tried as a European British subject. His servants have also been charged, but I have been satisfied that they have already been tried and acquitted by the Sub-Magistrate on an identical charge, and are not liable to further trial. They are at once acquitted under section 245, Criminal Procedure Code. They were charged here, as from the record sent up by the Sub-Magistrate it did not appear that their cases had been disposed of in his Court. The accused has raised a preliminary objection, that the sanction of the public servant who promulgated the order which he is charged with disobeying, is necessary before he can be prosecuted, and that the sanction given by the Chairman of the Municipal Council, which is produced, is useless, since the Chairman did not promulgate the rules. The rule, which accused is charged with infringing, is rule No. 17 (i), Original Mufussal Regulations under the Epidemic Diseases Act. It is headed G. O., No. $\frac{2830}{M}$, 17th December 1897, and Notification No. 897, Fort St. George Gazette, 18th December 1897. *Primâ facie*, it appears to have been promulgated by Government, not the Chairman. The person sent to conduct the case for the Chairman has, admitting this, produced a printed circular signed by the Collector and argued that paragraph 4 empowered the Chairman to accord sanction in cases of this nature. Paragraph 4 simply states that "the regulations that have been published under the Epidemic Diseases Act give all local bodies and all public officers ample power to deal with all acts or omissions calculated to sow the seeds of disease." This amounts neither to a general nor specific authorisation of the Chairman. Argument is further based on—a letter from the Collector to the Chairman—containing the words: "If you consider that the circumstances require it, you may sanction the prosecution of persons still in Guntur, and lodge a complaint against them for disobeying the lawful orders of a public servant." This is not in itself such a sanction as the law requires, since it mentions no names and does not specify any particulars of the offence charged. Nor can I consider it as an authority to the Chairman to sanction, without evidence (i) that the Collector has power of sanction himself, (ii) that they can be delegated. No such evidence is forthcoming. Under the circumstances, the accused is acquitted under section 245, Criminal Procedure Code.

Against the above order this appeal was preferred.

The Public Prosecutor (Mr. *E. B. Powell*) for the Crown.

The accused were not represented.

JUDGMENT.—The Public Prosecutor withdraws the appeal as against J. South and Solomon. The other two persons Mamilla Reddi and Rajendram were acquitted by the Stationary Sub-Magistrate of the offence alleged against them, viz, that they had disobeyed an order promulgated by Government under the Epidemic Diseases Act (III of 1897). The reason given by the Sub-Magistrate was that the prosecution required the previous sanction of the public servant concerned under section 195, Criminal Procedure Code, which public servant he held to be the public servant who promulgated the order.

The only sanction given for the prosecution was that of the Chairman

Digitized by Google

of the Municipality, in which the order was broken and the Sub-Magistrate held that the Chairman was not the public servant who promulgated the order and had not shown that he was specially empowered to give the sanction. The Joint Magistrate subsequently acquitted these persons on the ground that they had been already acquitted by the Sub-Magistrate.

Government appeals against these acquittals.

We are of opinion that the order of the Sub-Magistrate cannot be upheld. Section 195, Criminal Procedure Code, read with section 188, Indian Penal Code, does, no doubt, require that no Court shall take cognizance of an offence committed by disobeying an order promulgated by a public servant, except with the previous sanction of the public servant concerned or of some public servant to whom he is subordinate.

In the case before us, the order, for disobeying which the charge is brought, was not promulgated by any public servant but by Government. The Chairman cannot be said to have "promulgated" the order. He merely republished in his municipality the order promulgated, *i.e.*, formally made and issued by Government under the Epidemic Diseases Act. The order not having been promulgated by any public servant, no sanction is required as a condition precedent to prosecution for disobeying the order. We must therefore set aside the acquittals, and direct the Stationary Sub-Magistrate to restore the case to his file as against Mamilla Reddi and Rajendram and dispose of it according to law.

1900 *March* 16. **I. L. R. 24 Mad. 81.**

Before Mr. Justice Benson and Mr. Justice Moore.

SUBBA REDDI (ACCUSED No. 1), PETITIONER, *v.* MUNSHOOR ALI SAHEB (COMPLAINANT), RESPONDENT. *

Penal Code—Act XLV of 1860, s. 379—Removal of fish from an ordinary irrigation tank—Charge of theft—Maintainability of charge.

Fish in an ordinary irrigation tank are not in the possession of any person so as to be capable of being the subject of theft. Nor does the removal of such fish constitute any other offence.

Queen v. *Reru Pothadu*, (I. L. R., 5 Mad., 391n) : and *Bhagiram Dome* v. *Abar Dome*, (I. L. R., 15 Calc., 388), referred to.

PETITION that an order of the District Magistrate of Cuddapah might be revised whereby the case of the petitioner was directed to be restored to the file of the Stationary Second-class Magistrate of Cuddapah and the petitioner retried. The charge was for an offence of theft, under section 379 of the Indian Penal Code. The complainant alleged that he had taken the Patha Cuddapah tank fishery on lease, and was entitled to the sole right of fishing in the tank from the Bugga channel in Bellam Mundi. He had, however, found the accused and others catching fish by letting the water through the sluice and spreading nets. The Stationary Second-class Magistrate passed the following order :— "The complainant says that he has obtained the right of fishing in the Patha Cuddapah tank and a portion of the Bugga river, and that the accused have without his permission carried away the fish and have thus committed theft.

* Criminal Revision Case No. 38 of 1900.

Digitized by Google

It has been held by Madras and Calcutta High Courts that such an act constitutes no offence which a Criminal Court can take cognizance of. The petition is, therefore, dismissed under section 203 of the Code of Criminal Procedure" Upon this the District Magistrate of Cuddapah passed the following order:— "Fish in tanks are the property of the tank-owners and may be and are usually leased by the State to private persons. If a person other than the lessee remove such fish the offence is clearly theft. The case must be restored to file and disposed of according to law."

Against this order the petitioner preferred this criminal revision petition.

Mr. *C. Krishnan*, (for Mr. *N. Subrahmaniam*), for the petitioner.

K. C. Desikachariar (for *Venkatasubbaramayya*), for the respondent.

JUDGMENT.—The District Magistrate has overlooked the rulings of this court, dated 23rd October 1878, No. 1759, reported at page 232, Weir's 'Law of Offences,' 3rd edition, and in the note to *Queen* v. *Revu Pothadu* (1).

It was there held that fish in an ordinary open irrigation tank are not in possession of any person, so as to be capable of being the subject of theft. The question whether the removal of such fish constitutes any other offence is fully discussed in *Bhagiram Dome* v. *Abar* (2) and is answered in the negative. These rulings are evidently referred to by the Sub-Magistrate, though he has failed to note them with exactness.

The District Magistrate should have referred to them before setting aside the order of the Sub-Magistrate. Following these rulings we must set aside the order of the District Magistrate and restore that of the Sub-Magistrate dismissing the case.

1900 *Sept.* 13. **I. L. R. 24 Mad. 121.**

Before Mr. Justice Benson and Mr. Justice Moore.

QUEEN-EMPRESS *v.* MUNDA SHETTI AND OTHERS.*

Criminal Procedure Code—Act V of 1898, s. 195—Alleged forgery of documents submitted to Tahsildar holding enquiry as to transfer of names in Land Register—Revenue Court—Necessity for sanction to prosecute offender.

A Tahsildar, when holding an enquiry as to whether a transfer of names in a land register should be made or not, is a Revenue Court; and before a party to any proceeding in such a Court can be prosecuted for an offence referred to in section 195 (*c*) of the Code of Criminal Procedure, sanction should be obtained.

CASE referred to the High Court for orders. It appeared that a petition had been received by the Tahsildar of Kasaragod by post, which purported to be marked by one Koi Shetti, requesting that certain property standing in the Land Register should be transferred to the name of one of his heirs. The Tahsildar ordered enquiry to be made, with the result that a report and statement was forwarded to him in which Koi Shetti purported to consent to the transfer. The Tahsildar then returned the report with the remark that consent of all Koi Shetti's heirs was necessary before the transfer could be made; and a statement purporting to be signed by Koi Shetti's heirs was submitted, giving the required consent. The Tahsildar thereupon directed the transfer to be made. Some five months later, Koi Shetti presented a petition to the Tahsildar, alleging

---

§ Criminal Revision Case No. 200 of 1900.

(1) I. L. R., 5 Mad., 390.

(2) I. L. R. 15 Calc., 388.

Digitized by Google

that the documents referred to were forgeries, and asking that the transfer might be cancelled. This petition was dismissed. Meanwhile one of Koi Shetti's heirs presented a committal complaint to the Stationary Second-class Magistrate accusing seven persons of forgery, of whom four were committed for trial on charges under sections 465 and 471 of the Indian Penal Code. No sanction for the prosecution had been obtained from the Tahsildar, and it was contended, on behalf of the accused, that the Magistrate had, in consequence, no jurisdiction to entertain the complaint. The District Judge considered that the commitment was illegal and should be quashed. He said:—" The documents in respect of which the accused have been charged were given in evidence in a proceeding before the Tahsildar, who was legally authorised to take evidence, whose duty it was to hold an investigation in the matter and who could, under Act III of 1869, have issued summonses for the attendance of witnesses and the production of documents. In *Atchayya* v. *Gangayya* (1) the Full Bench of the Madras High Court ruled that the word 'Court' used in section 195 of the Code of Criminal procedure has the same meaning as the word 'Court' in section 3 of the Indian Evidence Act and includes all persons except arbitrators legally authorised to take evidence. That ruling was passed when the Criminal Procedure Code of 1882 was in force; but by sub-section (2) of section 195 of the present Criminal Procedure Code, it is declared that, although the term 'Court' does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877, it means a Civil, Revenue, or Criminal Court. In my opinion the Tahsildar holding an investigation and taking evidence in this case was undoubtedly a Court, and his sanction was undoubtedly necessary under section 195 of the Code of Criminal Procedure, before the accused could be prosecuted. It is clear from the Tahsildar's order that he would not have granted sanction if it had been applied for. Hence it appears to me that the accused have been greatly prejudiced, and that there has been a failure of justice within the meaning of this term in section 537, Code of Criminal Procedure. Under these circumstances, I submit that the commitment was illegal and ought to be quashed."

Rangachariar, for the Public Prosecutor, for the Crown.

Ayya Ayyar for the complainant.

JUDGMENT.—We agree with the Sessions Judge that the Tahsildar, when holding an enquiry as to whether tranfer of the names in a land register should be made or not, was a Revenue Court. He was authorised under Act III of 1869, (Madras), to receive evidence and to decide whether transfer should be made or not. He was therefore, in our opinion, a tribunal empowered to deal with a particular matter, and authorised to receive evidence bearing on that matter in order to enable him to arrive at a determination: (*Raghoobuns Sahoy* v. *Kokil Singh* (2). It appears, however that the second accused person alone was a party to the proceeding in the Tahsildar's Court in which the documents alleged to be forgeries were produced. The accused persons Nos. 1, 4 and 5 were not parties, and such being the case sanction in their case was not required under section 195, clause (*c*), of the Code of Criminal Procedure. We accordingly set aside the committal to the Court of Sessions in the case of the second accused and direct that she be discharged, but decline to interfere in so far as accused Nos. 1, 4 and 5 are concerned.

---

(1) I. L. R., 15 Mad., 138. (2) I. L. R., 17 Calc., 872.

Digitized by Google

1900 *September* 14. **I. L. R. 24 Mad. 124.**

Before Mr. Justice Benson and Mr. Justice Moore.

QUEEN-EMPRESS *v.* PEELIMUTHU TEVAN AND ANOTHER.*

Penal Code—Act XLV of 1860, s. 144—Unlawful assembly—Evidence of common object.

Two persons were charged with being members of an unlawful assembly armed with deadly weapons for the purpose of committing dacoity. The facts proved were that a crowd of about 100 persons, including the accused, had assembled together, armed with bill-hooks and sticks; and that the crowd had dispersed at once on seeing the police. On these facts the the Magistrate assumed that the intention of the members of the crowd was to use criminal force, and, having regard to the weapons with which they were armed, he convicted the accused under section 144 of the Indian Penal Code:

Held, that the Prosecution had failed to show that the common object of the crowd was such as would constitute it an unlawful assembly as defined by section 141 of the Indian Penal Code, and that the accused were entitled to be acquitted.

APPEAL against an acquittal. The facts of the case are set out by the Special First-class Magistrate in his judgment, the material portions of which are as follows:—" The accused in this case are 32 in number, all Maravars, belonging to Nilidanallur, Krishnapuram, and surrounding villages. The charge against them is that they assembled unlawfully for the purposes of dacoity on 16th June 1899 at Ommayanpottal. The prosecution case is as follows:—In the early morning of the 16th, first prosecution witness set out from Kurukkalpatti to Vilingapuram where he heard his brother-in-law's house had been looted. On the way, near, Chinnakovilingulam, he saw two men in front of him, and another pair in front of those. The former pair addressed the latter ' in what place is the crowd going to meet ? ' and the latter replied ' in Ommayanpottal, to loot places adjoining Shenthamaram.' On going a little further, first prosecution witness saw a crowd of about 100 persons, and being alarmed, returned to Kurukkalpatti and informed the Station House officer, fourth prosecution witness. The latter sent a constable to summon volunteers and, along with prosecution witnesses Nos. 1–3 and two constables, fifth prosecution witness, and another set out for Ommayanpottal. They came upon the crowd after crossing and getting on the bund of Shorangudi tank. The crowd made off as soon as they saw the police. The prosecution witnesses chased and caught two of the crowd, accused Nos. 1 and 2, who had sticks and a bill-hook, and brought them back to the police station. All the prosecution witnesses identified before the Court accused Nos. 3–32, who were subsequently arrested and deposed that they were members of the crowd. This account is given by prosecution witnesses Nos. 1–5. Prosecution witnesses Nos. 6 and 7 spoke only to the susbsequent identification of accused Nos. 3–32. The defence, as far as could be gathered, did not dispute the presence of the crowd, armed with sticks and bill-hooks at Ommayanpottal, and I see no reason to doubt the evidence on this point. I shall consider (1) the evidence as to the common object of the assembly, (2) the nature of the identification of the accused by the prosecution witnesses. The prosecution witnesses agreed in believing that the intention of the crowd was to commit dacoity. Their reasons are that there was a rumour that their village was going to be looted and that other places had been looted. Second prosecution witness said he heard the crowd say they were going to loot places round Shorattanur. This uncorroborated statement I am not inclined to credit, as second prosecution witness is, in other particulars of his evidence as will be seen, somewhat reckless, and as all the prosecution

* Criminal Appeal No. 179 of 1900.

Digitized by Google

witnesses agreed in saying that the crowd ran immediately they caught sight of the prosecution witnesses when they were some 25 yards off, and it is not likely the crowd would proclaim its intention then. First prosecution witness based his opinion as to the crowd's intention on the conversation of the four men whom he said he saw on the road and afterwards in the crowd. This account I am not inclined to give much credit to, because (1) the second pair was 25 yards behind the first pair, and the conversation was carried on by shouts, and it is unlikely that they would proclaim their intention so unguardedly; (2) first prosecution witness said he never went nearer either pair than 100 yards, and so the accuracy of what he heard is doubtful; (3) he said he saw all four in the crowd again, but deposed that he could not identify the latter pair; (4) I doubt, for reasons to be subsequently given, if first prosecution witness could be certain that he saw the four persons in the crowd. I did not, therefore, consider it as satisfactorily proved that the intention of the assembly was to commit dacoity. I saw no reason, *primâ facie*, to doubt the fact that a crowd of 100 persons armed with sticks and bill-hooks did assemble in Ommayanpottal and that accused Nos. 1 and 2, members of the crowd, were pursued and caught by the prosecution witnesses. The prosecution account on these general facts was not shaken in cross-examination. The intention of this assembly must be presumed from its conduct. The fact that the crowd consisted of 100 or 150 persons, armed with sticks and bill-hooks and that it fled immediately on seeing the police, is *primâ facie* evidence that the assembly was unlawful, and that its intention was to use criminal force in prosecution of any ulterior object it might have, its common object therefore was to use criminal force, in itself an offence, and that therefore the assembly was *primâ facie* an unlawful one. It would rest with any members of it to prove the contrary. Next, as to the identification of the accused by the prosecution witnesses, I did not consider the identification of accused Nos. 3-32 satisfactory. [He dealt with the evidence as against these accused and discharged them.] The case of first and second accused is different. The evidence was that they were arrested on the spot, and that they were armed with sticks and a bill-hook, produced in Court. Having found, for reasons stated above, that the assembly was an unlawful one armed with bill-hooks and sticks, I, considering a bill-hook a deadly weapon, framed a charge against accused Nos. 1 and 2 under section 144, Indian Penal Code. They pleaded not guilty and examined three witnesses. [He dealt with the defence evidence, and concluded as follows:—] The evidence for the defence is very dubious, and, considering that these witnesses were not cited at first, that their story differs from the statement of the accused, and that no reason has been shown why the prosecution witnesses should falsely depose against them, I cannot give any credit to the defence evidence. The prosecution account of the arrest of these two persons is consistent, and I see no reason to doubt it. They were arrested on the spot and the prosecution witnesses had ample opportunity of identifying them. The accused have not chosen to admit their presence in the crowd and explain their purpose there. I, therefore, find accused Nos. 1 and 2 guilty of being members of an unlawful assembly under section 144, Indian Penal Code, and sentence each of them to rigorous imprisonment for eighteen months."

Against this conviction and sentence the accused appealed. The judgment of the Sessions Court was as follows:—"Thirty-two accused were put up for trial by the police, but the Magistrate discharged 30 and convicted the two appellants; the 30 were not arrested at the time of the offence, but subsequently, while the two appellants are alleged to have been arrested on the spot.

Digitized by Google

The Magistrate also disbelieved the evidence given by the prosecution to show that the common intention of the crowd was to commit dacoity, but he inferred from the facts that the crowd consisted of 100 or 150 persons armed with sticks and bill-hooks and that it fled immediately on seeing the police, that the assembly was unlawful, and that its intention was to use criminal force in prosecution of any ulterior object it might have. I have said in previous appeals that I cannot draw any such inference. When nothing more than this is proved it seems to me that there are several lawful purposes which such a crowd might have, even supposing that they had any common intention at all. The Public Prosecutor did not trouble to argue the appeal, as he took it for granted that I should follow my previous decisions in appeals Nos. 54 and 59. The finding and sentence of the lower Court are reversed and the accused ordered to be set at liberty."

Against this acquittal the Public Prosecutor preferred this appeal under section 417 of the Code of Criminal Procedure.

Mr. *D. Chamier*, for the Public Prosecutor, for the Crown, contended that a *primâ facie* case had been made out against the accused. No crowd would assemble in such numbers and armed in such a manner unless their intention was to use criminal force. Moreover, the fact that the persons so assembled ran away immediately they saw the police showed that their object was not an innocent one. At any rate, enough had been shown to establish a *primâ facie* case, which the accused had not rebutted, as they might have done by showing that they had in fact assembled to carry out an object which was lawful. Moreover, the whole of this particular district was in a state of disturbance at the time.

Gopalasami Ayyangar for the accused.

MOORE, J.—This is an appeal preferred by Government against the judgment of the Sessions Judge of Tinnevelly in Criminal Appeal No. 66 of 1899, setting aside the conviction of two men, who had been sentenced by the Special Magistrate to rigorous imprisonment for eighteen months each for an offence under section 144 of the Indian Penal Code. The reasons for the decision arrived at by the Sessions Judge are given by him briefly in the judgment above mentioned and at greater length in his judgments in Criminal Appeals Nos 54 and 59 of 1899 which have been printed with the record in this case and referred to by the Government Pleader.

What the Magistrate has found as to the facts of this case is that the two persons convicted by him together with others, to the number in all of 100 or 150, assembled together armed with bill-hooks and sticks, and that they dispersed at once on seeing the police. From these facts he assumes that the intention of the members of the crowd was to use criminal force—an offence punishable under section 352 of the Indian Penal Code—and, as they were armed with what he appears to have held were deadly weapons, he has convicted them under section 144 of the Indian Penal Code. In order to show the common intention of the members of the crowd some evidence was put forward before the Magistrate to prove that certain members of the crowd were heard saying that they were going to loot, but he has, as I consider rightly, discredited this evidence. There is therefore nothing to show what the intention of the men was except that they were in a large crowd and were armed. These facts, no doubt, raise a strong suspicion that the men had not assembled with any harmless or innocent intention, but it cannot, in my opinion, be held that they afford proof that the intention of the members of

Digitized by Google

the crowd was to use criminal force or to commit any other offence. One argument put forward here by Mr. Chamier in support of the appeal appears to be that, as the men had assembled in a crowd and were armed, a *primâ facie* case against them had been made out which was sufficient, in the absence of rebutting evidence to show that the men had come together for self-defence or for any other lawful object, to warrant a conviction. I cannot admit this argument. The prosecution was bound to show that the common object of the crowd was such as would constitute it an unlawful assembly as defined by section 141 of the Indian Penal Code, and, as I am of opinion that this was not done, I would decline to interfere with the judgment of the Sessions Judge and would dismiss this appeal.

BENSON, J.—I am not prepared to dissent from the conclusion arrived at by my learned brother in this case.

The fact that so large a crowd of Maravars had assembled and that they were armed with sticks and bill-hooks and ran away when the police appeared is, in my opinion, sufficient to raise a strong suspicion that they had come together for an unlawful purpose, intending to use criminal force or to commit some offence, but I am not prepared to say that the Sessions Judge was wrong in holding that these facts alone were insufficient as legal proof of the unlawful character of the assembly. It is observed that no evidence was given as to the disturbed condition of the district which is now alleged before us and especially as to the relations existing between the Shanars and the Maravars in the neighbourhood and the action taken by similar crowd of Maravars about the same time. Had such evidence been given, it might, in my opinion, have been sufficient to lead to an inference as to the unlawful character of the assembly though it would not necessarily do so, for it might be that the crowd had come together for a lawful purpose, such as to discuss the situation or to petition the authorities, and had armed themselves with sticks and bill-hooks for protection against anticipated violence from the Shanars. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it and from a consideration of all the surrounding circumstances. In the absence of evidence such as I have referred to and when the specific acts adduced by the prosecution to prove the unlawful character of the assembly have been disbelieved by both Courts, I do not think that the case is one in which we should interfere with the acquittal. I therefore agree that we should dismiss this appeal.

1900 *March*, 16, *Sept.* 27. **I. L. R. 24, Mad. 136.**

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

KRISHNA REDDI AND OTHERS (ACCUSED NOS. 1 TO 3), PETITIONERS, *v.* SUBBAMMA (COMPLAINANT), RESPONDENT.§

Criminal Procedure Code—Act V of 1898, ss. 209, 436–Refusal by Magistrate to charge accused with offence triable exclusively by Court of Session—"Discharge"—Charge of offence triable by Magistrate—Acquittal—Order by Sessions Court for further enquiry and committal—Legality of such order.

§ Criminal Revision Case No. 26 of 1900.

Digitized by Google

Certain persons were charged before a Magistrate of the first class under section 379 of the Indian Penal Code with the theft of a promissory note. The prosecution applied for a further charge to be framed under section 477 of the Indian Penal Code, but this the Magistrate declined to do, as, in his opinion, there was no direct evidence that the accused had destroyed or secreted the note. After hearing the evidence for the defence the Magistrate acquitted the accused under section 258 of the Code of Criminal Procedure. Application was then made to the Sessions Court to call for the records and direct the committal of the accused for trial for an offence under section 477 of the Indian Penal Code. The Sessions Court ordered that a further enquiry be made and that the accused be committed for trial. On its being contended, on revision, that the order of the Sessions Court was illegal on the ground that the accused had been acquitted and not discharged :

Held, that the order of the Magistrate was, in substance, an order discharging the accused in respect of an alleged offence under section 477, Indian Penal Code, and that the Sessions Judge had jurisdiction to make the order sought to be revised.

Queen-Empress v. *Hanumantha Reddi*, (I. L. R. 23 Mad., 225) considered.

PETITION to revise an order made by the Sessions Court of Nellore directing the committal of the petitioners for an offence under section 477, Indian Penal Code. The petitioners, three in number, had originally been charged before the Head Assistant Magistrate of Gudur with theft, under section 379, Indian Penal Code. The prosecution alleged that the complainant held a promissory note for Rs. 2,000. Both the promisor and the promisee were dead ; but it was arranged that the third accused, who was the legal representative of the deceased promisor, should execute bonds in favour of complainant in place of the note. While third accused, in company with first accused, was writing the bond, second accused snatched the note, and subsequently all the three accused combined in retaining the note so obtained. The Magistrate framed a charge of theft as against second accused, and of abetment of theft as against accused Nos. 1 and 2. The prosecution also asked that a charge might be framed under section 477 of the Indian Penal Code, but this the Magistrate declined to do, there being no direct evidence that second accused had destroyed or secreted the document. In the end, after hearing evidence for the defence, the Magistrate made the following order :—" I think on the whole that the weight of evidence is on the side of the defence and so that accused are acquitted under section 258 of the Code of Criminal Procedure."

The Sessions Court was thereupon petitioned to direct a committal of the accused to the Court of Sessions for an offence under section 477 of the Indian Penal Code. The Sessions Judge, after stating the facts, said :—" At the trial it was pointed out that an offence under section 477 of the Indian Penal Code had been committed. The Magistrate, however, thought that the offence fell under section 379. He accordingly charged the accused under that section and after hearing the defence witnesses, acquitted them as in his opinion the defence evidence was entitled to a greater credence than the prosecution evidence. It is conceded that this Court cannot interfere and set aside the order of acquittal, if the offence really came within the Magistrate's jurisdiction. But it is urged that, when it was not so, his duty did not extend beyond committing the accused for trial to this Court, if he found that a *primâ facie* case had been made out by the prosecution in respect of the offence with which they stood charged." He dealt with the evidence and concluded :—" I am unable, for the above reasons, to hold that the Magistrat was right in charging the accused under section 379, Indian Penal Code, and accordingly direct that a further enquiry be made in reference to the documents filed from first witness' custody and the accused be committed to the Sessions Court under section 477, Indian Penal Code."

Digitized by Google

Against this order of committal the petitioners preferred this criminal revision petition.

The case first came on for hearing before a Court composed of BENSON and MOORE JJ.

Mr. *R. F. Grant* for petitioners.

Mr. *K. Brown* and *S. Subrahmania Ayyar* for complainant.

Their Lordships delivered the following judgments:—

BENSON, J.—I do not think that the order of the Sessions Judge was one which he had no jurisdiction to make. In my view the decision of the Magistrate must be taken to be not only one of acquittal of an offence punishable under section 379, Indian Penal Code, but one of discharge so far as the alleged offence under section 477, Indian Penal Code, is concerned. The complaint against the accused was that he committed an offence punishable under section 477, Indian Penal Code. Such offence is triable exclusively by the Court of Session. The Magistrate could neither acquit nor convict him of such offence. He was bound either to commit him to the Sessions Court or to discharge him. He did not commit him. The only alternative was to discharge him, and that, I take it, is what the Magistrate really did do. It is not suggested that the charge under section 477 is still pending before the Magistrate. It has been disposed of, and the only question is as to what the disposal has been. It seems to me that the accused has been discharged so far as the charge under section 477 is concerned. The Magistrate's order, if stated fully, should have been "I discharge him as regards the offence punishable under section 477, and I acquit him as regards the offence punishable under section 379."

If the order had run in that form I do not see how it could be said that the Sessions Judge would not have had jurisdiction under section 436, Criminal Procedure Code, to order him to be committed for trial upon the matter of which he had been, in the opinion of the Sessions Judge, improperly, discharged, *i.e.*, as regards the offence under section 477, Indian Penal Code. But the mere omission of the Magistrate to say "I discharge the accused so far as the offence under section 477, Indian Penal Code, is concerned" cannot alter the essential character of the Magistrate's proceedings.

The fact that the accused was acquitted of the minor offence of theft could not, in my opinion, affect the power of the Sessions Judge, any more than that power would have been affected by a conviction on the minor charge of theft.

Section 403, clause (4), Criminal Procedure Code, distinctly enacts that "a person acquitted or convicted of any offence constituted by any acts, may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged."

In the present case, therefore, the acquittal of theft by the Magistrate would be no bar to the trial and conviction of the accused by the Sessions Court on the same facts for an offence punishable under section 477, Indian Penal Code, since the latter offence is one which the Magistrate was not competent to try—and it is difficult to see how it can be a bar to the exercise by the Sessions Judge of the revisional jurisdiction conferred on him by section 436, Criminal Procedure Code.

One of the objects of sections 403 and 436, Criminal Procedure Code, is

Digitized by Google

to prevent Magistrates with limited powers from clutching jurisdiction in important cases, but this object would, it seems to me, with all respect, be, to a great extent, frustrated if the view of the Calcutta High Court on which the decision in *Baijanath Pandey* v. *Gauri Kanta Mandal* (1) followed in *Queen Empress v. Hanumantha Reddi* (2) is based, be accepted as correct. Under section 403, clause 4, if A is charged with, and acquitted of, theft by a Second-class Magistrate he may, on the same facts, be tried and convicted by a First-class Magistrate on a charge of robbery. The First-class Magistrate has this power notwithstanding the fact that an appeal against an acquittal can be made only by Government, and lies only to the High Court, and the reason, I take it, is because the Second-class Magistrate acted improperly in clutching jurisdiction and in dealing with a case which he ought not to have dealt with but left for the decision of a Court of competent jurisdiction. The Second-class Magistrate's proceedings in such a case are held to be no bar to further proceedings before the Court which is really competent to deal with the matter. On the same principle I do not think that the improper action of the Magistrate in clutching jurisdiction can be held to be a bar to the exercise of the revisional jurisdiction vested in the Sessions Judge under section 436. Nor can it be said that the Sessions Judge in the Calcutta case or in the present case, was exercising the powers of a Court of Appeal (section 423, Criminal Procedure Code) in a case of acquittal any more than a First-class Magistrate exercises such powers when he proceeds under section 403, clause 4, to convict of robbery a man who has been acquitted of theft, on the same facts, by a Second-class Magistrate. If this view is correct the ground on which the Calcutta case rests is not sustainable and no other ground in reason can, I think, be suggested why the Sessions Judge's general jurisdiction to revise improper discharges should be taken away in this particular class of cases.

As to the language of section 209, it may, I think, be conceded that it contemplates trial by the Magistrate as an alternative to discharge, but that is because the section is framed on the assumption that the Magistrate will act within his jurisdiction. There are many cases in which a Magistrate has a discretion as to whether he will try a case himself or will commit it for trial to the Court of Session. It is to meet such cases that the alternative given by the last clause of the section " unless it appears, &c. . . . ." is provided. Suppose a man is charged by the Police with having committed murder and theft at the same time and place and a Magistrate after enquiry says " I do not think there is sufficient evidence to justify me in committing the accused for murder, but the theft is proved and I convict him of that offence " can it be held that the Sessions Judge could not on revision, order the Magistrate to commit the accused on a charge of murder ? I think there is no doubt but that he could do so, yet section 209 does not in terms provide for such a case nor does any other section of the the Code do so. In my judgment, however, trial on a minor charge is not inconsistent with a discharge as regards a grave offence, nor does the provision for such trial by the last clause of the section negative the propriety of an order of discharge for a grave offence under the first part of the section. If such order of discharge had, in fact, been made in the present case, there can be no doubt the Sessions Judge would have been able to interfere under section 436 and, in my judgment, the mere omission to make a formal order makes no difference, when the proceeding in reality amounts to a discharge.

(1) I.L.R., 20 Calc., 633. (2) I.L.R., 23 Mad., 225.

Digitized by Google

I would, therefore, dismiss the petition on the ground that the Judge had jurisdiction to make the order.

MOORE, J.—Three persons were put on their trial before the Head Assistant Magistrate of Nellore, the case for the prosecution being that they had committed offences under sections 379 and 477 of the Indian Penal Code. The Magistrate acquitted them of the charge under section 379. He was asked to frame a charge against them of having committed an offence under section 477, Indian Penal Code, but refused to do so as the evidence did not appear to be sufficient to warrant him in drawing up a charge under that section. On application having been made to the Sessions Judge he directed that further enquiry should be made and that the accused persons should be committed to the Court of Session on a charge of having committed an offence under section 477, Indian Penal Code.

It is now urged that, as the accused persons had not been discharged by the Head Assistant Magistrate with respect to a charge of having committed an offence under section 477, Indian Penal Code, it was not open to the Sessions Judge under section 436 of the Criminal Procedure Code to direct that they should be committed to the Court of Session for trial on that charge and attention is called to the case of *Baijanath Pandey* v. *Gauri Kanta Mandal* (1) and to *Queen-Empress* v. *Hanumantha Reddi* (2) on the file of this Court.

In answer to this argument it is urged that the present case can be distinguished from those just mentioned on the ground that, although a formal order discharging the accused persons with respect to a charge of having committed an offence under section 477, Indian Penal Code, was not drawn up under section 209, Criminal Procedure Code, yet that the men were accused before the Magistrate of having committed that offence and that the Magistrate having refused to frame a regular charge against them under that section, it must be held that they were discharged by him in so far as that offence was concerned and that, such being the case, it was not necessary, in order to give the Sessions Judge the right to act under section 436, Criminal Procedure Code, that a formal order of discharge under section 209, Criminal Procedure Code, should have been drawn up.

With reference to these contentions it will be seen, on referring to the cases above mentioned, that no distinction can be drawn between them and the present case. In *Baijanath Pandey* v. *Gauri Kanta Mandal* (1) it will be found that the complaint against the accused persons was that they had committed dacoity; the Magistrate, however, found "that no sessions offence was *primâ facie* established" (vide page 639) and accordingly framed charges of offences under sections 379 and 448 of the Indian Penal Code, which he proceeded to try himself. Here, as in the present case, although there was no formal discharge under section 209 of the Criminal Procedure Code, there was a refusal by the Magistrate to proceed against the accused persons on a charge of dacoity. I have referred to the magisterial records connected with *Queen-Empress* v. *Hanumantha Reddi* (2) on the file of this Court and find that the facts are similar to the present case. There a Deputy Magistrate took up a charge laid before him as being one under section 304, Indian Penal Code, he examined witnesses but took leave before completing the inquiry. His successor, "after careful consideration of the evidence on record and of the circumstances of the case and after hearing the pleaders on both sides,"

(1) I.L.R., 20 Calc., 633. (2) I.L.R., 23 Mad., 225.

Digitized by Google

held that a charge under section 304, Indian Penal Code, could not stand. He accordingly proceeded to try the accused persons under sections 147 and 325 of the Indian Penal Code, and acquitted them of offences under those sections. He, however, did not either formally or otherwise discharge them under section 209, Criminal Procedure Code, with reference to the complaint made against them of having committed an offence under section 304 of the Indian Penal Code. It thus appears to me to be clear that no distinction can be drawn between the present case and those already alluded to. Having a second time heard the question fully argued, I am of opinion that the decision in *Queen-Empress* v. *Hanumantha Reddi* (1), in which I took part, is correct. What the Sessions Judge should have done in this case was, as pointed out in *Baijanath Pandey* v. *Gauri Kanta Mandal* (2), to make a reference to the High Court under section 438, Criminal Procedure Code. I may further point out that not only did the Head Assistant Magistrate not discharge the accused persons with respect to the charge under section 477, Indian Penal Code, before he proceeded to try them for theft, but that under the provisions of section 209, Criminal Procedure Code, it would not have been open to him to do so. That section provides that when a Magistrate has taken the evidence for the prosecution he shall, if he finds that there are not sufficient grounds for committing the accused for trial, record his reasons and discharge him, unless it appears to him that he should be tried before himself or some other Magistrate, in which case he shall proceed to have him tried. The section does not appear to warrant a Magistrate to formally discharge the accused with respect to certain offences under section 209, Criminal Procedure Code, and then proceed to try him for other offences. This point does not, however, appear to me to be of much importance.

On the ground that, as there was no discharge by the Magistrate under section 209, Criminal Procedure Code, the order of the Sessions Judge, under section 436, Criminal Procedure Code, directing committal to the Sessions Court was illegal, I am of opinion that that order should be set aside.

[The case again came on for hearing before a Court constituted as above, under sections 429 and 439 of the Code of Criminal Procedure.]

Ramachandra Rao Saheb for accused No. 2.—There was no charge in the complaint in respect of an offence under section 477. The Magistrate charged the accused for theft and they were acquitted. There was no allegation that the accused had destroyed the document. Then the Sessions Judge was applied to and his power of revision invoked. Even if there had been evidence as to an offence under section 477, which is not admitted, I submit that the Sessions Judge had no jurisdiction to pass an order of committal, there having been an acquittal by the Magistrate. The Sessions Judge's order was pased under section 436. If there is no order of discharge the Sessions Court had no power to make the order. To see if the order was one of discharge, it is necessary to examine section 209. Here the Magistrate has not discharged the accused. [DAVIES, J., referred to the Magistrate's order—"I am asked to charge the accused under section 477. This I decline to do." That was a refusal to charge and was in effect a discharge; and must have been passed under section 209, as there is no other section under which it could be passed.] [SUBRAHMANIA AYYAR, J., referred to *Queen-Empress* v. *Pirya Gopal* (3).] There are three modes of discharge,—under sections 209, 213 and 253.

(1) I. L. R., 23 Mad., 225. (2) I. L. R., 20 Calc., 633.
(3) I. L. R., 9 Bom., 100.

Digitized by Google

Under section 437 a Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make, or direct any Subordinate Magistrate to make, further enquiry into any complaint which has been dismissed under section 203 or sub-section (3) of section 204, or into the case of any accused person who has been discharged. On the charge of theft the accused were acquitted under section 258. I submit that the Magistrate either discharges, or charges and tries or acquits—he must do one or the other. In *Baijanath Pandey* v. *Gauri Kanta Mandal*(1), the facts disclosed dacoity exclusively triable by sessions. There the Magistrate acquitted the accused and gave sanction to prosecute the complainant. The District Magistrate directed that there should be an enquiry; and the High Court held that the Sessions Judge had exercised a jurisdiction not vested in him by law; acting as a revision Court he could send for the record for any purpose mentioned in section 436, but he was not competent under section 436 to direct a fresh enquiry, inasmuch as the accused had not been improperly discharged of an offence triable exclusively by a Court of Session, but had been acquitted of an offence within the Magistrate's jurisdiction; the Sessions Judge had, in fact, exercised the jurisdiction vested in him as an Appellate Court under section 423, as if an appeal had been presented to him from an order of acquittal; such powers in revision cases are only conferred on the High Court. By section 403:—"A person once convicted or acquitted may not be tried again on the same facts." The meaning of section 209 is made clear by referring to the corresponding section of Act X of 1872, *i.e.*, section 195. I submit that the remark of the Magistrate as to section 477 does not deal with the case, *i.e.*, does not decide it. *Queen-Empress* v. *Hanumantha Reddi* (2). There was nothing to prevent the Magistrate from making an order of discharge. There may be a single transaction which discloses either a major or a minor offence, and the Magistrate decides there is nothing to justify his proceeding with the higher offence and he decides to proceed with the minor one, and passes an order on the minor offence,—that action precludes the possibility of its being a discharge. *Har Kishore Dass* v. *Jugul Chunder Kabyarathna Bhuttacharjee* (3) was an order of conviction, but that does not affect my argument. That was a charge of mischief. The Sessions Judge directed further enquiry. It was held by the High Court that he could only direct it in two events, *i.e.*, where the complaint had been dismissed under section 203 or sub-section (3) of section 204 of the Code of Criminal Procedure, or where there was an order of discharge. The Magistrate here thought it was a case he could take cognizance of and under the latter part of section 209 (1) he proceeded to try it, and acquitted. That precludes its being treated as an order of discharge. I am supported by *Baijanath Pandey* v. *Gauri Kanta Mandal*(1) and *Queen-Empress* v. *Hanumantha Reddi*(2).

Mr. *K. Brown* and S. *Subrahmania Ayyar* for the complainant were not called upon.

JUDGMENT.—The order of the Magistrate was in substance an order discharging the accused in respect of an alleged offence under section 477, Indian Penal Code.

If section 209 of the Criminal Procedure Code is to be construed as mean-

(1) I. L. R. 20 Calc., 633.

(2) I.L.R., 23 Mad., 225.

(3) I.L.R., 27 Calc., 658.

Digitized by Google

ing that there can be no "discharge" under that section in respect of an offence exclusively triable by a Court of Session in cases where it appears to the Magistrate that the accused should be tried before himself or some other Magistrate in respect of offences not so exclusively triable, there would be a deadlock, since there is no provision in the Code, other than that contained in section 209, for dealing with a case where the Magistrate is of opinion that there is no evidence of an alleged offence which is triable exclusively by a Court of Session, but considers that the accused should be tried before himself, or some other Magistrate, in respect of alleged offences which are not so exclusively triable. From the terms of the Magistrate's order it is clear that he adjudicated upon the question whether there was any evidence against the accused in respect of the major offence. The Magistrate came to the conclusion that there was not, and he declined to charge him with the major offence. It seems to us that this is a "discharge" within the meaning of section 209.

Chapter XVIII relates to enquiries into cases triable by the Court of Session or High Court. The primary object of section 209 is to make provision for the procedure in such cases. If, in the opinion of the Magistrate, there is no evidence to warrant a charge for an offence exclusivly triable by a Court of Session, he may "discharge" the accused in respect of the alleged offence and, having done so, may proceed as regards the minor offence or offences under chapter XXI or other appropriate chapter. In fact, a Magistrate cannot proceed to act under the latter part of sub-section (1) of section 209 until he has "discharged" the accused under the former part of the sub-section. This is the course which the Magistrate adopted in the present case.

We think that the Sessions Judge had jurisdiction to make the order under section 436. We agree with the judgment of Benson, J., and the general grounds of that judgment and we are unable to agree with the view taken by the Calcutta High Court in *Baijanath Pandey* v. *Gauri Kanta Mandal*(1) and with the decision of a Division Bench of this Court, *Queen Empress* v. *Hanumantha Reddi* (2), which followed the Calcutta High Court.

The petition is dismissed.

1900 *August* 23. **I. L. R. 24 Mad. 161**

Before Sir Arnold White, Chief Justice, Mr. Justice Shephard and Mr. Justice Davies.

QUEEN-EMPRESS *v.* SUBRAHMANIA AYYAR.*

Bail—Release on bail of a person convicted by Sessions Court of Madras pending appeal to Privy Council—Jurisdiction of High Court.

A person was, at Criminal Sessions held in Madras, convicted of certain offences and sentenced to imprisonment and fine. Upon a certificate being granted by the Advocate-General under section 26 of the Letters Patent, the High court reviewed the conviction and reduced the sentence. The accused obtained from the Judicial Committee of the Privy Council special leave to appeal, and also applied to be released on bail ; but the Judicial Committee expressed the opinion that the latter application should be decided by the Madras High Court. Upon application being made accordingly to the Madras High Court :

Held, that the High Court had jurisdiction to make an order releasing the accused on bail pending the decision of the Privy Council ; and that having regard to the rule laid down

(1) I.L.R., 20 Calc., 633. (2) I.L.R., 23 Mad., 225.

* Criminal Miscellaneous Petition No. 95 of 1900.

Digitized by Google

by the Judicial Committee in *Ex parte Carew*, ([1897] A. C., 719) as to the circumstances under which an appeal in a criminal matter will be admitted by the Privy Council, the accused ought to be released on bail in the present case.

PETITION for the release of petitioner on bail. Petitioner had been tried at the Criminal Sessions of the Madras High Court for having committed offences under sections 161, 384 and 109 of the Indian Penal Code, and was found guilty on the first, second and sixth counts in the indictment and was convicted and sentenced to three years' rigorous imprisonment and a fine of Rs. 8,000. The petition set forth that, upon a certificate granted by the Advocate-General under section 26 of the Letters Patent, the High Court had reviewed the case and determined that the conviction in respect of the first and second counts ought not to be upheld ; but that the majority of the Judges of the High Court had upheld the conviction on the sixth count and had altered the sentence to one of two years' rigorous imprisonment and a fine of Rs. 5,000. The petition stated that petitioner had obtained special leave to appeal to Her Majesty in Council against the said sentence and fine ; but that he was now confined in jail and undergoing the sentence of imprisonment. It further stated that petitioner had applied for bail to the Judicial committee, who had expressed the opinion that the matter should be decided by the Madras High Court. He prayed that having regard to the difference of opinion which had existed as to the propriety of his conviction on the sixth count and to the fact that special leave to appeal had been granted by the Privy Council, the Madras High Court would be pleased to enlarge him on bail or suspend the sentence or pass such order as to the Court should seem fit.

Mr. *J. H. M. Ryan*, for petitioner, referred to the charter of the Madras High Court, and submitted that precedents must be sought in the practice of the English Courts. He cited Bishop's 'Criminal Procedure,' paragraph 880, and Blackstone's 'Commentaries,' Book IV, as showing that a Court has power to respite a sentence and argued that if a Court can respite it may admit to bail. By section 498 of the Criminal Procedure Code the court which has convicted has power to liberate on bail pending an appeal, and that power is conferred without restriction. He cited the following cases and books:—*The Queen* v. *Lord* (1) ; *The King* v. *Reader* (2); *In re Turner* (3) ; *Nga Hoong* v. *The Queen* (4) ; *Ex parte Carew* (5) ; *In re Abrham Mullory Dillet* (6) ; *Reg* v. *Bertrand* (7) ; *Kops* v. *The Queen* (8) ; *Gangadhar Tilak* v. *Queen-Empress* (9) ; and Mayne's 'Criminal Law,' page 971.

The Crown Prosecutor (Mr. *John Adam*) opposed the application. The remark in Blackstone, he contended, was based on the fact that offenders in certain small felonies were at that time liable to capital punishment. The cases in the Law Journal were instances of bail being granted by an Appellate Court—not by the Court which had convicted. He argued that section 498 of the Criminal Procedure Code could not be construed without regard to the other sections of the Code, the principle underlying which was that only the Court to which an appeal is preferred can admit to bail.

JUDGMENT.—In our judgment this Court has jurisdiction to make an order, in this case, releasing the accused on bail, pending the decision of the Privy Council.

---

[1] 16 L.J., [M.C.], 15.
[2] 1 Stra., 531.
[3] 15 L.J., [M.C.], 140.
[4] 7 M.I.A., 72.
(5) (1897) A.C., 719.
(6) L.R., 12 App. Cas., 459 at p. 466.
(7) L.R., 1 P.C., 520 at p. 530.
(8) (1894) A.C., 650.
(9) L.R., 25 I A., 1; I.L.R., 22 Bom., 528.

Digitized by Google

Having regard to the rule laid down by the judicial committee in *Ex Parte Carew* (1) as to the circumstances in which an appeal in a criminal matter will be admitted by the Privy Council, we think we ought to allow the accused to be released on bail in the present case.

The accused will be released on bail on entering into his own recognizances for Rs. 10,000 and on the recognizances of two sureties for Rs. 5,000 each.

P. Subrahmania Ayyar.—Attorney for petitioner.

1900 *Sept.* 27, *Oct.* 2. **I. L. R. 24 Mad. 195.**

Before Mr. Justice Shephard and Mr. Justice Benson.

QUEEN-EMPRESS *v.* ALLAN*

District Municipalities Act (Madras)—Act IV of 1884, s 63 (2), (3)—Levy of tax—Legality.

By section 63 (2) of the District Municipalities Act, (Madras), 1884, it is enacted that, except as provided in sub-section [3] of that section and in section 63-A, a tax may be levied at such rate, not exceeding eight and a half per centum, on the annual value of the buildings or lands or both upon which it is imposed, as the Municipal Council may have notified under section 50 ; and by section 63 [3], in the case of [*a*] lands not occupied by buildings and not appurtenant to any building or attached thereto for use therewith as a garden or pleasure-ground or for the pasturage of animals kept for private use, and [*b*] lands occupied by native huts, the Chairman may, subject to the approval of the Municipal Council and the sanction of the Governor in Council, impose a tax on such lands at an annual rate, not exceeding four annas for every 80 square yards thereof, in lieu of the tax referred to in sub-section [2]. Provided that no tax shall be levied under this sub-section upon lands used solely for agricultural purposes :

Held, that, subject to the conditions mentioned, a tax levied under sub-section [3] on all lands within a municipality is a legal tax.

APPEAL by Government against an order of acquittal. Defendant was charged under clause (2) of section 103 of Madras Act IV of 1884, (as amended by Madras Act III of 1897). The facts of the case appear from the judgment of the Bench of Magistrates, Ootacamund, which was as follows :—

" This is a prosecution under clause 2, section 103, Act IV of 1884, as amended by Act III of 1897, instituted by the Ootacamund Municipal Council against Mr. Alexander Allan, the proprietor of certain lands within the municipality under their charge, taxation on which is imposed it is stated under section 63, clause 3 (*a*) and section 75 of the District Municipalities Act, 1884. Mr. Allan has omitted to pay. The claim amounts to Rs, 354-14-4 in all and refers to taxation for the years 1897-98 and 1898-99. Bills for the claim were presented, but the defendant would not pay, warrants of distraint were then issued but were returned unexecuted as no moveable property of the defendant could be found.

" The Solicitor for the prosecution has informed the court that criminal proceedings against the defendant have been instituted in view to obtaining a test case. The lands against which the claim was originally made are as follows :—Survey Nos. 157, 172, 175 to 180, 184, 186, and 1117 to 1120.

" The first named of these has now, at the request of both parties, been struck out, it having been sold some time since to his Highness the Gaicowar

---

* Criminal Appeal No. 512 of 1900.

(1) (1897) A.C. 719 at p. 721.

Digitized by Google

of Baroda. The fields which remain are, it is admitted, not appurtenant to any building or attached thereto for any purpose.

"The condition of these lands as found on inspection by the municipal overseer very shortly after the present complaint was lodged is given in the statement attached to exhibit D, the correctness of which is not traversed by the defendant.

"The defence is that the whole of the lands shown in the list above referred to including Nos. 1117 to 1120 which are said by the defendant to be grass lands, a statement which the prosecution does not deny, are lands used solely for agricultural purposes and are therefore under the proviso to clause 3, section 63 of the Act exempt from taxation. Another ground raised is that the defendant did not wilfully or negligently omit to pay the amount said to be due by him, inasmuch as the claim made was under the circumstances alleged for the defence an illegal one.

"We at first went into the evidence bearing upon the cases put forward by the prosecution and defence, and it was not until we came to discuss the draft of a judgment which it was proposed that we should pass and which was based on an examination of the objections raised for the defence and which dealt with the case on its merits, that a point which had hitherto escaped notice attracted our attention. A consideration of this has caused us to arrive at the conclusion that this prosecution must fail.

"There are under the District Municipalities Act, 1884, two methods of taxing lands.

"The one is on the annual rent value at a rate not exceeding 8½ per cent. on such value (section 63, clauses 1 and 2). The other is on the area at a rate not exceeding four annas for every 80 square yards (section 63, clause 3). It is under the latter of these that the claim before us has been made.

"Referring to exhibits F and G,* it will be seen that, in both of them, the municipality claims the tax under section 63, clause 3, of the Act not at the rate of so many pies or annas not exceeding four annas per 80 square yards which is the unit laid down by the law where the section and clause above referred to are applied, but at the rate of Rs. 1-8-0 per acre. We have re-examined the manager of the municipal office, and he produces the sanction of Government to the levy of land-tax as notified in exhibits F and G.

"He states that the whole of the lands within the Ootacamund Municipality which have been taxed have been accessed under clause 3, section 63 of the Act. He cannot account for this having been done to the exclusion of taxation on the annual rent value, but thinks that the reason must have been that the municipality did not know the rent values of the land within their jurisdiction or in other words did not care to go to the trouble of ascertaining or fixing them and hearing appeals against the assessments. It may be, however, that the municipality adopted the course which it did as being the more remunerative for the annual rent value per acre which would produce at 7½ per cent. Rs. 1-8-0 per annum is Rs. 20, a manifestly absurd figure for land bearing as a very large proportion of the waste to be found

* Notifications of taxes to be levied during the financial year. These contained announcements in the following terms :—"Taxon (*a*) lands not occupied by buildings and not appurtenant to any building or attached thereto, and (*b*) lands occupied by native huts at an annual rate of rupee one and annas eight per acre under section 63 (3) (*a*) and (*b*)."

Digitized by Google

within the limits of the Ootacamund Municipality does either worthless scrub, or almost equally worthless indigenous grass.

"Reading section 63 of the District Municipalities Act as a whole, we are of opinion that clause 3 of it is intended to apply to exceptional cases only, for in clause (1) the word 'shall' is used with reference to the action of the Chairman, whilst in clause (3) the word 'may' occurs, and in that clause there are specific instances given in which its provisions cannot, in any case, be applied. Further the use in clause (3) of a small unit of area of which an acre is no multiple and the mention in it of a rate of taxation calculated upon this unit, which if applied to the acre would work out to a permissible tax of something over Rs. 15 on that area, support the view that it was not the intention of the Legislature that taxation under its provisions should ever be rendered applicable, as has been the case in the Municipality of Ootacamund, to all lands within a municipality; but only to special cases—of which that of the defendants is certainly not one—in which what may be called punitive taxation is found, or considered necessary. Apart from this aspect of the case, we consider that to allow of taxation under clause (3), section 63 of District Municipalities Act, 1884, at all, the sanction of Government should be obtained in the terms of the clause itself, viz., so many pies or annas not exceeding four annas per 80 square yards and no other; that taxation under this clause calculated upon the acre and at a rate arbitrarily fixed is contrary to the law as it stands, and that the fact that that Government sanctioned it does not render it legal as such sanction was *ultra vires*. We acquit Mr. Alexander Allan under section 245, Criminal Procedure Code."

The defendant was accordingly acquitted.

Against that order of acquittal this appeal was preferred.

Mr. *N. Subrahmaniam* (for the Public Prosecutor) for the Crown.

Respondent was not represented.

JUDGMENT.—The Bench of Magistrates have in effect held that the tax imposed upon Mr. Allan's lands by the Municipal Council is an illegal one and have accordingly acquitted him on the charge laid under section 103 (2) of Madras Act IV of 1894.

According to section 63 of the Act read with section 50, to which it refers, it is lawful for the Municipal Council with the approval of the Governor in Council to notify that a tax shall be levied on buildings or lands.

Sub-section (2) declares the maximum rate at which such tax shall be levied in cases other than those to which sub-section (3) or section 63-A may be made applicable, the maximum rate being, according to the sub-section, 8½ per centum on the annual value of the lands.

In the third sub-section power is given to the Chairman subject to the approval of the Municipal Council and the sanction of the Governor in Council "to impose a tax on lands" at an annual rate not exceeding four annas every 80 square yards thereof in lieu of the tax referred to in sub-section [2]. This latter provision can be applied only to lands occupied by native huts [which notwithstanding the definition of buildings are not regarded as buildings] and to lands not occupied by other buildings nor attached thereto for use therewith for the pasturage of animals kept for private use. Not unnaturally, having regard to the small area with reference to which the calculation is to be made and the other terms of the sub-section, the Bench have considered that it was intended to apply in exceptional cases

Digitized by Google

only and have been led to the conlusion that an indiscriminate application of the section to all lands within the municipality other than those excepted in the provision itself illegal. It certainly does seem strange that the Legislature should have authorized the Municipal Council to impose a tax upon all lands and buildings in the manner mentioned in sub-section (2) and by way of alternative should have allowed, in the case of lands including lands occupied by native huts the imposition of a tax on a much higher scale, nor is it easy to understand why, with regard to this alternative method, the power is in the first instance given to the Chairman, and there is practically a repetition of the provision that the consent of the Municipal Council and of the Governor in Council shall be obtained. The smallness of the area, only 80 square yards, and the rate chargeable, which is nearly double what can be-charged under sub-section (2), certainly suggest that the Legislature has not said precisely what it meant to say. But the words of the two sub-sections being unambiguous we are bound to give effect to them and to hold that, subject to the conditions mentioned, a tax levied under sub-section (3) on all lands within the municipality indiscriminately is a legal tax.

We do not think the objection taken to the terms of the sanction is a valid one. As there are questions left undecided by Bench, we must, while setting aside the order of acquittal, remand the case for trial.

1900 *October.* 19. **I. L. R. 24 Mad. 238.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

QUEEN-EMPRESS, *v.* CHENCHI REDDI.*

Criminal Procedure Code—Act V of 1898, s. 556—Disqualification of Magistrate to try a case —Directing the prosecution of an accused—Subsequent trial by same Magistrate—Legality of trial.

A Deputy Tahsildar made a report concerning A to the Tahsildar, who, in turn, reported the matter to the Deputy Magistrate. The latter authorized the Tahsildar to prosecute A, on such charges as might be capable of being proved in a Criminal Court. and a prosecution was accordingly instituted. The case was tried by the same Deputy Magistrate, and on the objection being raised that under section 556 of the Code of Criminal Procedure that Magistrate was disqualified from trying the accused :—

Held, that he was not disqualified. The act of the Deputy Magistrate was an authorization and not a direction that the accused should be prosecuted.

Girish Chunder Ghose v. The Queen-Empress, (I.L.R., 20 Calc., 857), In the matter of the petition of Ganeshi, (I.L.R., 15 All., 192), and Queen-Empress v. Narain Singh, (I.L.R., 22 All., 340), referred to.

APPEAL against an acquittal. An accused was tried by the Deputy Magistrate of Kurnool, on a charge of criminal breach of trust by a public servant under section 409 of the Indian Penal Code, and convicted and sentenced to three months' rigorous imprisonment. The case had been taken up by the Magistrate in the following manner, as stated by him in his judgment:— The second prosecution witness (the Deputy Tahsildar) made a report to the Tahsildar, the first prosecution witness. He, in his turn, reported the matter to the Divisional officer (*i. e.*, myself), who authorized him to criminally prosecute the accused on such charges as may be capable of being proved in a Criminal Court. Hence this prosecution." An objection was raised under section 556 of the Code of Criminal Procedure, on behalf of the

* Criminal Appeal No. 560 of 1900.

Digitized by Google

accused after the close of the case, that the Magistrate was disqualified from trying it, on the ground that he, as a Divisional officer, had sanctioned the prosecution. The Magistrate dealt with it as follows:— "Having regard to the illustration under that section given in the Code, it is not a point for consideration. I was conscious of this provision when I, as a Divisional officer, received the report about this embezzlement from the Tahsildar and I passed an order in the terms noted *supra*. As the case comes before me in the natural course in my magisterial capacity, I did not wish to go into it then and left it to the discretion of the Tahsildar. He then lodged the criminal complaint. As under the existing circumstances a Divisional officer is ordinarily the only First-class Magistrate, who has to try cases of embezzlement brought against village officers within his division and as, on the other hand, such prosecutions are usually authorized by him as the officer who appoints the village officers, it follows that, in the event of its being considered that he is precluded under section 556, Code of Criminal Procedure, from trying such cases himself, all such cases arising in one division will have to be tried by a Magistrate outside the division, to the serious inconvenience of the parties and witnesses, and it may further result in delays. I cannot suppose that this result would have been intended and I think that the provisions of section 556 do not apply to the circumstances of the present case."

The Sessions Judge reversed the finding and sentence on the ground that, under section 556 of the Criminal Procedure Code, the Deputy Magistrate was disqualified from trying the case, he having as Deputy Collector directed his subordinate, the Tahsildar, to prosecute the accused. He referred to section 556 and the illustration to it. He acquitted the accused.

Against this order an appeal was preferred by Government, under section 417 of the Code of Criminal Procedure.

The Public Prosecutor (Mr. *E. B. powell*) for the Crown.

The accused was not represented.

JUDGMENT.—So far as the words of section 556 of the Criminal Procedure Code are concerned, we should have felt no doubt that the Deputy Magistrate was not disqualified to try the case. The terms of the illustration however give rise to a difficulty.

The question whether a given case falls within the provisions of section 556 must be a question of fact to be determined by the circumstances of the particular case. In the Calcutta case to which our attention has been called (*Girish Chunder Ghose* v. *The Queen-Empress* (1), where the Magistrate was held disqualified to try the case, it appeared that he had taken a very active part in connection with the case as an executive officer. On the other hand, in the two Allahabad cases (*In the matter of the petition of Ganeshi* (2) and *Queen-Empress* v. *Narain Singh* (3)), the Court held the Magistrate was not disqualified. The illustration says: "A, as Collector upon consideration of information furnished to him, directs the prosecution of B for a breach of the Excise Laws. A is disqualified from trying this case as a Magistrate."

The word used is 'directs', which we take it, means institutes, or gives orders for the institution of the prosecution.

---

(1) I.L.R., 20 Calc., 857. (2) I.L.R., 15 All., 192.
(3) I.L.R., 22 All., 340.

Digitized by Google

In the present case the order of the Magistrate was in these terms:— The second prosecution witness made a report to the Tahsildar, the first prosecution witness. He, in his turn, reported the matter to the Divisional officer (*i.e.*, myself) who authorized him to criminally prosecute the accused on such charges as may be capable of being proved in a Criminal Court.

This is an authorisation and not a direction.

In our judgment the Deputy Magistrate was qualified to try the case.

In any case the Sessions Judge ought to have directed a re-trial and not to have acquitted the accused.

We must set aside the order of the Sessions Judge and remand the appeal to him to be dealt with on the merits.

Ordered accordingly.

1900 *November* 2. I. L. R. 24 Mad. 262.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

QUEEN-EMPRESS *v.* ABDULLA SAHEB AND OTHERS.*

Criminal Procedure Code—Act V of 1898, ss. 144, 487—Order to "abstain from a certain act"—Trial by Magistrate who made the order of persons alleged to have disobeyed it.

On petition being filed in the Court of a Sub-Divisional First-class Magistrate setting out that a breach of the peace was likely to arise from the simultaneous use of a certain mosque by members of the Hanifi and Shafi sects, the Magistrate passed an order addressed to ten members, who were named, and several others of the Hanifi sect, and to three members, who were named, and several others of the Shafi sect. The order concluded as follows:—"I do order hereby that the following order should be observed in regard to the entry of the said mosque by any of you or any other Mussalmans of the Hanifi and Shafi sects for a period of two months from this date unless in the meanwhile you establish your right in a Court of competent civil jurisdiction." It set out five periods of half an hour each during which each sect, respectively, might enter the mosque on ordinary days, and two periods of one hour each in which each sect might enter the mosque on other days:

Held, that the order was within the powers conferred by section 144 of the Criminal Procedure Code.

Certain members of the Hanifi sect having entered the mosque in disobedience to the order hereinbefore referred to, they were charged under section 188 of the Indian Penal Code with disobedience to an order by a public servant. The case was tried by the Magistrate who had passed the order:

Held, that the Magistrate was not competent to try the case, inasmuch as he had made the order under section 144.

PETITION to revise an order of the First-class Sub-Divisional Magistrate of Chitoor, convicting certain accused under section 188 of the Indian Penal Code for disobedience to an order by a public servant made under section 144 of the Code of Criminal Procedure. On 11th April 1900 the Sub-Divisional First-class Magistrate of Chittoor passed the following order on a petition filed in his Court:—"Whereas it has been made to appear to me that you [here follow ten names] and several others of the Hanifi sect, and you [here follow three names] and several others of the Shafi sect are about to go at one and the same time to the mosque at Chittoor for the purpose of offering prayers, &c., and that your entry to the said mosque at one and the same time is likely to lead to a riot or an affray or other breach of the peace, I do order hereby that the following order should be observed in regard to the

* Criminal Revision Case No. 328 of 1900.

Digitized by Google

entry of the said mosque by any of you or any other Mussalmans of the Hanifi and Shafi sect for a period of two months from this date, unless in the meanwhile you establish your right in a Court of competent civil jurisdiction:—*Ordinary days.*—4 to 4-30 A.M., Shafi; 5 to 5-30 A.M., Hanifi; 12 noon to 1 P.M., Shafi; 2 to 3 P.M., Hanifi; 3-30 to 4-30 P.M., Shafi; 4-30 to 5 P.M., Hanifi; 6 to 6-15 P.M., Shafi; 7 to 7-15 P.M., Hanifi; 8 to 9 P.M., Shafi; 10 to 11 P.M., Hanifi. *Kutba days—Bakiri and Ramzan,*—9 to 10 A.M., Shafi; 11 A.M. to 12 noon, Hanifi; *Fridays—Johar*—12 noon to 1 P.M., Shafi; 2 to 3 P.M., Hanifi."

On 21st April 1900 thirteen persons belonging to the Hanifi sect were charged under section 188 of the Indian Penal Code with having disobeyed the said order on 13th April 1900. They were tried by the same First-class Sub-Divisional Magistrate who had passed the order, five being convicted and sentenced to pay a fine of Rs. 5 each, with simple imprisonment for one week in default.

The accused preferred this revision.

Mr. *C. Krishnan*, for petitioners, contended that by section 487 of the Code of Criminal Procedure the Magistrate was debarred from trying the offence, which was one committed in contempt of his authority. *Reg* v. *Ranchhod Dayal*(1). He also submitted that the order dated 11th April 1900 was not a lawful order within the meaning of section 144 of the Code, as it prohibited numerous acts and was directed to numerous persons.

Mr. *D. Chamier*, for the Public Prosecutor, argued that disobedience of an order passed by a Magistrate was not an offence committed in contempt of his authority; and that *Reg* v. *Ranchhod Dayal* (1) did not apply as it was decided under the old Code. He contended that the order was a valid one. *Ramanuja Jeeyarsvami* v. *Ramanuja Jeeyar*(2), and *Palaniappa Chetti* v. *Dorasami Ayyar*(3) were referred to.

JUDGMENT.—Two points have been raised on behalf of the petitioners,—first, that the conviction of the petitioners by the Magistrate is invalid upon the ground that the Magistrate, who convicted the petitioners of an offence under section 188 of the Indian Penal Code—the offence being a breach of an order made under section 144 of the Criminal Procedure Code—is the same Magistrate who made the order under section 144 of the Criminal Procedure Code; secondly, that the order which purports to have been made under section 144 of the Criminal Procedure Code was beyond the powers conferred by the section, and was therefore made without jurisdiction. Section 487 of the Criminal Procedure Code provides as follows:—(1) Except as provided in section 477, 480 and 485 no Judge of a Criminal Court or Magistrate other than a Judge of a High Court and the Recorder of Rangoon shall try any person for any offence referred to in section 195 when such offence is committed before himself or in contempt of his authority or is brought under his notice as such Judge or Magistrate in the course of a Judicial proceeding; (2) nothing in section 476 or section 482 shall prevent a Magistrate empowered to commit to the Court of Session or High Court from himself committing any case to such Court. The words "in contempt of his authority" are general and are not to be construed as limited to cases where the alleged offence is in the nature of a "contempt of Court." It is to be observed that chapter X of the Penal Code, the chapter in which section 188 occurs is headed "of contempts of the lawful authority of public servants," whilst the language of section 144 of the Crimi-

(1) 10 Bom., H. C. R. 424. (2) I. L. R., 3 Mad., 354. (3) I. L. R., 18 Mad., 402.

Digitized by Google

nal Procedure Code which gives jurisdiction to a Magistrate to direct any person to "abstain from a certain act or to take certain order with certain property" is the same as the language of section 188 of the Indian Penal Code, which constitutes a breach of an order duly promulgated by a public servant an offence punishable under the latter section.

On the construction of the sections of the Penal Code and of the Criminal Procedure Code referred to above we are of opinion that a Magistrate who makes an order under section 144 of the Code of Criminal Procedure is not competent to try a person for an alleged offence under section 188, Indian Penal Code, the offence being an alleged breach of the order made under section 144, Criminal Procedure Code. This is also the view taken by the Bombay High Court in *Reg* v. *Ranchhod Dayal*(1), a case decided under the Code of 1872 the material provisions of the law being the same then as now.

As regards the second point it seems to us that the order made on 11th April 1900, was within the powers conferred by section 144 of the Criminal Procedure Code. In form, no doubt, it may be said that the order is not one to abstain from a certain act. In substance and effect, however, we think the order was an order directing certain persons to abstain from certain acts, and that being so it cannot be said to have been made without jurisdiction.

We think that by reason of section 487 of the Code of Criminal Procedure the Magistrate had no jurisdiction to try the petitioners. We must accordingly set aside the conviction and direct that the petitioners be re-tried before the District Magistrate or any other competent Magistrate whom the District Magistrate may appoint.

The fines, if paid, will be refunded.

1900 *Oct*, 9, *November*. 5. **I. L. R. 24, Mad. 271.**

Before Mr. Justice Davies and Mr. Justice Benson.

RATTIGADU (ACCUSED), *v.* KONDA REDDI (COMPLAINANT).*

Regulation XI of 1816, s. 10—Confinement of Native Christian in stocks—Legality of order.

By section 10 of Regulation XI of 1816, heads of villages are given summary powers of punishment in cases of a trivial nature, such as using abusive language, and if the offenders "shall be of any of the lower castes of the people on whom it may not be improper to inflict so degrading a punishment," they may be put in the stocks. A person, who was a Mala, or Hindu pariah, by birth, and who had become a convert to Christianity, was convicted of having used abusive language and sentenced to two hours' confinement in the stocks under the said regulation. His profession was that of a weaver, but he, in fact, worked as a cooly. On the question of the legality of the sentence being referred to the High Court :

Held, that to render a person liable to confinement in the stocks under the regulation there must be a concurrence of two circumstances, viz., (1) he must be a person belonging to one of the lower castes of the people, and (2) he must be a person on whom from his social standing or otherwise it may not be improper to inflict so degrading a punishment. That the test is not what is the offender's creed, but what is his caste.

Semble, that a person who has changed his creed but continues to belong to his caste may be within the purview of the regulation if the caste is of the nature therein referred to ; but if he abandons his caste he cannot longer be said to "belong to one of the lower castes of the people" and punishment by confinement in the stocks would no longer be legal.

The Queen v. *Nabi*, (I.L.R., 6 Mad., 247), discussed.

---

* Criminal Revision Case No. 308 of 1900.

(1) 10 Bom., H. C. R. 424.

Digitized by Google

THE following facts appeared from the letter of reference : One Emmari Konda Reddi lodged a complaint before the Village Munsif that he had been abused by Vemurri Rattigadu, a Christian by religion, and a weaver by profession. Before his conversion to Christianity, Rattigadu had been a Hindu of the Mala or pariah caste, which was, in the opinion of the District Magistrate, " one of the lower castes." After trial, the Munsif convicted Rattigadu and under section 10 of Regulation XI of 1816, sentenced him to be confined in the village stocks for two hours. The District Magistrate thought that the complainant annoyed the feelings of the accused by pasturing his cattle in a burying ground and that there had been an altercation, but that the use of abusive language by the accused was doubtful. The reference did not dwell upon this, but rather on the legality of the punishment. The District Magistrate said:— " The High Court in *The Queen* v. *Nabi* (1) laid down the rule that a Muhammadan cannot be said to belong to lower castes of the people. Now a Muhammadan is a person who professes a particular form of religion, and may have been, prior to the acceptance by him of Islam, a Hindu of a very low caste. It is notorious that in Malabar conversions to Islam from among the extremely low caste Cherumars are of daily occurrence. Under the ruling of the High Court quoted, an ex-Cherumar Muhammadan could not be confined in stocks. It seems to me that a professor of Christian religion is entitled to as much consideration as a professor of the Muhammdan religion without regard to his former position in Hindu society. If this position is correct, the sentence was illegal. Native Christians do regard themselves in this district as of a higher status than Hindus of the Mala caste, and look upon the punishment of confinement in stocks as very degrading. Malas do not so regard it. "

Sivasami Ayyar for complainant.

The accused was not represented.

BENSON, J.—One Rattigadu, a Mala, or Hindu pariah by birth, but now a convert to Christianity, and a weaver by profession according to the District Magistrate, but who, in fact, earns his living by cooly work according to the Village Magistrate, was convicted by the latter of having used abusive language, and was sentenced to two hours' confinement in the stocks under section 10 of Regulation XI of 1816 of the Madras Code.

The District Magistrate, relying on *The Queen* v. *Nabi*(1), refers to the sentence as illegal on the ground that a Native Christian is not a person belonging to one " of the lower castes of the people " so as to be within the purview of the regulation. In the case of *The Queen* v. *Nabi*(1) the High Court held that " a Muhammadan cannot be said to belong to the lower castes of the people," and the District Magistrate points out that conversions to Islam from the low caste Cherumars of Malabar are of daily occurrence, and that if they by reason of their creed are exempt from confinement in the stocks so ought converts to Christianity to be exempt even though born in one of the lower castes of the people.

To render a person liable to confinement in the stocks under the regulation there must be a concurrence of two circumstances, viz., (1) he must be a person belonging to one of the lower castes of the people, and (2) he must be a person on whom from his social standing or otherwise it may not be improper to inflict so degrading a punishment. As pointed out by this Court in *The Queen* v. *Nabi*(1) the framers of the regulation probably had in view those

[1] I.L.R., 6 Mad., 247.

Digitized by Google

castes who, prior to the introduction of British rule, were regarded as servile, and it was apparently from this point of view that the Court held that a Muhammadan could not be said to belong to the lower castes of the people. Save in the Mopla districts of the West Coast, where conversions from the low Hindu castes are common, the name Muhammadan ordinarily implies a race, as well as a creed, distinction. Broadly speaking Muhammadans are foreigners by race, who have no connection with any of the castes of the people. There is nothing in *The Queen* v. *Nabi* (1) to show, or to suggest, that he was a convert to Islam from one of the lower castes of the people, and it may be doubted whether the case can be regarded as an authority for holding that every professor of the creed of Islam, whatever caste he may have belonged to before conversion or after it, is outside the purview of the regulation. The framers of the regulation probably had not in mind the question which has now arisen, and so made no special provision for it. But the regulation is a penal one and must be construed strictly, and in case of doubt, in favour of the liberty of the subject. The test seems to be not what is the offender's creed, whether Muhammadan, Christian or Hindu, but what is his caste. If he belongs to one of the lower castes a change of creed would not, of itself, in my judgment make any difference, provided he continues to belong to the caste. Ordinarily, as I understand, a convert to Christianity abandons his caste, whether high or low; but I do not know that this is always, or necessarily, so. It will be a question of fact in each case. If he continues to accept the rules of the caste in social and moral matters, acknowledges the authority of the headmen, takes part in caste meetings and ceremonies, and, in fact, generally continues to belong to the caste, then, in my judgment, he would be within the purview of the regulation.

If, on the other hand, he adopts the moral standards of Christianity, instead of those of his caste, if he assimilates his social ideals to those of the Christian community which he joins, if he accepts the authority of his pastors and teachers in place of that of the headmen of the caste, if he no longer takes part in the distinctive meetings and ceremonies of the caste, and if, in a word, he abandons his caste, then he can no longer be said "to belong to one of the lower castes of the people," and his punishment by confinement in the stocks is no longer legal.

The District Magistrate says that "Native Christians in this district do regard themselves as of a higher status than Hindus of the Mala caste, and look upon the punishment of confinement in the stocks as very degrading. Malas do not." This is a consideration which concerns the second condition required by the regulation to render an offender liable to confinement in the stocks. The question is not whether Native Christians as a class regard the punishment as degrading, but whether the individual offender is from his social standing or otherwise (*e. g.*, from his education) a person on whom it may not be improper to inflict so degrading a punishment.

As pointed out in the proceedings of this Court, No. 1732, dated 9th October 1879, (Weir 'Law of Offences', third edition, page 685), the word "whom" in section 10 of the regulation refers back to the words "the offending parties" not to the words "the lower castes of the people."

In the present case there appears to be no reason to think that Rattigadu was exempt under the second condition, and the District Magistrate's letter does not show that he was exempt under the first condition, though it

(1) I.L.R., 6 Mad., 247.

Digitized by Google

is not improbale that he was. If the District Magistrate, having regard to the remarks made above, should find that Rattigadu was exempt under the first condition, it will be open to him to make a further representation with a view to a formal declaration that the punishment inflicted was illegal.

DAVIES, J.—I concur.

1900 *September* 25, *Nov.* 8. **I. L. R. 24 Mad. 284.**

Before Mr. Justice Davies and Mr. Justice Benson.

JAGANNADHA RAO AND OTHERS (PRISONERS), ACCUSED, *v.* KAMARAJU (COMPLAINANT), RESPONDENT.§

Penal Code—Act XLV of 1860, ss. 361, 363, 366—Kidnapping from lawful guardianship—"Lawful guardian"—Continuance of parent's possession though physical possession temporarily with another.

S, a girl of the age of eight years, lived ordinarily under the guardianship of her father. A sister of S was married to a nephew of one K, and, with her husband, lived in the house of K. S, with her father's knowledge and consent, visited her sister in K's house, and had remained there for about a month when four brothers (being cousins of S) came to K's house one night and took S to their own house, which was close by, and S was at once married to one of them. The father of S was not asked for his consent, and it was known by the nephews and by K that the father objected to such a marriage. K was present at the marriage and consented to it, hoping to reconcile the girl's father to it subsequently. The father, however, sought the aid of the police, to whom S was given up by her cousins after having been detained by them in their house for thirty-six hours. The four cousins were then charged, under section 366 of the Indian Penal Code, with kidnapping S from lawful guardianship with intent that she might be compelled to marry one of them. The charge was framed in general terms and did not state from whose guardianship the kidnapping was alleged to have taken place. The trial was, however, conducted on the footing that the kidnapping was from the guardianship of K. the accused were acquitted, on the ground that K was at the time the lawful guardian of the girl and it had not been shown that she had been taken without K's consent. Upon an appeal being preferred by Government against that acquittal:

Held, that the accused had been rightly acquitted of the charge of kidnapping S from the guardianship of K; but that the question whether they were guilty of kidnapping S from the guardianship of her father had not been and ought to be tried. The word "include" in the explanation to section 361 of the Indian Penal Code is not intended to limit the protection which the section gives to parents and minors, but rather to extend that protection by including in the term "lawful guardian" any person lawfully entrusted with the care or custody of the minor. The fact that a father allows his child to be in the custody of a servant or friend for a limited purpose and for a limited time does not determine the father's rights as guardian or his legal possession for the purposes of the Criminal Law. If the facts are not inconsistent with a continuance of the father's legal possession of the minor, the latter must be held to be in the father's possession or keeping even though the actual possession should be temporarily with a friend or other person.

APPEAL against an acquittal under section 417 of the Code of Criminal Procedure. Four persons were charged under section 366 of the Indian Penal Code with having kidnapped a minor from lawful guardianship. The minor was one Sarasamma, a girl of the age of eight years and daughter of one P. Acharlu, Tahsildar of Tenali. The minor had, with her father's knowledge and consent, a month prior to the alleged offence, gone to stay with a sister, who was married to a nephew of one Kamaroju, at Bhogapuram, and lived in Kamaraju's house. The accused, who were brothers, were nephews of Acharlu,

§ Criminal Appeal No. 511 of 1900.

Digitized by Google

the minor's father, and came one night late to Kamaraju's house and took the minor to their own house close by, where she was at once married to the third accused. The further facts of the case are fully set out in the judgment of the Court, which follows. The Sessions Judge after dealing with the evidence said:—" Both the assessors find the accused not guilty because Sarasamma does not say she was put under any restraint and was apparently quite content with her position. They also think that if the kidnapping had really taken place the Village Munsif would have reported the matter even without any complaint being made to him. I am not prepared to differ from the finding of the assessors. As shown above there are reasonable grounds for doubting that the accused acted without the consent of Kamaraju, who was the girl's guardian for the time being. At the close of the trial the public prosecutor argued that Kamaraju might be himself looked upon as the kidnapper seeing that he had no authority to marry the girl to Cholapati and requested that a charge of abetment of kidnapping might be added. I thought it improper to do so at that stage of the case. Accepting the finding of the assessors, I acquit the accused of the offence of kidnapping under section 366 with which they are charged. The accused, who are on bail, are discharged."

Against this acquittal this appeal was preferred by Government.

Mr. *N. Subrahmaniam* for the Public Prosecutor.—Assuming that Kamaraju was a consenting party, he colluded with the accused knowing well that the father had not given his consent to the marriage and that he would not give his consent even if asked. But Kamaraju's complicity does not save the accused for their liability for having committed the offence of kidnapping. Kamaraju was a temporary guardian only for a special purpose, as a schoolmistress might be. He was not the lawful guardian under section 361 of the Penal Code. The girl had not been committed to his custody for purposes of marriage. He allowed her to be taken away knowing well that she would be compelled to marry one of the accused. In Roscoe's 'Criminal Evidence,' 11th edition, page 254, it is laid down that, by the fraud of a temporary guardian, the latter forfeits all his right to the possession of the child, who reverts in law to the possession of her natural guardian. It is submitted that the offence really committed by the accused was that of kidnapping from the lawful guardianship of the father, and not of Kamaraju. In *Empress* v. *Pemantle*(1), it was held that even a mother had committed the offence of kidnapping by taking a girl from her father's house for the express purpose of marrying her without his consent. Here, Kamaraju's position is worse. The section is intended to protect parental rights. By the explanation to section 361, the father's rights over the girl are extended to temporary guardians, but the father is not deprived of his right to bring an action when a fraud is committed upon his rights. That physical custody is not necessary is laid down clearly in *Reg* v. *Mycock* (2), where Willes, J., held that a girl in the street is in the possession of her father unless she has given up all intention of returning home. So also in *The Queen* v. *Manktelow*(3), where the girl met the accused at a distance from her father's house and went away with him.

V. Krishnasami Ayyar and *K. Subrahmania Sastri* for the accused.—The girl was sent with the father's knowledge and consent to Kamaraju to stay there for an indefinite period and not for any temporary purpose. Kamaraju was therefore the lawful guardian within the meaning of the explanation to section 361. Since he was a consenting party to the removal, there was no

(1) I.L.R., 8 Calc., 971. (2) 12 Cox. Cr. C., 28.
(3) 22 L.J., (M.C.), 115.

Digitized by Google

removal from the guardianship of Kamaraju without his consent and hence the accused committed no offence. The test is whether Kamaraju would have been entitled to bring an action under that section if somebody else had deprived him of the custody of the girl. Certainly he could have done so. If Kamaraju had celebrated the marriage in his own house, the accused would have committed no offence under the section. In *The Queen* v. *Buldeo*(1), an orphan girl had been removed from the custody of a person who took her away from the custody of a woman who had placed herself in *loco parentis*. It was held that no offence had been committed In *Hicks* v. *Gore* (2), the mother placed the girl under the care of Lady Gore, who caused the girl, without her mother's consent, to marry her own son. Lord Herbert held that no offence had been committed. The contention that the girl reverted to the custody of the father on the celebration of the marriage cannot be supported. In this case, the father was at Tenali, some hundreds of miles away. Under the section, there must be actual removal from the lawful guardianship of the person who has physical possession of the girl. The explanation is clear. The act of celebration of marriage had nothing to do with the offence of kidnapping. If fraud was committed, the validity of the marriage might posssibly be questioned in a civil suit. The cases quoted to show that physical possession is not necessary are cases where the girl went out of the house while under the guardianship of the father. This is a case where the father had given up control over the girl and entrusted the general custody of her to another. He was not in a position to exercise any immediate control over her. The case of a schoolmistress is also different as she whould not be a general guardian in the position that Kamaraju occupied, but would hold custody for a special purpose. The girl was, in fact, a member of Kamaraju's family at the time. He referred to *Reg* v. *George Kipps* (3); *Reg* v. *Henkers* (4); and *Reg* v. *Miller* (5).

BENSON, J.—In this case the accused have been acquitted of the offence of taking a girl under the age of 14 years out of the keeping of her lawful guardian, without his consent, with intent that she should be compelled, or knowing it to be likely that she would be compelled, to marry against her will (sections 361, 363, 366, Indian Penal Code).

Government appeals against the acquittal.

I think the facts have been correctly found by the Sessions Judge, and may be briefly stated as follows:—

The girl, Sarasamma, aged 8 years, is the daughter of P. Acharlu, a Tahsildar. Her sister, Ramamma, is married to a nephew of Kamaraju. Sarasamma had been on a visit with her sister, Ramamma, in the house of Kamaraju for about a month, with her father's knowledge and consent. The accused are four brothers, and they are the nephews of P. Acharlu. About midnight on the 10th June they came to the house of Kamaraju, which is close to their own, and took the girl, Sarasamma, to their own house, where she was at once married to the third accused. The consent of P. Acharlu was not asked for, nor obtained, and the accused and Kamaraju knew that it would be refused if asked for. Kamaraju after the marriage pretended that the girl was taken away without his consent, but the finding is that he was present at the marriage and really consented to it, hoping to persuade P. Acharlu to accept ac-

(1) 2 N.W.P.H.C.R., 286.
(2) 3 Mod.. 84.
(3) 4 Cox. Cr. C., 167.
(4) 16 Cox. Cr. C., 257.
(5) 13 Cox. Cr. C., 179.

Digitized by Google

complished facts after the marriage was over. The girl was kept for some 36 hours in the house of the accused, and was then given up to the Police whose aid had been sought on behalf of P. Acharlu.

The Sessions Judge acquitted the accused on the ground that Kamaraju was the lawful guardian of the girl at the time, and the prosecution had failed to show that the taking of the girl was without his consent. It was suggested to the Sessions Judge that Kamaraju, if a party to the taking, should be charged as an abettor, but this the Sessions Judge refused to do.

The question raised in this appeal is one of great importance and of considerable difficulty owing to the indefiniteness of section 361 of the Indian Penal Code. The section requires that a taking or enticing out of the keeping of the lawful guardian without the consent of the guardian should be established, and the explanation to the section states that the words "lawful guardian" include "any person lawfully entrusted with the care or custody of such minor." It cannot, I think, be doubted that Kamaraju had been entrusted with the care and custody of the minor for a temporary, but indefinite, period, and was therefore a lawful guardian for the time being, within the meaning of the section, so that a taking out of his possession, without his consent, would have been an offence. But the evidence is that he was a consenting party, so that the taking from his house was no offence so far as his guardianship was concerned. It is, however, urged for the prosecution that the guardianship of Kamaraju did not extend to the giving of the girl in marriage, and that, for that purpose, she was still under the guardianship of her father, and reliance is placed on the language of Sir Hyde East in reference to the case of *Hicks* v. *Gore* (1). In that case the mother, who was the guardian of the girl, placed her under the care of Lady Gore, who caused the girl, without her mother's consent, to marry Lady Gore's own son. Lord Herbert having regard to the terms of the statute (4and 5 Philip and Mary, ch. 8, s. 2) held that no offence was committed. In reference to this Sir Hyde East says:—" It deserves good " consideration before it is decided that an offender, acting in collusion with " one who has the temporary custody of another's child, for a special purpose, " and knowing that the parent or proper guardian did not consent, is yet not " within the statute. For, then, every schoolmistress might dispose in the " same manner of the children committed to her care, though such delegation " of the custody of a child for a particular purpose be no delegation of the " power of disposing of her in marriage, but the governace of the child in " that respect may still be said to rest with the parent." (1 East Pleas of the Crown, page 457).

In reference to this opinion Mr. Mayne says:—" I think there can be no " doubt that if a schoolmistress were to connive at the elopement of one of " her pupils with a man, she would be convicted under section 361. She could " have no authority to consent to such an act and he could not have suppo- " sed that she had (Mayne's ' Criminal Law of India,' page 643) " and Mr. Roscoe suggests that the correct view " is to hold that, by the fraud of the " temporary guardian, the latter loses all right to the possession of the " child, who reverts into the possession of her natural guardian " and he states that in accordance with the above view Amphlett, B., in a case tried at Leeds Assizes (after consulting Coleridge, C.J.) ruled that by the fraud of the temporary guardian the right to possession of the child had reverted (Roscoe's ' Criminal Evidence, 11th edition. page 254).

(1) 3 Mod., 84.

Digitized by Google

In *In the matter of the petition of Prankrishna Surma*(1) the mother of a little girl removed her from her father's house at night, without his consent, and got her married to a certain man. The conviction under section 363, Indian Penal Code, was upheld, the High Court remarking "under any ordinary "circumstances, the custody of the mother is the custody of the father, and "any removal of the children from place to place by the mother ought to be "taken to be consistent with the rights of the father as guardian and not as "a taking out of his keeping. But the present case is very peculiar. The "mother removed the girl from the father's house for the express purpose of "marrying her without his consent, and thereby depriving him for ever of her "guardianship and custody. This did, we think, amount to a taking out of "the keeping of the lawful guardian."

In the present case, though Kamaraju was a guardian within the meaning of section 361, he was not the only guardian. The explanation to the section says that the words "the lawful guardian" include any person lawfully entrusted, &c. Such a temporary guardianship does not exclude the higher legal guardianship of the father. That remains in full force. Here Kamaraju was a lawful guardian and the girl's father also was her legal and lawful guardian. It cannot, of course, be said that the accused removed the girl from the immediate or physical keeping or possession of her father, but such possession on the part of the father is not necessary. In the case of *Reg* v. *Mycock* (2) the girl, aged sixteen, met the accused by appointment at some distance from her father's house and went away with him voluntarily. Willes, J., in summing up said that "the Statute (24 and 25 Vict., cap. 100, section 55), "upon which the prosecution was based was for the protection of the rights of "parents, and the prisoner had no more right to deprive the father of the girl "of his property, as it were, in her, and his possession of her, than he would "have a right to go into his shop and carry away one of his telescopes or "optical instruments. The girl was, also, just as much in the possession of "her father when she was walking in the street, unless she had given up the "intention of returning home, as if she had actually been in her father's house "when taken off." Again, in the *Queen* v. *Manktelow* (3) the girl met the accused at a distance from her father's house and went away with him. In the course of the argument Alderson, B., remarked "what is to determine the "father's possession? Suppose the prisoner meets the girl in the garden and "takes her away from that place with him, does he not take her out of her father's possession? Or suppose she is walking a mile from the house, or going "on a message for her father, and the man meets her and carries her away, is "she not in her father's possession? Suppose she is staying on a visit, is "this any difference?"

Jervis, C.J., delivered the judgment of the Court (all five Judges concurring), upheld the conviction, and said "according to the opinion of Maule, "J., in the *Reg* v. *George Kipps* 4), it is not necessary that there should be "an actual possession by the father. So long as she continues a member of "her father's family and is subject to his control, she is in his possession. The "facts of this case show that there was a continuing possession in the father." The case of *Reg* v. *Henkers*(5) is not opposed to this view, for there the girl, aged under 18 years, had been living in London employed as a barmaid, while

(1) I.L.R., 8 Calc., 969 at p. 971.
(2) 12 Cox. Cr. C., 28.
(3) 22 L.J., (M.C.), 115.
(4) 4 Cox. Cr. C., 167.
(5) 16 Cox. Cr. C., 257.

Digitized by Google

her father was living in Wimbledon. There is a clear and wide distinction between a girl of nearly eighteen who has gone into employment away from her father and is earning her livelihood apart from him, and a child who is still habitually living in her father's house and is dependent on him for support and who goes on a merely temporary visit to the house where her sister is staying. The English Statutes are intended to protect the rights of parents and to safeguard the interests of minors and these are also the objects of the provisions of the Indian Penal Code in sections 361 and 363. The explanation to section 361 is not intended to limit the protection which the section gives to parents and minors. It is intended to extend that protection by including in the term "lawful guardian" any person lawfully entrusted with the care or custody of the minor. The fact that a father allows his child to be in the custody of a servant or friend, for a limited purpose and for a limited time, cannot, in my judgment, determine the father's rights as guardian or his legal possession for the purposes of the Criminal Law. This was clearly the view of Alderson, B., and of the Court in *Queen* v. *Manktelow*(1) already referred to. To hold otherwise would, I think, deprive parents and minors of a protection which they need, and which the law desired to give them. The result of the cases seems to be that the Court must consider all the facts and see whether they are consistent or not with the continuance of the father's legal possession of the minor. If they are not inconsistent, the minor must be held to be in the father's possession or keeping even though the actual physical possession should be temporarily with a friend or other person. In the present case the accused knew that the father of Sarasamma did not, and would not, consent to her removal from the house of Kamaraju for the purpose of being married to the third accused. When Kamaraju connived at the taking he knew that it was contrary to the wishes of the girl's father and that he had no authority to consent to the taking, and his connivance thereat was a fraud upon the rights of the father as guardian. A fraudulent consent of this kind, known to the accused to be fraudulent, would not, in my judgment, be of any avail to the accused. So long as the girl was in the house of Kamaraju where the father allowed her to be temporarily, she was still in the father's legal keeping and he was able to exercise control over her through Kamaraju. But when the accused carried her off to their own house, the father had no longer any control over her. By this act they took her from his keeping within the meaning of section 361, and Kamaraju, in conniving at their act was, in my judgment, guilty as an abettor.

It remains to consider what the result of these conclusions is with reference to the appeal against the acquittal of the accused. The charge against them under section 366, Indian Penal Code, is framed in general terms and does not state from whose lawful guardianship the kidnapping took place, and the acquittal is in equally general terms. The records in the case, however, show that the trial was conducted on the footing that the kidnapping was from the guardianship of Kamaraju and of that offence the accused were rightly acquitted. Whether the accused were guilty of kidnapping the girl from the lawful guardianship of her father was not really tried, though on the evidence that would seem to be the offence of which they were guilty.

The charge, however, and the acquittal being in general terms, the acquittal might, I think, be pleaded under section 403, Criminal Procedure Code, in bar of a new trial on a charge of kidnapping from the father unless this Court in terms sets aside the acquittal so far as it relates to this offence.

(1) 22 L.J., (M.C.), 115.

Digitized by Google

I would therefore allow the appeal and set aside the acquittal so far as it relates to the offence of kidnapping from the lawful guardianship of P. Acharlu, and I would dismiss the appeal so far as the acquittal relates to the offence of kidnapping from the lawful guardianship of Kamaraju.

I would also direct that the accused be re-tried on the charge of kidnapping the girl from the lawful guardianship of P. Acharlu.

It is of course open to the prosecution to take steps against Kamaraju as an abettor.

DAVIES, J.—I agree.

1900 *November* 15. **I. L. R. 24 Mad. 305.**

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

QUEEN-EMPRESS *v.* YAMANA RAO.*

Criminal Procedure Code—Act V of 1898, s. 545—Order for payment of expenses of prosecution out of fine—Court Fees Act—Act VII of 1870, s. 31—Re-payment to complainant of fees paid in Criminal Courts.

A person who was convicted by a Deputy Magistrate of having caused hurt, was ordered to pay a fine of Rs. 15, and also the complainant's costs of the prosecution. In the month following the conviction the Deputy Magistrate issued a warrant for the collection of Rs. 12-4-0 from the accused, of which Rs.2-4-0 was levied under section 31 of the Court Fees Act as Court fees paid by the complainant, and Rs. 10 under section 545 of the Code of Criminal Procedure for two fees of Rs. 5 each paid by the complainant to the medical officer for a certificate and for giving evidence in the case. Objection having been made to the recovery of these sums, the case was referred to the High Court for orders :

Held, that the levy of Court fees was warranted by section 31 of the Court Fees Act, which is not modified by section 545 of the Code of Criminal Procedure.

Held also, that the Deputy Magistrate's order passed under section 545 of the Code of Criminal Procedure for the payment of expenses incurred in the prosecution was unsustainable, and such expenses could only be awarded to the complainant out of the fine levied from the accused and not in addition to it.

CASE referred for the orders of the High Court. The facts are set out in the head-note and appear more fully in the following judgment.

The parties were not represented.

JUDGMENT.—In a reference of this kind the Sessions Judge should have stated the facts clearly and consecutively. They are as follows:—

One Yamana Rao was convicted of an offence under section 323 of the Indian Penal Code by the Deputy Magistrate of Narsaraopet on the 24th April 1899, and was ordered to pay a fine of Rs. 15 and also to pay "the complainant's costs of the prosecution."

In May 1900 the Deputy Magistrate issued a warrant for the collection of Rs. 12-4-0 from the accused. This sum was made up as follows :—Rs. 2-4-0 Court and process fees paid by the complainant; Rs. 10 two fees of Rs. 5 each paid by the complainant to the medical officer for a certificate and for giving evidence in the case.

The accused objected to the recovery of these sums on the ground that they were not assessed at the time when the judgment of the Deputy Magis-

* Criminal Revision Case No. 322 of 1900,

Digitized by Google

trate was pronounced, but the Deputy Magistrate refused to review his order or withdraw the warrant.

In the explanation furnished by the Deputy Magistrate to the Sessions Judge, the Deputy Magistrate state that the sum of Rs 2-4-0 was levied under section 31 of the Court Fees Act, and that the levy of the Rs. 10 was intended to be made under section 545, Criminal Procedure Code.

The Sessions Judge refers the case on the ground that the whole order of the Deputy Magistrate to levy Rs. 12-4-0 was illegal. We are unable to agree in this view so far as concerns Rs. 2-4-0. The levy of this sum was warranted by section 31 of the Court Fees Act. The opinion of the Sessions Judge that this section must be held to be modified by section 545, Criminal Procedure Code, is incorrect. Each section provides for a separate matter. Section 31 of the Court Fees Act requires the Magistrate to direct the accused to repay to the complainant in certain cases the amount of Court and process fees paid by the complainant under the provisions of the Court Fees Act. Section 545, Criminal Procedure Code, gives a Magistrate a discretion in certain cases to grant to the complainant out of any fine levied from the accused, the expenses properly incurred in the prosecution and also compensation for injury caused by the offence committed. The duty of the Magistrate to order payment of Court and process fees under secion 31 of the Court Fees Act is imperative, whereas under section 545 of the Code of Criminal Porcedure he has a discretion to award the expenses of the prosecution or to refuse to do so. It follows that section 545 of the Criminal Procedure Code must be taken to exclude those expenses in regard to which the Court has no discretion,

The order of the Deputy Magistrate therefore as regards Rs. 2-4-0 must be upheld.

The order as to Rs. 10 is clearly unsustainable, for although the medical officer's fees were expenses properly incurred in the prosecution, they could only be awarded to the complainant out of the fine levied from the accused, and could not be levied from the accused in addition to the fine.

That part of the Deputy Magistrate's order must be cancelled. In lieu thereof, however, we direct that the sum of Rs. 10 be paid to the complainant out of the fine collected from the accused.

1900 *Nov.* 19. **I. L. R. 24 Mad. 317.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

QUEEN-EMPRESS, *v.* KUPPUMUTHU PILLAI.*

Criminal Procedure Code—Act V of 1898, s. 528—Transfer of case at request of Magistrate—Notice.

An order for the transfer of a case, made at the request of the magistrate on whose file the case stands, and not on the application of a party, is an exception to the general rule that an order for transfer should not be made under section 528 of the Code of Criminal Procedure without notice to the other said.

PETITION for the revision of an order of the District Magistrate of Tinnevelly transferring a case on the file of the Sub-Magistrate of Palamcottah to that of

* Criminal Revision Case No. 425 of 1900.

Digitized by Google

the Sub-Magistrate of Tuticorin. The order of the District Magistrate had been passed on reading the petition and affidavit of the accused in the case in which transfer was asked for, and a report from the Sub-Magistrate of Palamcottah. The District Magistrate passed the following order:—"The case is transferred to the file of the Sub-Magistrate of Tuticorin for trial and disposal according to law. The Sub-Magistrate of Palamcottah has himself suggested the desirability of the case being transferred from his file and there is no necessity to enquire how far all or any of the allegations in the petitions are sustainable. The Sub-Magistrate of Palamcottah will forward the records of the case direct to the Sub-Magistrate of Tuticorin." No notice of the application for transfer had been given to petitioner, who was the complainant in the case.

Complainant now preferred this criminal revision petition.

Mr. *Joseph Satya Nadar*, for the petitioner, contended that notice was necessary, and that the transfer should not have been made without it.

JUDGMENT.—The order for transfer was in effect made at the request of the Sub-Magistrate, not on the application of a party. Such a case is an exception to the general rule that an order should not be made under section 528 of the Criminal Procedure Code without notice to the other side. The Court to which the case was transferred was selected by the District Magistrate as the most convenient for the parties. We see no reason to interfere with the exercise of his discretion.

The petition must be dismissed.

1900 *December* 7. **I. L. R. 24, Mad. 318.**

Before Mr. Justice Davies and Mr. Justice Benson.

QUEEN-EMPRESS *v.* LAKSHMANNA AND OTHERS.*

Cattle Trespass Act—Act I of 1871, s. 24—Rescue of cattle after seizure for trespassing on public property—Conviction—Omission to record finding as to whether locality was public property—Legality of conviction.

Certain persons had been fined for rescuing cattle after seizure under section 24 of the Cattle Trespass Act, 1871. The judgment contained no finding to the effect that the land on which the cattle had been seized was public property in charge of the Public Works Department:

Held, that the conviction must be set aside, and the case remanded.

PETITION to revise a judgment of the Head Assistant Magistrate of Kistna confirming the conviction of the petitioners by the Sheristadar Second-class Magistrate of Nuzvid. The petitioners had been fined under section 24 of the Cattle Trespass Act, 1871, for rescuing cattle after seizure. According to the prosecution, the cattle, some thirty-five in number, were seized, while grazing on the banks of the Pullera canal, by the gumastah in charge and driven towards the pound by him and his coolies. The cattle were then rescued by the accused when within twenty yards of the pound. On appeal, the Acting Head Assistant Magistrate upheld the conviction. Neither the Second-class Magistrate nor the Head Assistant Magistrate recorded a finding to the effect that the land upon which the cattle had been seized was public property and in charge of the Public Works Department.

* Criminal Revision Case No. 381 of 1900.

Digitized by Google

From the above conviction the accused preferred this criminal revision petition.

V. Krishnasami Ayyar and *Subrahmania Sastri* for the accused.

JUDGMENT.—The conviction under section 24 of the Cattle Trespass Act can only be supported if the cattle were "liable to be seized under that Act." If the cattle were not "liable to be seized" their rescue was no offence, and the fact that rescuers had a special remedy under section 20 does not affect the matter.

The cattle were not liable to be seized in this case by the officers of the Public Works Department unless they were trespassing on public property in charge of the officers of the Public Works Department (*Vide* section 11 of the Act). Neither of the Magistrates has decided that the land on which the cattle were seized was public property and in charge of the Public Works Department. The conviction must be set aside and the case remanded for disposal by the Second-class Sheristadar Magistrate of Nuzvid according to law.

1900 *December* 2. **I. L. R. 24 Mad. 319.**

Before Mr. Justice Davies and Mr. Justice Benson.

QUEEN-EMPRESS *v.* VIRASAMI.*

Stamp Act—Act II of 1899, s. 69—Court Fees Act VII of 1870 (as amended by Act XII of 1891), s. 34—Sale by thief of stolen stamps—Offence.

A person who had been convicted of stealing two stamps was charged, under section 69 of the Stamp Act, 1899, with having sold them, he not being a licensed vendor of stamps:

Held, that the words "sells or offers for sale," which occur in section 69 of the Stamp Act and in section 34 of the Court Fees Act include the case of a thief who exchanges a stolen stamp for a sum of money, even though the thief cannot give a legal title by the transaction.

APPEAL against an acquittal. One Virasami was charged with having committed an offence under section 69 of the Stamp Act, 1899, by selling two stamps of the value of Rs. 10 each, he not being a licensed vendor of stamps. The accused admitted the sale, but stated that he did not know it was an offence. It appeared that he had been already convicted for the theft of the stamps The judgment of the Deputy Magistrate was as follows:—"The accused in this case is one Vali Virasami who was previously convicted for the theft of certain impressed stamps. He sold these stamps to two persons and being a person not licensed to sell stamps is now prosecuted under section 69 (*a*) of the Stamp Act. The fact of delivering the stamp to another and taking money from him is admitted by the accused. There is also no question that, if the property disposed of by a thief who had stolen it were not stamps or other such articles on the sale of which the restrictions are laid, the disposal of the stolen property by the thief is itself no offence. The disposal of the property is however a distinct transaction from the original theft, and if the former is an offence by virtue of a special incident there is no reason why a person should not be convicted of both the offences. The question in the present case is merely whether the disposal by a thief of the stamp paper that he has stolen amounts to a sale under the Stamp Act. There is no definition

* Criminal Appeal No. 845 of 1900.

Digitized by Google

of the word sale in the Stamp Act, and in the absence of such definition it should, I think, be understood in the sense that it is used in legal phraseology which may be gathered from the definition of this word in the Contract Act and the Transfer of Property Act. In this sense it involves a transfer of ownership from the seller to the buyer and presumes ownership in the property sold of the seller. A thief cannot be said to have such ownership and the person with whom a stolen property is found is liable to be deprived of it. I am strengthened in this view by the fact that the word sale is defined in the Madras Abkari Act and given a wider sense and the presumption therefore is that, where there is no such special definition, the strict and narrower meaning should be adopted. For these reasons I consider that the accused has committed no offence under the Stamp Act and he is therefore acquitted."

Against this judgment of acquittal the Public Prosecutor preferred this appeal, under section 417 of the Code of Criminal Procedure, on the grounds, among others, that the acquittal was wrong; that the charge had been wrongly framed under section 69, clause (*a*), of Act II of 1899 ;and that it should have been framed under section 34,clause (3) of the Court Fees Act.

Mr. *N. Subrahmaniam* for the Public Prosecutor.

The accused was not represented.

JUDGMENT.—We do not agree with the Deputy Magistrate that, because a thief cannot give a legal title in regard to a stamp stolen by him, he is incapable of committing an offence under section 69 of the General Stamp Act or section 34 of the Court Fees Act. The words of those sections are,—whoever " sells or offers for sale " any stamp shall be punished, *&c.*, unless he is a person who has been appointed by Government to sell stamps. We think there can be no doubt but that these words include the case of a thief who exchanges a stolen stamp for a sum of money. We, therefore, set aside the acquittal. the judgment of the Deputy Magistrate treats the offence as one under section 69 of the General Stamp Act, but the appeal petition states that it is one under section 34 of the Court Fees Act. The stamps are not on the record and we are unable to say against which Act the offence was, in fact, committed. We therefore do not ourselves pass sentence but direct the Deputy Magistrate to restore the case to his file and dispose of it according to law.

1900 *Nov.* 30. *Dec.* 3,11. **I. L. R. 24 Mad. 321.**

Before Mr. Justice Davies and Mr. Justice Benson.

QUEEN-EMPRESS *v.* RAMASAMI.*

Criminal Procedure Code—Act V of 1898, ss. 337, 339—Pardon—Withdrawal of pardon and commitment for trial—Procedure.

R was charged with having committed the offence of dacoity, with others. In consequence of a confessional statement made by R, pardon was tendered to him by the Stationary Sub-Magistrate, under the District Magistrate's order. R was subsequently examined as a witness for the prosecution at a preliminary enquiry into the dacoity held by the Magistrate under chapter XVIII of the Code of Criminal Procedure, but he retracted his former statement, (which, he said, had been made in consequence of police torture), and asserted that he knew nothing about the dacoity. The decoity case came on for trial in the Sessions Court, but R. was not called as a witness, and, in the end, the persons charged were acquitted. Upon the subsequent application of the police, the District Magistrate withdrew the pardon which

* Criminal Revision Case No. 452 of 1900.

Digitized by Google

had been tendered to R, on the ground that the latter had withdrawn and contradicted his first statement. R was in due course charged before the same Sub-Magistrate with having been one of the dacoits, and was committed for trial:

Held, that the commitment was legal. The words "in the case," which occur in section 337 (2) of the Code of Criminal Procedure, include a preliminary enquiry, and do not refer to the trial alone. If there is reason to believe that a person to whom pardon has been tendered will give false evidence, there is no duty on the prosecution to put him forward as a witness. Pardon conditionally granted may be at once withdrawn as soon as good faith has been broken, and good faith is broken if the witness does not disclose the truth to the Magistrate. The proper authority to withdraw a pardon is the authority which granted it.

Queen-Empress v. *Manick Chandra Sarkar*, (I.L.R., 24 Calc., 492), followed.

Semble, that when pardon is revoked, no steps should be taken against the person who so forfeits it until after the trial of the other accused is over; and that his trial should then proceed *de novo*.

Queen-Empress v. *Brij Narain Man*, (I.L.R., 20 All., 529), and *Queen-Empress* v. *Bhau*, (I.L.R., 23 Bom., 493), considered.

CASE referred for the orders of the High Court. The facts appear from the headnote and are fully set out in the following judgment:—

Mr. *W. Barton* for the Public Prosecutor.

The accused was not represented.

BENSON, J.—The facts of the case are stated by the Sessions Judge in paragraph 4 of his letter of reference as follows:—

"The facts of the present case seem to be these—Ramasami, the present accused, was originally charged by the Police with being one of a band of dacoits whose crime was committed on the night of 3rd February 1900 at Egattoor. He is said to have made a confessional statement to the Stationary Sub-Magistrate of Trivellore on the 15th February 1900 (exhibit A). Pardon was tendered to him by the Stationary Sub-Magistrate under the District Magistrate's order (not sent to this Court, but *vide* Sub-Magistrate's proceedings, dated 15th March). Subsequently, on 7th March 1900 he was examined by the same Sub-Magistrate as fifth prosecution witness at a preliminary enquiry into the dacoity held under chapter XVIII, Criminal Procedure Code. He then (*vide* exhibit B) retracted his former statement, protested that he knew nothing about the crime, and asserted that he had made the statement, exhibit A, in consequence of police torture.

"At the trial in this Court (Calendar Case No. 12 of 1900) before my predecessor Mr. O'Farrell and a Jury, he was not put into the witness box as a prosecution witness, nor was his evidence heard at that trial, which ended on 26th April 1900 in the acquittal of the twelve men, who were then tried for the crime.

"The Police applied on 7th May 1900 to the District Magistrate for withdrawal of the pardon tendered to Ramasami, and on 22nd August 1900 the District Magistrate in his proceedings, Dis. No. 756/M of 1900, passed the following order:—'Ramasami having withdrawn and contradicted his first statement, the pardon tendered to him under section 337 is hereby withdrawn.'

"Thereupon the police have charged Ramasami before the same Sub-Magistrate for having been one of the dacoits, and Ramasami now stands committed by the Sub-Magistrate for trial by this Court."

The Sessions Judge considers the commitment illegal and recommends that it be quashed on two grounds. The first is that section 337 (2), Criminal

Digitized by Google

procedure Code, requires that every person accepting a tender of pardon "shall be examined as a witness in the case," and that the words "in the case" mean before the Sessions Court and are not satisfied if the witness is examined only in the preliminary enquiry, as in the present case.

I do not think that this view is correct. I think the words "in the case" are purposely used so as to include the preliminary enquiry and do not refer to the trial only. There are many cases in which there would be no need to examine the approver as a witness before the Court of Sessions, *e.g*, where the Magistrate discharges the accused, or where the accused dies before the trial, or where the accused pleads guilty before the Sessions Court and is convicted on the plea. Could it be held that if the approver in these cases, when examined at the preliminary enquiry, kept back material evidence within his knowledge, the pardon could not be withdrawn, and that the witness must go scot-free though guilty of the offence of which he had been pardoned on condition of making a full disclosure? I can see no reason for such a conclusion. The case relied upon by the Sessions Judge (*Queen-Empress* v. *Natu*(1) is not an authority which supports his view, for in that case the commitment was quashed for other reasons. The Judges, no doubt, considered that the person to whom tender of pardon was made ought to have been made available for examination before the Sessions Court and gave that as an additional reason for quashing the commitment, but it was not the primary reason. Moreover, in the present case the man was sent up as a witness to the Sessions Court and was available as a witness though not, in fact, examined by either side. On the other hand in *Queen-Empress* v. *Brij Narain Man*(2) the Court clearly was of opinion that failure on the part of the approver to fulfil the conditions of the pardon when examined at the preliminary enquiry before the Magistrate was a sufficient reason for at once revoking the sanction and committing the witness to stand his trial for the offence originally charged against him.

It may, perhaps, be doubted whether the opinion of the Judges in that case that the approver might be at once committed to stand his trial with those who were originally his co-accused is correct. The better opinion seems to be that beyond revoking the pardon nothing should be done against him until after the trial of the other accused is over, and that his trial should then proceed *de novo* (*Queen-Empress* v. *Bhau*(3) and cases there quoted).

This is exactly the procedure observed in the present case.

The Sessions Judge is of opinion that the man should have been given an opportunity of earning his pardon in the Sessions Court, and says that, if he had, he might, in that Court, have complied with the conditions on which pardon was granted. I do not think that this view is correct. The man having failed to comply with the conditions of his pardon when examined on oath before the Magistrate, there was no reason for the prosecution to think that he would give other evidence before the Sessions Court. There was, in my judgment, no reason why the prosecution should, in the Sessions Court, put forward as a witness for the prosecution a man who they had every reason to think would give false evidence. He was bound over and was available for examination if the Court or the accused wished to examine him, but I do not think that there was any duty on the prosecution to examine him. Even if he were examined in the Sessions Court and gave the evidence originally expected from him when pardoned, his evidence would be of little or

(1) I.L.R., 27 Calc., 137. (2) I.L.R., 20 All., 529. (3) I.L.R., 23 Bom., 493.

Digitized by Google

no value in consequence of his previous contradictory evidence before the Magistrate. In fact, if the prosecution was bound to follow the course proposed by the Sessions Judge, the provisions of the law which aim at securing convictions by the grant of pardons would become nugatory for the approver could always save himself without materially assisting the prosecution. It would only be necessary for him to give false evidence before the Magistrate, and reserve the truth for the Sessions Court. The latter would "earn his pardon," while the former would deprive the latter of any weight it might otherwise have in favour of the prosecution. When a pardon has been tendered and has been accepted, the utmost good faith must be kept on both sides. Good faith is broken if the witness does not disclose the truth to the Magistrate, and, in my opinion, the conditional pardon may be at once withdrawn as soon as good faith has been broken.

The second objection to the commitment taken by the Sessions Judge is on the ground that the District Magistrate had no power to withdraw the pardon after the Sessions trial was over, and that such power rested with the Sessions Court alone. The Criminal Procedure Code does not specify by whom a pardon may be withdrawn. Ordinarily the authority which makes an offer has power to withdraw it, and in the case of *Queen-Empress* v. *Manick Chandra Sarkar*(1) it was expressly ruled that the proper authority to withdraw a pardon is the authority which granted it (in that case the Joint Magistrate)even after the trial has been held in the Sessions Court. I am of opinion that that ruling is correct.

Lastly, it was suggested in the course of the argument that the District Magistrate has given no sufficient reason for withdrawing the pardon, that the withdrawal is therefore illegal, and, as a consequence, that the commitment is also illegal. This is not a ground taken by the Sessions Judge, and, in my opinion, there are no materials before us from which we can say that the withdrawal was not made until after the conclusion of the Sessions trial when all the facts of the case and the evidence must have been before the District Magistrate. There is no appeal before us against the order of the District Magistrate, nor is there any application before us to revise it. I think we must take it that the District Magistrate was satisfied that the approver when he withdrew and contradicted his first statement was giving false evidence or was wilfully concealing essential facts. If he was so satisfied, he had power under section 339, Criminal Procedure Code, to withdraw the pardon.

I would inform the Sessions Judge that the commitment is not illegal and that he should proceed with the trial according to law.

DAVIES, J.—I concur.

1900 *December* 17. **I. L. R. 24 Mad. 337.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

QUEEN-EMPRESS *v.* KUNIYIL RARU AND ANOTHER.*

Criminal Procedure Code—Act V of 1898, s. 203—Dismissal of complaint—Refusal by Magistrate to take cognizance of case—Subsequent trial by him.

A complaint was laid in the Court of a Town Magistrate, charging certain persons with

* Criminal Revision Case No. 440 of 1900.

(1) I.L.R., 24 Calc., 492.

Digitized by Google

having committed offences under the Registration Act. The Town Magistrate dismissed the complaint on the ground that sanction, which he deemed to be necessary, had not been obtained. The complainant obtained sanction and thereupon the Town Magistrate proceeded with the case and convicted the accused. On appeal, the Deputy Magistrate, while agreeing that the accused were guilty, reversed the conviction on the ground that inasmuch as the Town Magistrate had once thrown out the complaint under section 203 of the Code of Criminal Procedure, he could not subsequently entertain it. On the case being referred to the High Court for orders :

Held, that though, in form, the Town Magistrate's order purported to dismiss the complaint under section 203, in substance it refused to take cognizance of the offence on the ground that sanction was necessary and had not been obtained ; and that the acquittal must be set aside.

CASE referred for the orders of the High Court. A complaint was filed in the Court of the Second-class Magistrate of Calicut Town against two persons for committing an offence under the Registration Act. The Magistrate dismissed the complaint on the ground that it had been filed without sanction. Complainant then obtained sanction and the Town Magistrate proceeded with the case, and convicted the accused. On an appeal being preferred against that conviction, the Deputy Magistrate agreed with the Town Magistrate that the accused were guilty, but reversed the conviction on the technical ground that as the Town Magistrate had once thrown out the complaint under section 203 of the Code of Criminal Procedure, he could not subsequently entertain it. He relied upon *Queen-Empress* v. *Adam Khan*(1), and the cases cited therein. This reference was, in consequence, made by the District Magistrate.

Mr. *D. Chamier* for the Public Prosecutor, in support of the reference, contended that sanction was not in fact necessary for the institution of the proceedings against the accused ; and that *Queen-Empress* v. *Adam Khan*(1), relied on by the Sub-Magistrate, did not support the proposition laid down by him. In that case it was held that a matter could not be re-opened by another tribunal having the same powers ; and the Judges expressly stated that their ruling did not conflict with Calcutta cases in which it had been held that a Magistrate who had dismissed a complaint was not precluded from himself entertaining again what was in substance the same complaint. He also referred to *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee*(2), and *Komal Chandra Pal* v. *Gour Chand Audhikari*(3).

Govinda Menon for the accused.

JUDGMENT.—Section 203 of the Code of Criminal Procedure refers to the procedure of a Magistrate who has taken cognizance of a case. Section 195 of the Code of Criminal Procedure debars a Magistrate from taking cognizance of certain offences unless sanction has been obtained. In form, no doubt, the Magistrate before whom, in the present case, the complaint was preferred, purported to dismiss the complaint under section 203 of the Code of Criminal Procedure. In substance what he did was to refuse to take cognizance of the offence on the ground that sanction to prosecute was necessary and sanction had not been obtained.

In the Calcutta cases and in the Allahabad case to which our attention has been called (*Queen-Empress* v. *Adam Khan*(1), *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee*(2) and *Komal Chandra Pal* v. *Gour Chand Audhikari*(3)), the Magistrate before whom the first complaint was preferred took

(1) I.L.R., 22 All., 106. (2) I.L.R., 23 Calc., 983. (3) I.L.R., 24 Calc., 286.

Digitized by Google

cognizance of the alleged offence and, after adjudicating upon the case, made an order under section 203 of the Code of Criminal Procedure.

These cases are clearly distinguishable from the present case.

We must set aside the acquittal and direct the Magistrate to deal with the appeal according to law.

1901 *Feb.* 15. **I. L. R. 24 Mad. 414.**

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

QUEEN-EMPRRESS *v.* DORASAMI AYYAR (ACCUSED No. 2).*

Criminal Procedure Code—Act V of 1898, s. 288—Statement of witness before committing Magistrate treated as evidence at a trial before Court of Session—Evidence duly taken.

Under section 288 of the Code of Criminal Procedure the Court is not restricted to admitting the evidence of a witness duly taken before the committing Magistrate merely for the purpose of contradicting that witness when he is called as a witness at the Sessions Court. The section is intended to enable the Court to read the previous evidence as substantive evidence in the case, at the trial, where, for the purposes of justice, the adoption of such a course is found necessary by the Judge.

CHARGES of voluntarily causing hurt for the purpose of extorting a confession or information which might lead to the detection of an offence, under section 330 of the Indian Penal Code, and of voluntarily causing hurt for the purpose of constraining a person to do an illegal act, under section 327 of the Indian Penal Code. During the trial at the Court of Session the Sessions Judge, having reason to doubt the evidence then given by some of the witnesses called on behalf of the prosecution, permitted the statements of those witnesses before the committing Magistrate to be treated as evidence in the case. He made the following statement in the course of his judgment :—" The present is one of that troublesome class of cases in which the chief witnesses have been palpably gained over by the defence. The Public Prosecutor could hardly obtain an intelligible reply from either of the women, while questions put by the Pleaders for the defence were clearly and promptly answered. Most of the other witnesses endeavoured to minimise their knowledge of what had taken place. I therefore allowed several of the depositions given in the lower Court to be filed under section 288, Criminal Procedure Code." These witnesses had not been cross-examined. The accused, two in number, were both convicted, and preferred these appeals.

Mr. *D. Chamier* for the accused in Appeal No. 1035 of 1900.

Mr. *Joseph Satya Nadar* for the accused in Appeal No. 18 of 1901.

In the course of the argument a question was raised as to the admissibility in evidence of the statements which the prosecution witnesses had given before the committing Magistrate. It was suggested that those statements could not be " evidence duly taken " within the meaning of section 288 of Criminal Procedure Code, inasmuch as the witnesses had not been cross-examined; and their mere statements as given in examination-in-chief could not be accepted as reliable. It was the general practice to reserve cross-examination of prosecution witnesses before committing Magistrates in cases likely to be committed for trial. That practice was adopted in

* Criminal Appeals Nos. 1035 of 1900 and 18 of 1901.

Digitized by Google

the interests of accused persons. If such statements of prosecution witnesses before committing Magistrates could be filed under section 288 it would be unsafe to reserve cross-examination, and the interests of accused persons would be prejudiced. The only reasonable construction of section 288 was that the previous statement of a witness might be put to him with a view to contradict his evidence at the trial if the latter were questioned. Reference was made to *Queen-Empress* v. *Sagal Samba Sajao* (1); *Queen* v. *Amanulla* (2) *and Queen Empress* v. *Dan Sahai* (3).

The Public Prosecutor (Mr. *E. B. Powell*) for the Crown.

JUDGMENT.—We are unable to accede to the contention that section 288 of the Criminal Procedure Code permits the production of the evidence given before the committing Magistrate only for the purpose of contradicting the witness at the Sessions trial. If that were all, the provision would be quite unnecessary and superfluous inasmuch as such evidence could be adduced for the purpose stated under the Evidence Act. There can be no doubt the provision was intended to enable the Court to read the previous evidence as substantive evidence in the case at the trial where, for the purposes of justice, the adoption of such a course is found necessary by the Judge. Such evidence may be used as much in favour of the defence as in support of the prosecution. In this case we think the Judge was well advised in adopting the course he took. The evidence of the first prosecution witness, even as it was given at the trial, is, in our opinion, sufficient to warrant the conviction of both prisoners. There never has been any doubt as to the commission of the offence charged, and the only question is whether the policemen who committed the offence were the two prisoners. The woman was admittedly in the custody of the first prisoner during the period the hurt was caused and the second prisoner was present all the time, and as the superior officer engaged in the investigation of the case he was *prima facie* responsible for any thing done to the woman while in police custody. It is impossible that the hurt could have been caused to the woman without the cognizance of these two men, if they did not themselves cause it, as the woman in her earlier deposition expressly stated they did, and in her present evidence implies the same. The conduct of the prisoners in not reporting in their report (exhibit N) the marks of injuries on the person of the woman, which were discovered two days afterwards, is a concealment on their part telling strongly against them. We have therefore no hesitation in confirming the convictions and sentences and dismissing the appeals.

1901 *March.* 13. **I. L. R. 24 Mad. 417.**

Before Mr. Justice Davies and Mr. Justice Benson.

QUEEN-EMPRESS *v.* GANGAYYA.*

Abkari Act (Madras) Act I of 1886, s. 55 (g)—" Wash " fit for distillation—" Materials " for manufacturing liquor.

A liquid mixture known as " wash, " consisting of jaggery and babool bark and proved to be fit for distillation, constitutes " materials" for the purpose of manufacturing liquor within the meaning of section 55 (g) of the Abkari Act.

---

* Criminal Appeal No. 691 of 1900.

(1) I.L. R., 21 Calc., 642. (2) 12 B.L.R., Appx. 15. (3) I.L.R. 7, All., 862.

Digitized by Google

CHARGE of illicitly possessing wash fit for illicit distillation of arrack and concealing the same, preferred under section 55 (*g*) of Madras Act I of 1886. The Sub-Inspectors, as first and second prosecution witnesses, deposed that "wash" is a mixture of jaggery, babool bark and other intoxicating drugs, and is fit for distillation. The Magistrate acquitted the accused in the following judgment:—"The Inspector of Salt and Abkari Revenue, Cuddapah Circle, charged the accused for illicitly possessing wash waste fit for illicit distillation of arrack and concealing the same in a field near Tavvaripalli, an offence punishable under section 55 (*g*) of Act I of 1886. The prosecution evidence shows that when the witnesses were marching in the street they observed, before daybreak on 6th February 1900, the accused issuing from a house with a pot and proceeding towards a paddy-field, depositing the pot there and going away, when he was arrested. The pot is said to have contained what is called wash, which is explained to be a mixture of jaggery, babool bark and other intoxicating drugs. It is said to be fit for distillation. The liquid wash was not analysed to find out what, if any, intoxicating drugs it contained. The accused said that he carried no pot, but that when he was proceeding in the street, he was unjustly arrested. The witnesses for the defence bear out the accused's statement. The pleader Mr. Nanjundappa brings to notice in his argument that wash, such as it is called, is neither material nor implement, or apparatus used for the purpose of manufacturing liquor, and under *Queen-Empress* v. *Sondi Donnai Sabu*(1) it is no offence to possess wash even if it is possessed, which the accused did not possess. In the case referred to in the foregoing paragraph, the accused had been charged for being in possession of mixture of some boiled rice with dried ginger and nuts of the marking-nut plant, which mixture the accused in that case admitted he had for manufacturing liquor. The High Court observed that the mixture was certainly not an implement for the manufacture of liquor. The mixture was not liquor which the accused intended to manufacture liquor with the mixture. The conviction was therefore quashed by the High Court. This seems a case similar to that. Here the man is alleged to have taken the pot containing the wash, not from the accused's house, but from the house of somebody else. The wash is said to be not liquor fit for drinking. Section 55 (*g*), under which the accused is charged, only makes it punishable to possess, use or keep any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing liquor other than toddy or any intoxicating drug. The wash in question cannot be deemed materials or any of the other things named, nor does the possession of wash independently amount to an offence under any clause of section 55. I find, under these considerations, the accused not guilty and acquit him under section 245 of the Code of Criminal Procedure. Under section 517 of the Code of Criminal Procedure, the wash will be destroyed."

Against that acquittal this appeal was preferred by the Public Prosecutor.

Mr. *N. Subrahmanyam*, (for the Public Prosecutor), for the Crown.

The accused was not represented.

JUDGMENT.—The Second-class Magistrate is entirely wrong in supposing that the "wash" consisting of a liquid mixture of jaggery and babool bark is not "materials" for the purpose of manufacturing liquor. The evidence of the Abkári officers on that point is clear and is not contradicted.

The case to which the Second-class Magistrate refers (Weir's 'Criminal

(1) Weir's 'Criminal Rulings,' p. 417.

Digitized by Google

Rulings,' page 417) in support of his view is totally irrelevant. It was passed (as appears from the report itself) with reference to the language of section 23A of Act III of 1864 as amended by Act V of 1879, which Acts were repealed by the present Act I of 1886. The former Acts were defective in not providing for the case of possession of "materials" for distillation, but the defect was remedied by the present Act, and it was under the present Act that the charge was made.

We set aside the acquittal and convict the accused (Gangireddi Gangayya) of an offence punishable under section 55 (*g*) of Act I of 1886, and sentence him to pay a fine of Rs. 10, or in default of payment to suffer one month's rigorous imprisonment.

1901 *March* 25 to 29. *April* 1 to 3, 10 to 12 and 17. *May* 1.

I. L. R. 24 Mad. 523.

Before Mr. Justice Davies, Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

KING-EMPEROR *v* TIRUMAL REDDI AND OTHERS.* KING-EMPEROR *v.* SUBBI REDDI.§

Criminal Procedure Code—Act V of 1898, ss. 285, 537—Commencement of trial for murder by Judge and two assessors—Absence of one assessor during portion of the trial—Resumption of his seat by assessor and his opinion expressed and recorded by the Judge—Legality of trial—Conspiracy—Abetment—Penal Code—Act XLV of 1860, s. 109.

A trial for murder, conspiracy to murder, and abetment of murder, duly commenced before a Sessions Judge and two assessors, and continued for about seven weeks. During that period one of the assessors was permitted to absent himself during two whole days, and five half days respectively; at first, so that he might visit his mother on her death-bed, and subsequently, to perform the daily obsequies rendered necessary by her decease. He then resumed his seat as an assessor and continued so to act until the termination of the trial, all the depositions recorded in his absence having been read by him on his return. At the conclusion of the trial the Sessions Judge invited the opinion of each assessor, and recorded it. The opinion of each was that all accused were guilty and the Judge, concurring in that opinion, convicted the accused. The prisoners appealed to the High Court, where it was contended that the Judge had acted contrary to law in allowing the assessor who had been absent to resume his seat as an assessor, and in inviting and taking into consideration his opinion in deciding the case; and that the conviction ought to be quashed:

Held, (DAVIES, J., dissenting), that the finding and sentence appealed against had been passed by a Court of competent jurisdiction within the meaning of section 537 of the Code of Criminal Procedure and that the defect in the trial did not affect its validity and was cured by that section if the irregularity had "not in fact occasioned a failure of justice"; and that no such failure of justice had been shown:

---

* Referred Trial No. 61 of 1900, referred by W. M. Thorburn, Sessions Judge of Kurnool, for confirmation of the sentence of death passed in Sessions Case No. 53 of 1900. In this case, accused Nos. 1, 4 and 5 preferred Criminal Appeal No. 875 of 1900; accused No. 2 preferred Criminal Appeal No. 874 of 1900; accused Nos. 3 and 6 preferred Criminal Appeal No. 876 of 1900, against the sentence of transportation for life; accused Nos. 7 and 8 preferred Criminal Appeal No. 877 of 1900; accused No. 9 preferred Criminal Appeal No. 878 of 1900. The Public Prosecutor preferred Criminal Appeal No. 1028 of 1900, under section 417 of the Criminal Procedure Code, against the judgment of acquittal of accused Nos. 1, 2 and 9, on the charge of entering into a conspiracy to murder.

§ Referred Trial No. 9 of 1901, referred by G. W. Elphinstone, Sessions Judge of Kurnool, for confirmation of the sentence of death passed in Sessions Case No. 1 of 1901. In this case, the accused preferred Criminal Appeal No. 143 of 1901.

Digitized by Google

Per BHASHYAM AYYANGAR, J.—Under the Indian Penal Code conspiracy except in cases provided for by sections 311, 400, 401, 402, and 121A of the Code is a mere species of abetment where an act or an illegal omission takes place in pursuance of that conspiracy, and amounts to a distinct offence for each distinct offence abetted by conspiracy.

CHARGES of murder, conspiracy to murder and abetment of murder. In the first referred trial, (Sessions Case No. 53 of 1900), nine persons were charged as aforesaid. In the second referred trial, (Sessions Case No. 1 of 1901), one person was charged with conspiracy to murder and murder. The accused in the latter case was tried separately because he had not been arrested in time to be tried with the accused in the former, the evidence being, for all practical purposes, identical in both cases.

The indictment in Sessions Case No. 53 of 1900 contained the following counts:—" (i) That you, ... accused Nos. 1 and 2, on or about the 19th day of March 1899 at . . . . , entered into a conspiracy with . . . . Subbi Reddi [accused in Sessions Case No. 1 of 1901] and accused No. 9 to murder the deceased . . . . Ranga Reddi ; that, in pursuance of that conspiracy, the deceased Ranga Reddi was murdered on the 11th June 1900 at Rallavagu at about 11 A.M., and that you have thereby committed an offence punishable under sections 302 and 109 of the Indian Penal Code, and within the cognizance of the Court of Sessions, Kurnool. (ii) That you accused Nos. 3, 4, 5, 6, 7 and 8 with the accused Nos. 1 and 2 and Subbi Reddi on or about the 11th day of June 1900 at Rallavagu vanka within the limits of . . . . did murder the deceased . . . . . Ranga Reddi and that you have thereby committed an offence punishable under section 302 of the Indian Penal Code, and within the cognizance of the Court of Sessions, Kurnool. (iii) That you, accused No. 9 . . . . . on or about the 19th day of March 1899 at ... ..., entered into a conspiracy with the accused Nos. 1 and 2 and Subbi Reddi to murder.....Ranga Reddi, in consequence of which the said Ranga Reddi was murdered on the 11th June 1900 ; that you abetted the murder of Ranga Reddi by giving information of the movements of Ranga Reddi on the 11th June 1900 to the first accused in pursuance of which information prisoners Nos. 1 to 8 murdered Ranga Reddi at Rallavagu on the 11th June 1900 and that you have thereby committed an offence punishable under sections 302 and 109 of the Indian Penal Code and within the cognizance of the Court of Sessions, Kurnool,"

The indictment in Sessions Case No. 1 of 1901 contained the following counts:—" (i) That you [Subbi Reddi] on or about the 19th day of March 1899 at . . . . entered into a conspiracy with . . . . [accused Nos. 1, 2 and 9 in Sessions Case No. 53 of 1900] to murder one . . . . Ranga Reddi of Gooty in pursuance of which conspiracy the said Ranga Reddi was murdered on 11th June 1900 and thereby committed an offence punishable under sections 302 and 109 of the Indian Penal Code and within the cognizance of the Court of Sessions, Kurnool (ii) That you on or about the 11th day of June 1900 at Rallavagu vanka within the limits of . . . . committed murder by causing the death of the said Ranga Reddi and thereby committed an offence punishable under section 302 of the Indian Penal Code, and within the cognizance of the Court of Sessions, Kurnool."

The following short statement of the effect of the prosecution evidence has been prepared from the judgments delivered in the High Court :—The deceased Ranga Reddi, B.A., B.L., was a first-grade pleader, who practised in the district of Anantapur at Gooty. accused No. 1 was a brother-in-law of accused No. 2, both of them being men of some wealth and position. Accused

Digitized by Google

Nos. 3, 4 and 5 were servants of accused No. 1. It was alleged that accused Nos. 6, 7 and 8 had been employed by accused No. 2 or by the accused in the other case, Subbi Reddi, to commit the murder; accused No. 9 was a second grade pleader in practice at Gooty, and an undivided brother of accused No. 1. The accused in Sessions Case No. 1 of 1901, namely, Subbi Reddi, was also a brother-in-law of accused No. 1 in the earlier case, he having married Subbi Reddi's sister. According to the prosecution, the murder of Ranga Reddi took place in the following manner:—On the 11th June 1900 the deceased pleader, B. Ranga Reddi, was travelling in his cart from Rayalcheruvu railway station, which he left at 10 A.M., to his father's house in Chimalavagupalli, seven miles off, accompanied by his gumastah Narayan Reddi and by two clients belonging to a distant village named Rayampalli, the cart being driven by a bandyman named Hanumantu. On the way, the two clients got down to drink at a stream and then followed at a little distance behind the cart. When the cart got to the dry bed of a stream called Rallavagu or vanka, the time then being about 11-30 A.M., the first eight accused in the earlier case and Subbi Reddi met the bandy, threw stones at it and stopped it, the first accused firing his revolver at the bandy but without effect. Ranga Reddi fired a shot in return from a revolver which Narayan Reddi had brought with him from Chimalavagupalli but also without effect. Accused Nos. 5 and 6 gave the bandyman a couple of blows with sticks on the leg and knocked him down, and accused No. 7 cut the rope which fastened the bullocks to the pole. Narayan Reddi, the gumastah, jumped down from the cart and tried to run away but was pursued and stopped by accused Nos. 5 and 8, who then turned back and stopped the two Rayampalli man (who had run up on seeing the disturbance) and threatened to kill them if they came further. Accused Nos. 2, 4 and 7 meantime dragged Ranga Reddi out of the cart and the accused No. 2 and Subbi Reddi cut him with their axes, accused No. 1 finally cutting his throat from ear to ear. When going away accused No. 1 took with him the revolver which the deceased had fired. Accused No. 3 was present armed with a stick but was not said to have taken any active part in the murder. Two raiyats who were in the fields half a mile or so from the spot, hearing the revolver shots, ran up to the scene of offence in time to see the murderers going away. They recognized accused Nos. 1 and 2 and Subbi Reddi, whom they had previously known, and spoke to Narayan Reddi about the murder.

All the accused pleaded not guilty, and the defence of all was that they had been elsewhere at the time of the murder, and that they knew nothing as to how or by whom it had been committed. They suggested that they had been falsely charged because the real offenders were not known, and because there had been long standing and notorious enmity between the father of the deceased and accused Nos. 1 and 9; and that the other, being more or less connected with them by relationship or position, had been falsey implicated for that reason.

The trial of the accused in Sessions Case No. 53 of 1900 was commenced in the Court of Session, consisting of the Judge sitting with two assessors, on 23rd August 1900, and closed on 24th October 1900. On 5th September, after 2 P.M. the first assessor, by permission of the Judge, absented himself from Court, and remained absent on 6th and 7th September, the trial proceeding. There was no sitting of the Court on 8th or 9th September, and the first assessor resumed his attendance on 10th September and was present throughout the remainder of the trial, excepting on 16th, 17th, 18th and 19th September, on each of which days he was absent by permission, until 1 P.M.

Digitized by Google

The cause of this absence was a sufficient one and is referred to in the judgments of DAVIES and BHASHYAM AYYANGAR, JJ. Sessions Case No. 1 of 1901 was subsequently heard and determined. The result of the cases was as follows:—In Sessions Case No. 53 of 1900 the first eight accused were convicted of murder, the ninth accused being convicted of abetment of murder. The first, second and ninth accused were acquitted on the charge of conspiracy. Sentence of death was passed upon all excepting the third and sixth, who were sentenced to transportation for life. In Sessions Case No. 1 of 1901, the accused was also convicted and sentenced to death.

All the accused appealed.

The Public Prosecutor also appealed under section 417 of the Code of Criminal Procedure against the judgment of acquittal of the first, second and ninth accused in Sessions Case No. 53 of 1900, on the charge of entering into a conspiracy to murder. This appeal was numbered Criminal Appeal No. 1028 of 1900.

Mr. *John Adam*, for accused Nos. 1, 4 and 5 in Referred Trial No. 61 of 1900 and Criminal Appeal No. 875 of 1900, raised the preliminary objection that the trial in the Sessions Court was vitiated by reason of the absence of the first assessor during part of the trial. He contended that the evidence which had been recorded during his absence was very material, and that he had been wrongly allowed to give his opinion on the case as a whole. The first assessor, he said, was a retired Sub-Magistrate and his opinion would carry much weight and must undoubtedly have influenced the opinion, not only of the other assessor, but also of the Judge himself. He referred to *Queen-Empress* v. *Babu Lal*[1]. Even if no objection had been raised on behalf of the accused in the lower Court the Appellate Court would consider it now, as there could be no waiver in a criminal trial, especially where the jurisdiction of the Court was in question. He contended that under section 268 of the Code of Criminal Procedure, a Court of Session is not properly constituted unless there are at least two assessors, and that section 295 of the Code of Criminal Procedure contemplates the presence of at least two assessors throughout the trial; also that section 285 of the Code, though it lays down a special course of procedure upon the absence of an assessor, makes no provision for an assessor who has been absent to resume his seat at a later stage, and give his opinion on the case as a whole. The absence of the assessor, he submitted, was not a mere irregularity capable of being cured by section 537. The trial, no doubt, was valid in its earlier stages but it had become illegal from the moment at which the absent assessor was allowed to resume his seat, or at all events when the opinion of the absent assessor was asked and recorded *Queen-Empress* v. *Munna Lal*[2] and section 289, sub-section [2], of the Code of Criminal Procedure were referred to, as indicating that the whole procedure in the Court below was vitiated. It was impossible to merely eliminate the first assessor's opinion, since the real question was as to the effect produced by that opinion in influencing the opinions alike of the second assessor and of the Judge. He referred to *Queen-Empress* v. *Muhammad Mahmud Khan*(3), *Queen-Empress* v. *Babu Lal*(1), *Proceedings of the Madras High Court, dated 22nd July* 1869(4) and *Queen-Empress* v. *Ram Lal*(5), as showing that the whole proceedings in the lower Court were illegal. Also to *Queen* v. *Matam Mal*(6) as showing that the Judge was bound to consult the opinion of each of the asse-

(1) I.L.R., 21 All., 106. [2] I. L. R. 10 All. 414. (3) I.L.R., 13 All., 337.
(4) Weir's Crl. Rul.. 3rd ed., p. 927. (5) I.L.R., 15 All., 136.
(6) 22 W.R., (Cr.R.), 34.

Digitized by Google

sors and that, in consequence, the opinion of the first assessor could not be treated as mere surplusage.

Mr. *C. Sabhapathi Ayya*, for accused No. 2, contended that the taking of the opinion of the first assessor was not a mere error of procedure but that it went to the root of the trial and cited *Queen-Empress* v. *Appa Subhana Mendre*(1).

Mr. *C. Krishnan*, for accused Nos. 3 and 6, argued the same point.

K. Ramachandra Ayyar, for accused Nos. 7 and 8, referred to the case of *Empress of India* v. *Anant Ram*(2)

Sankaran Nayar and *Sundara Ayyar*, for accused No. 9, took the same objection and contended that the opinion of an assessor could not be considered in the same light as the testimony of an expert, as the trial in this case must be treated as one conducted by a Judge with the aid of two assessors. The opinion of the assessor was incapable of being expunged. The recording of the opinion was an illegal act. Section 537 of the Code of Criminal Procedure applies only to those cases where the proceedings are valid in law, though an irregularity has crept in of such a nature as not to affect the merits of the case. They contended that if persons who have no right to do so are called in to assist the Court, the constitution of the Court becomes illegal. They referred to the article on "Assessors" at pages, 348, 349 of volume I of the Encyclopædia of the Laws of England.

Seshachariar and *M. R. Krishna Ayyar* for the accused in Referred Trial No. 9 of 1901 and Criminal Appeal No. 143 of 1901.

The Public Prosecutor, (Mr. *E. B. Powell*), in both cases and also in the appeal filed on behalf of the Crown, contended that though the procedure complained of might heve been irregular it did not vitiate the trial and was cured by section 537 of the Code of Criminal Procedure. The objection that had been taken at the trial had not been clearly persisted in and the course taken had, he thought, been taken practically without opposition. The opinion of the absent assessor might be disregarded and treated as surplusage and as a nullity. If he had remained and never returned, no question could have arisen. The fact that he had resumed his seat and had expressed an opinion after hearing all the evidence which had been recorded in his absence read to him could not have caused any failure of justice.

On the 1st May 1901, their Lordships delivered judgments on the preliminary objection as follows:—

DAVIES, J.—As regards the preliminary objection that the convictions of the several appellants are bad in law inasmuch as the case was not tried by a competent tribunal, the following are the facts:—The trial began on the 23rd August 1900 with the aid of two assessors as was right, and was regularly continued with the aid of the two assessors from day to day until the 5th of September. On the afternoon of that day and for the two following days, the 6th and 7th of September, the first assessor was allowed to absent himself on account of the illness and death of his mother while the trial proceeded with the aid of the one remaining assessor. The Judge did not dispense with the further services of the first assessor as he might have done under section 285 (1), Code of Criminal Procedure, and as he ought to have done if he could not adjourn the hearing, for on the assessor's return to the Court on

(1) I.L.R., 8 Bom., 200. [2] I.L.R., 4 All., 293 at p. 295.

Digitized by Google

the 10th of September, which was the next date of hearing after the 7th, the Judge reinstated him as first assessor, and the depositions of the prosecution witnesses Nos. 47 to 62 which had been taken during his absence for the 2½ days were then "shown to, and read by, him." The trial went on with the two assessors until the 14th September, but on the following 3 or 4 days (the Judge in his report is not very precise as to the dates) the first assessor was again allowed to absent himself every day up to 1 P.M, in order to perform his mother's funeral ceremonies, and the trial proceeded during his abesence, as before, with only the remaining assessor, but "he read the depositions recorded" during his absence before he resumed his seat in the afternoon." The depositions taken on these occasions were those of defence witnesses. From the 19th September till the 29th idem, when the examination of witnesses was concluded, and up to the 15th October, when the trial was closed, both assessors sat together and, at the end of the trial, the opinion of each was taken and duly recorded.

It is thus clear that the trial purports to have been conducted with the aid of two assessors, and it is so made to appear on the face of the Judge's record. Neither in his judgment nor elsewhere is there anything to indicate that the two assessors had not sat together throughout the trial.

Now my learned colleagues are of opinion that it must be considered that the trial on and after the 5th September was held with the aid of only one assessor, which was permissible under section 285 (1), Code of Criminal Procedure, and that the resumed sittings of the first assessor and his taking part in the proceedings after his absence from the 5th to 7th September should be treated as an irregularity not occasioning a failure of justice. I am unable to accept this view. In the first place the Judge did not, as a matter of fact, act under section 285 (1) nor does he profess to have done so, and in the second place the opinion of the first assessor finding the appellants guilty must have done them positive harm. The first assessor happens to be a retired Sub-Magistrate versed in criminal affairs and it is highly probable that his opinion had great effect on the mind of the second assessor, who is an ordinary trader devoid of forensic knowledge. Had the second assessor been left to give his own opinion without hearing the first assessor's opinion he might have given one different from what he did. In any case, the taking of the first assessor's opinion resulted in the concurrent opinion of two assessors which must necessarily have carried more weight with the Judge than the single opinion of one The opinion of an assessor is given in the exercise of a judicial function imposed on him by law, and the Judge is bound to take it into consideration. He cannot dispense with it. Considering the status of the first assessor the Judge was doubtless influenced by his opinion in coming to his own conclusions on the many doubtful points in the case, which he has himself set out in his judgment, but he had no right to ask for or take that opinion, and by having it his judgment was vitiated. I can see no analogy between assessors in civil cases in England and the assessors we have in criminal cases in India. A court consisting of a Judge and two or more assessors by which every person must be tried before a Court of Session when he is not tried by jury, appears to me a compromise between a trial by Judge and jury, and by a single Judge. It is a constitutional privilege, the benefit of which is not confined to the subject, for in an appeal by a person convicted in an assessor's case, the Crown can as well rely on the opinion of the assessors if it is in favour of a conviction as the prisoner can when their opinion is the other way.

Digitized by Google

I must therefore take it as the fact that this trial was a trial held with the aid of two assessors as the law requires (section 268, Code of Criminal Procedure). It began with two assessors and it ended with the two same assessors and the depositions taken during the absence of the first assessor were handed to him for perusal as a functionary who was taking part in the whole trial. The absence of the first assessor extended in all to 4 or 4½ days, upon which the evidence of witnesses both for the prosecution and for the defence was being taken, out of a total of 30 days occupied in their examination. So that, there was a lawfully constituted Court for 26 days while for 4 days there was not. The question then is whether if in a trial held by a Judge with the aid of two assessors, one of the assessors is absent for a considerable portion of the time during which the most important part of the trial, viz, the examination of witnesses, is proceeding, the Court ceases to be a Court of competent jurisdiction. It seems to me that there can be no doubt that in such circumstances the trial is rendered null and void, for section 295, Code of Criminal Procedure, lays down the rule that if a trial is adjourned, as this was, from day to day, "the jury or assessors shall attend at the adjourned sitting and at every subsequent sitting until the conclusion of the trial." It follows that in my opinion, the conviction of the appellants must be set aside and a re-trial ordered.

BENSON, J.—I do not think that there is any validity in the preliminary objection.

The law does not require that a trial should be held with the aid of two assessors throughout. It requires that a trial shall be commenced with the aid of two assessors, but it makes a special provision (section 285, Criminal Procedure Code) for the unavoidable absence of one of the assessors after the trial has commenced. In such case the law allows the trial to proceed and to be completed with the aid of one assessor only. It is only if both assessors are unavoidably absent that the proceedings are to be stayed and a new trial, with the aid of fresh assessors, held. In the present case one assessor was present throughout, and if the second assessor had not been allowed to return after absenting himself for a time, there could be no question as to the validity of the trial. The law, it is true, does not contemplate that an assessor, having once absented himself, should return and take part in the proceedings at a later stage, and the Sessions Judge ought not to have allowed him to do so in this case. His having done so was, no doubt, an irregularity, but the law expressly provides (section 537, Criminal Procedure Code) that an irregularity in the proceedings is no ground for setting aside a finding or sentence "unless the "irregularity has, in fact, occasioned a failure of justice." The onus is on the appellant to show that there has, in fact, been a failure of justice owing to the irregularity. This has not been shown in the present case. In my opinion, therefore, the preliminary objection has no validity and should be overruled.

BHASHYAM AYYANGAR, J.—These are appeals in Sessions Case No. 53 of 1900 before the Sessions Judge of Kurnool Division. The trial of the said case commenced on 23rd August 1900 and closed on 15th October 1900 when judgment was reserved. The judgment was given on 24th October 1900 and the first eight accused in the case were convicted of murder and the ninth of abetment of murder. The trial before the Court of Sessions was with the aid of two assessors, viz., Gundu Rao and P. Seshayya Chetti, hereinafter referred to as the first and second assessor respectively. The first assessor was allowed by the Judge to go to Gooty to the death-bed of his mother at 2 P.M. on the

Digitized by Google

afternoon of 5th September 1900 and he was also absent on the 6th and 7th September, but the trial proceeded during his absence. There was no trial of the case on Saturday the 8th and Sunday the 9th idem, and it was adjourned to Monday the 10th, on which day the first assessor returned and continued to attend the trial throughout, except on 16th, 17th, 18th, and 19th September, on each of which days he was allowed to absent himself till 1 P.M. to enable him to perform the daily obsequies of his deceased mother. It appears that all the depositions recorded in his absence were shown to and read by him. It is not contended that there was no sufficient cause for his absence on the days above mentioned, and it appears that no objection was raised on either side to the Judge permitting him to absent himself on those days. The Judge in his letter, dated 20th March 1901, further reports that when the first assessor returned "some doubts were expressed as to the legality of the '(assessor's)' "return and felt by myself but finally it was decided with the concurrence of "both parties, that he might be allowed to return, as the validity of the trial "could not be affected in either case, so long as one assessor was present throu-"ghout the trial, according to section 285, Criminal Procedure Code." The counsel who represented all the accused in the Sessions Court also appeared in this Court as counsel for the second accused, the appellant in Appeal No. 874 of 1900, and says that he did not waive his objection though he did not press it or make any protest after the Judge ruled that the trial could not be affected by the return of the first assessor. The statement of the counsel made in this Court, that he did not waive the objection, must be accepted, though the Judge might have misunderstood counsel as concurring in the view of the Judge. It is very much to be regretted that any doubt should have been felt on a point which is so plain and that the first assessor should have been allowed to resume his seat as an assessor instead of the trial proceeding, as it undoubtedly could, with the aid of the remaining assessor alone under section 285, clause (1). The Public Prosecutor, who also appeared in the Sessions Court, now admits that the first assessor ought not to have been allowed to resume his seat as assessor. At the conclusion of the trial the Sessions Judge invited the opinion of each assessor and recorded it, viz., that all the accused were guilty, and the Judge concurring in such opinion, convicted the accused. Upon the above facts a preliminary ground has been raised and argued in the above appeals, that the Judge having acted contrary to law in allowing the first assessor to resume his seat as assessor and in inviting and taking into consideration his opinion in deciding the case, the trial ought to be set aside and the conviction quashed.

In my opinion, the finding and sentence appealed against is one passed by a Court of competent jurisdiction within the meaning of section 537 of the Criminal Procedure Code and that the defect in the trial does not affect its validity and is one that can be cured under that section, if the irregularity "has not in" fact occasioned a failure of justice."

The chief contentions raised in support of the preliminary ground are, that assessors are members of the Court, that, therefore, the Court was illegally constituted from the time when the first assessor was allowed to resume his seat as assessor on 10th September, and that, even if assessors are not members of the Court, yet inasmuch as the Sessions Judge invited the opinion of the first assessor, when in law he had not the status of an assessor, and decided the case in concurrence with such opinion, the finding and sentence appealed against cannot be regarded in law as one passed by a Court of competent jurisdiction. If either of these contentions be well founded, it will go to the root of the case and the result will be that a new trial will have to be ordered. Section 268,

Digitized by Google

Criminal Procedure Code, provides that all trials before a Court of Session shall be either by jury or with the aid of assessors. In the latter case it is provided by section 284 that at least two assessors shall be chosen by the Judge. The next section 285 provides that if an assessor be prevented from any sufficient cause from attending throughout the trial, the trial shall proceed with the aid of the remaining assessor or assessors only and that, if all the assessors are so prevented or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors.

With reference to these provisions, it is conceded that the trial commenced validly with two assessors and that no exception could be taken to the trial of the case including the finding and sentence if the second assessor alone continued as assessor from 2 P M. on the 5th September when the first assessor departed on leave. The authorities cited simply establish that the trial will be invalid if it commenced really with only one assessor, though nominally there was a second assessor who, by reason of blindness or deafness, was incapable of understanding the proceedings (*Proceedings of the Madras High Court, dated 22nd July* 1869 (1), *Queen-Empress* v. *Babu Lal* (2)), or if it ended without the last remaining assessor having attended the trial throughout *Queen-Empress* v. *Muhammad Mahmud Khan* (3)), or if a portion of the trial which consisted in the taking of the additional evidence took place after the discharge of the assessors (*Queen-Empress* v. *Ram Lal* (4)). The principle of these decisions is that in cases not tried by jury, it is imperative that the Judge should commence his trial with the aid of at least two assessors and that at least one of them should continue to attend the trial throughout. This being mandatory, the jurisdiction of the Sessions Judge to commence the trial and his jurisdiction to continue the trial are dependent upon his choosing at least two assessors to aid him and on the continuation of at least one of them throughout the trial. In other words, the above two requisites are conditions precedent to the exercise of his jurisdiction, and, therefore, any finding or sentence passed by a Session Judge in contravention of either of those requisites will not be one passed by a Court of competent jurisdiction and the defect is not one which can be cured by sections 537 of the Criminal Procedure Code or section 167 of the Evidence Act.

In *In the matter of the petition of Narain Das* (5) it was held by a single Judge that the acquittal of an accused person, without asking the assessors their opinion, was only an irregularity though a serious one and that it could be cured under sections 283 and 300 of Act X of 1872 corresponding to section 537 of Act V of 1898. In the view I have already expressed, I need hardly add that I dissent from that decision and that if a Sessions Judge should decide a case without inviting the opinion of the assessors, he virtually holds the trial without the aid of assessors and that his finding or sentence cannot be regarded as one passed by a Court of competent jurisdiction (*Queen* v. *Matam Mal* (6), and *Queen-Empress* v. *Munna Lal* (7). In the present case there has been no violation of either of the said conditions precedent and the question raised as to the effect of allowing an assessor who absented himself for some time after he had attended a portion of the trial to resume his seat and to give his opinion at the conclusion of the trial is not governed by any direct authority and the case, therefore, being new in the instance ought " to

(1) Weir's Crl. Rul., 3rd ed., p. 927.
(2) I.L.R., 21 All., 106.
(3) I.L.R., 13 All., 337.
(4) I.L.R., 15 All., 136.
(5) I.L.R., 1 All., 610
(6) 22 W.R., (Cr. R.), 34
(7) I.L.R., 10 All., 414.

Digitized by Google

be governed by the established "principles and the analogies which have here-"tofore prevailed in like cases" (per Willes. J., in *Juttendromohun Tagore* v. *Ganendromohun Tagore*(1), per Lord Wenleysdale in *Mirehouse* v. *Rennell*(2).

I now proceed to consider the principles and the analogies which bear on the question raised in this case. The principles are clearly deducible from the provisions in regard to trial with the aid of assessors as contrasted with the provisions in regard to trials by jury. In the latter case, the trial is by jury before a Court of Session and the functions of the two tribunals forming a mixed tribunal are respectively defined in sections 298 and 299 of the Code of Criminal Procedure.

The jury form a tribunal or body with a foreman and the verdict is the verdict of the body, and when there is no unanimity among the members of the body, the opinion of the majority prevails as the verdict of the body. The jurors are sworn after the foreman has been appointed. And after the Judge had finished his charge, the jury may retire to consider their verdict, and if they are not unanimous, the Judge may require them to retire for further consideration. If, in the course of a trial by jury, any juror unavoidably absents himself, or if it appears that any juror is unable to understand the language in which evidence is given or the language in which it is interpreted, a new juror shall be added or the jury discharged and a new jury chosen. But in either case the trial shall commence anew. But in the case of a trial with the aid of assessors, the assessors do not form a body and each acts and expresses his opinion individually, and the Judge is to invite the opinion of each separately and record it. The Judge is the sole judge of law and fact and the responsibility of the decision rests only with him, though, in the decision of the case, he is expected to take into consideration the individual opinion of each assessor and during the trial of the case, he may also consult them on any point in connection with the examination of witnesses or otherwise. The assessors are not to retire for consultation and forming their opinion. In the case of assessors the principle is that the Judge should have before him the individual and the independent opinion of each assessor. Before the enactment of the Criminal Procedure Code, Act X of 1882, the Judge had to invite the opinion of the assessors without summing up the evidence to them. The object was to preclude the possibility of the assessors being influenced by the Judge in forming or giving their opinion. On this point the Indian Law Commissioners appointed under 16 and 17 Vic., cap. 98 section 22, in their first report accompanying the draft Code which formed the basis of the Criminal Procedure Code of 1861 observe at page 152 as follows:— "A difference is proposed in the mode of taking the verdict of a jury from "that of taking the opinion of the assessors. In the former case, the Judge "will sum up the evidence for the guidance of the jury and then for their ver-"dict. In the latter, the Judge will call for the opinions of the assessors with-"out any expression of his own. There is a reasonable apprehension that the "native assessor when his own opinion is to be subjected to discussion in open "Court is likely to be unduly biassed by the opinion of the presiding Judge: "we have endeavoured to obviate this by the order of procedure which we have described." But in the Code of 1882, an enabling provision was introduced which is also retained in the present Code empowering the Judge to sum up the evidence to assessor before inviting their opinions. In my opinion this provision should be availed of by the Judges only in cases where the facts are

(1) L.R., I.A., Sup. Vol., 47 at p. 68. (2) 1 Cl. & Fin., 546.

Digitized by Google

intricate or complicated and it may therefore be expedient to explain or marshal the same. Even in those cases, the Judge should not, as he may do in charging a jury, express his opinion upon any question of fact arising in the case. The contrast between trial by jury and trial with the aid of assessors is that, in the former, the jury is the real tribunal but is aided by the Judge, and in certain matters directed by the Judge, but in the latter the Judge is the sole tribunal aided by each of the assessors.

"The tribunal which has to try the case is the Judge himself, and the judg-"ment is his and his alone. The assessors who assist the Judge take no part "in the judgment whatever; they are not responsible for it and have nothing "to do with it. They are there for the purpose of assisting the Judge" (per Brett, M. R., in *In re Beryl*(1)).

For the above reasons I am decidedly of opinion that assessors do not form members of the Sessions Court and that, therefore, the Sessions Court was not illegally constituted since the first assessor was allowed to resume his seat as assessor. If assessors are members of the Court, and the first assessor acted as a member of the Court after his return, though he ceased to be an assessor in the case when once he departed on the 5th September and the case proceeded during his absence, it may be that the finding and sentence cannot be regarded as passed by a Court of competent jurisdiction and the defect could not be cured under section 537. In the course of argument, it was put to Mr. Adam, counsel for the appellant in No. 875, whether the finding and the sentence would have had to be quashed if the Judge had, at the conclusion of the trial, discovered his mistake in having permitted the first assessor to resume his seat as assessor and had therefore refrained from inviting his opinion but had invited the opinion of the other assessor only and had taken it into consideration. But for obvious reasons, the learned counsel did not venture to give a direct answer. The argument that assessors form members of the Court would have carried weight, if the question had arisen under Act VII of 1843 or under the Criminal Procedure Code of 1861; at any rate such argument would have been very plausible under section 32 of the said Act and under section 324 of that Code which ran as follows:—"In a trial before the Court "of Session not by jury the trial shall be conducted with the aid of two or "more assessors as members of the Court."

The phrase "as members of the Court" disappeared in the corresponding section 232 of Act X of 1872 and has not been re-introduced either in the Code of 1882 or in that of 1898.

Though assessors do not form members of the Court, yet inasmuch as it is mandatory that the Court should be aided till the conclusion of the trial by at least one assessor attending the trial throughout and giving his opinion, can it be maintained that the second assessor cannot, under the circumstances, be legally regarded as the remaining assessor who validly attended the trial subsequent to the return of the first assessor?

This question was not raised or argued. But to my mind that was the only question that required consideration, and it was with reference to that in particular that I have drawn attention to the various provisions of the Code relating to the constitution and the status of jurors and assessors. If assessors, like a jury, act as a body, though when the body is reduced to one the remaining assessor may act alone, the argument that the second assessor cannot be regarded as having legally continued to act as the remaining assessor after he

(1) L.R., 9 P. D., 141.

Digitized by Google

was associated with the first assessor who ought not to have been allowed to resume his seat as assessor and thus the two formed a body, would be conclusive. For, in that case, the opinion given would be not his individual opinion, but the opinion of the body consisting of himself and the first assessor and the constitution of the body being illegal, it would be just the same as if the trial had been continued without the aid of any assessor. But, for the reasons already given, it is clear that assessors do not form a body or tribunal, but each forms an entity in himself acting independently of his fellow assessor or assessors. The status, therefore, of the remaining assessor and the validity of his opinion as such is in no way legally affected by the first assessor having been, contrary to law, allowed to resume his seat as assessor and that probably in juxtaposition to the former.

The second contention above referred to in support of the preliminary ground is chiefly relied upon by the learned pleader who appeared for the appellant in Appeal No. 878. He argues that the Judge having invited the opinion of the first assessor as an assessor and having presumably taken the same into consideration in arriving at his conclusion in the case, his judgment is thereby vitiated and should therefore be set aside. He further argues that he is entitled to the judgment of the Sessions Court and that this Court as a Court of reference or appeal cannot substitute its own judgment for that of the Sessions Judge, after expunging from the record the opinion of the first assessor which was taken into consideration by the Sessions Judge. If this argument were sound, its result would simply be that the conviction and sentence would be quashed and the Sessions Judge would be directed to give a fresh judgment upon the evidence on the record without taking into consideration the opinion of the first assessor. One need hardly predict what the result would be in an assessor's case in which the Judge decides according to his own judgment and on his own responsibility, though he takes into consideration the opinions of the assessors. It is not alleged that beyond giving his opinion when he was invited to do so at the conclusion of the trial, the first assessor, after his return, took any part in the trial by putting any questions to the witnesses through the Court, or otherwise took any part in the trial beyond attending to it. Can it be argued that, though the second assessor validly continued as the remaining one assessor from and after the 5th of September, his opinion is vitiated and therefore invalidated by the first assessor having been invited to express his opinion first? If such a position can be maintained, it may then be said that it will be just the same as if the Judge had decided the case without inviting the opinion of assessors, in which case a new trial would have to be held. It may be that the first assessor happens to be a retired Sub-Magistrate and that the second assessor is an ordinary trader devoid of "forensic knowledge." But that circumstance cannot lead to any presumption either of fact or of law that the former is more competent to form an opinion upon the evidence in the case than the latter, or that the latter was influenced in giving his opinion by the previously expressed opinion of the former, assuming, as I suppose was the case, that such opinion was expressed in the presence of the latter. Even, if in fact, he was so influenced, his opinion will not be invalidated, whatever may be the value to be attached to such opinion, any more than the opinion of an assessor in any Sessions trial would be invalidated if in forming such opinion he was influenced by the eloquence or personality of the counsel for the accused in the case or the eloquence or personality of the Judge expressed now and then during the trial of the case. Under the law the opinion of an assessor, as I have already explained, is his own individual opinion, and it must be accepted as such whatever considerations

Digitized by Google

may have weighed with him in forming his opinion, and no evidence will be admissible to establish that his opinion was influenced by the opinion of a co-assessor or any other person, or by any other circumstance. If such a doctrine were accepted, where are we to stop? Suppose, in the present case, both the assessors had attended the trial throughout, would the trial have to be set aside because the opinion of second assessor, which echoed the opinion of the first assessor, was invalidated because it was influenced by it, and the Judge in a trial with the aid of two assessors is to have the benefit of the opinion of each assessor but that in reality "he had the opinion of only one assessor, which "opinion resulted in the concurrent opinion of two assessors wich must neces-"sarily have carried more weight with the Judge than the single opinion of "only one"?

The whole argument proceeds on a misapprehension of the functions of a Court of reference or appeal under the Indian law. It is not a mere Court of error, but the Court, as a Court of reference, appeal or revision is enjoined by sections 537, Criminal Procedure Code, and 167 of the Indian Evidence Act, not to reverse or alter the finding or sentence passed by a Court of competent jurisdiction on account of any error, omission, irregularity, improper admission or rejection of evidence, unless in its judgment such error, omission or irregularity has, in fact, occasioned a failure of justice or unless independently of the evidence objected to and admitted there was not sufficient evidence to justify the decision, or that if the rejected evidence had been received, it ought to have varied the decision. The only question which has now to be considered is whether the error or illegality committed by the Judge is one that is cured under either of the above sections, if this Court is satisfied, after rejecting the opinion of the first assessor, that the conviction is right and that there has been, in fact, no failure of justice and that the accused have in no way been prejudiced in their defence by the first assessor having been allowed to resume his seat. Section 167 of the Evidence Act does not directly apply to the case, because it applies only to improper admission or rejection of evidence, and technically the opinion of an assessor, which the Judge is to take into consideration in arriving at his conclusion, cannot be regarded as evidence any more than the confession of a co-accused affecting himself and others jointly tried with him for the same offence, which confession, under section 30 of the Evidence Act, the Court may take into consideration against such others, can be regarded technically as evidence (*Queen-Empress v. Khandia bin Pandu* (1).

The case, therefore, has to be dealt with under section 537 as an error or irregularity committed by the Judge in his proceedings during trial in that he invited and took into consideration the opinion of the first assessor as an assessor when in fact and law he had forfeited his status as assessor when he departed on leave and the further trial was not adjourned until his return. In determining whether such error or irregularity has in fact occasioned a failure of justice, this Court as a Court of reference or appeal will be guided by the principle laid down by section 167 of the Evidence Act in the analogous case of improper admission of evidence. Such is the course which is adopted when the Court below convicts a person upon the evidence on record taken along with the supposed confession of a co-prisoner if this Court considers that the so-called confession is no confession at all within the meaning of section 30, or that for some other reason it ought not to have been taken into

(1) I.L.R., 15 Bom., 66.

Digitized by Google

consideration by the Judge. This Court does not and ought not to quash the conviction simply on that ground and order a new trial or direct the Sessions Judge to pass a fresh judgment after dismissing from his consideration such supposed confession. But this Court takes and ought to take the responsibility of deciding whether independently of and apart from such confession the conviction ought to be upheld or set aside. Such confession not being technically evidence against the co-accused, the case is not dealt with directly under section 167 of the Evidence Act but has to be dealt with as an error or irregularity within the meaning of section 537 of the Code of Criminal Procedure. But in determining whether the error or irregularity is cured under that section, the Court is guided by the principle laid down by section 167 of the Evidence Act and I am at a loss to understand how it can be maintained that even if the finding and sentence appealed against were passed by a Court of competent jurisdiction, yet it cannot be cured under section 537 though this Court might come to the conclusion that the prisoners were not prejudiced in their defence by the irregularity complained of and that the conviction was right upon the evidence on record after expunging the opinion of the first assessor. It is argued that the opinion of an assessor is a judicial opinion and is not on the same footing as the opinion evidence of expert witnesses or on the same footing as the confession of a co-accused and therefore section 537, Criminal Procedure Code, can not be applied to the case. No doubt an assessor, like a juryman, is a public servant vide section 21, clause (5), Indian Penal Code, and like a juryman he is expected to form and give his opinion on the evidence given at the trial and not to act upon his personal knowledge of any relevant facts of the case without giving evidence of the same as a witness in the case (*vide* section 294, Criminal Procedure Code) and he may also, like the Jury, be allowed to put questions through the Court to witnesses under examination (*vide* section 166 of the Evidence Act). But the opinion of an assessor is certainly not a Judicial opinion in any sense, though one may not be so hypercritical as to object to its being characterised or referred to as *quasi*-judicial. But in my opinion, assessors are analogous to expert witnesses and in principle the opinion of an assessor is substantially on the same footing as the opinion evidence of expert witnesses. A brief retrospect of Indian legislation in regard to trial of criminal cases with the aid of assessors would clearly show that such is the correct view and it is also in conformity with the institution of assessors in England in civil cases, especially in admiralty, ecclesiastical, patent and similar cases (*vide* volume I of Encyclopædia of Laws of England, page 348). The earliest Indian legislation which authorised European functionaries presiding in Courts of Session to constitute two or more respectable natives to assist them as assessors " with a view to the " advantages derivable from their observations particularly in the examination " of witnesses " is Regulation VI of 1832 which was applicable only to Bengal. Act VII of 1843 extended that system to the Presidency of Madras, and it was provided by section 32 of that Act that Sessions Judges may, in the trial of criminal cases, avail themselves of the assistance of respectable natives or other persons by constituting two or more such persons assessors or members of the Court " with a view to the advantages derivable from their observations, parti- " cularly in examination of witnesses." It was further provided that the opinion of each of the assessors shall be given separately and discussed and, if so desired, recorded in writing. I may also observe that, under that Act, the opinion of assessors had a potentiality which it has ceased to have since the enactment of the Code of 1861. Thus it will be seen that provision was made

Digitized by Google

by the Legislature for Europeans administering justice in a foreign land and therefore deficient in their knowledge of the customs and habits of the parties and witnesses appearing before them and also deficient in judging of their demeanour in the witness-box, having the benefit of the opinion of two or more respectable natives of the land as assessors possessing such knowledge and judgment. Such being the principle underlying the institution of assessors in India, which is the same as that in England in the class of cases already referred to, the opinion of an assessor given upon the whole case tried before a Court of Session or any portion of such case is, in principle, on the same footing as the opinion evidence of a person specially skilled in foreign law, science or art.

On the ground, therefore, that assessors are not members of the Court of Session, that the trial in this case validly commenced with the aid of two assessors, that one of the assessors attended the trial throughout till its termination, that his status as an assessor has not been affected and his opinion recorded by the Judge at the conclusion of the trial has not been invalidated by the action of the Judge in allowing the first assessor to resume his seat as an assessor and inviting his opinion as one of the assessors at the conclusion of the trial, but that such action on the part of the Sessions Judge is only an error or irregularity in a proceeding during the trial, which, if it has not, in fact, prejudiced the accused, could be cured under section 537 of the Code of Criminal Procedure, I would overrule the priliminary objection and proceed to hear the case on the merits and affirm or set aside the conviction, according as, in the opinion of this Court, the evidence in the case without taking into consideration the opinion of the first assessor does or does not warrant the conviction of the prisoners.

The preliminary objection having been overruled, the case was heard on the merits.

The same counsel and vakils argued on the evidence.

The Public Prosecutor (*Mr. E. B. Powell*) appeared in support of the convictions.

In the result judgments were delivered on the merits in both the Referred Trials and in the connected Criminal Appeals, in which all their Lordships concurred in acquitting all the accused.

The question of conspiracy was dealt with by BHASHYAM AYYANGAR, J. as follows:—

BHASHYAM AYYANGAR, J.—The first count against the first and second accused in Sessions Case No. 53 of 1900, as finally amended, runs to the following effect:—" That you the accused Nos. 1 and 2 on or about the 19th March 1899 entered into a conspiracy with the ninth accused in the same case and one Subbi Reddi the accused in Sessions Case No. 1 of 1901 to murder the deceased Ranga Reddi and that in pursuance of that conspiracy Ranga Reddi was murdered on 11th June 1900 and that you first and second accused have thereby committed an offence punishable under sections 302 and 109 of the Indian Penal Code." The first part of the third count against the ninth accused in Sessions Case No. 53 of 1900 runs to the following effect —" That you the ninth accused on or about 19th March 1899 entered into a conspiracy with the first and second accused in the same case and one Subbi Reddi the accused in Sessions Case No. 1 of 1901 to murder Ranga Reddi in consequence of which the said Ranga Reddi was murdered on 11th June 1900." In Sessions Case No. 1 which was tried by a different Sessions Judge, the first count against

Digitized by Google

Subbi Reddi the accused in that case ran as follows :—"That you the accused on or about 19th March 1899 entered into a conspiracy with the first, second, and ninth accused in Case No. 53 to murder Ranga Reddi in pursuance of which conspiracy Ranga Reddi was murdered on 11th June 1900 and thereby you the accused committed an offence punishable under sections 302 and 109, Indian Penal Code."

The first and second accused in the former case and the accused in the latter case were also respectively charged with the offence of murder itself and the ninth accused in the former with the offence of abetting that murder by giving information to the first accused in the same case of the movements of Ranga Reddi on the 11th June 1900. The second count in the former case was not drawn with sufficient precision so as to charge first and second accused also with murder along with the accused Nos. 3, 4, 5, 6, 7, and 8. But it is clear that first and second accused were not misled by this inaccuracy and the defect therefore is cured by section 535(1) of the Criminal Procedure Code. In case No. 53 the accused Nos. 1, 2, and 9 have been acquitted of the so-called charge of conspiracy and the Government has preferred Appeal No. 1028 of 1900 against such acquittal. In Sessions Case No. 1 of 1901 the accused has been convicted not only on the count of murder but also on the so-called count of conspiracy and he has appealed in No. 143 of 1901 against his conviction on both the counts.

The count of conspiracy in both the cases proceeds on a misapprehension of the law bearing on the question, as is evident not only from the wording of the count but also from the fact that the first and second accused in Sessions Case No. 53 and the accused in Sessions Case No. 1 are also charged with the substantive offence of murder. The law bearing on the question of conspiracy under sections 107 and 109, Indian Penal Code, was considered by a Full Bench of this Court in the case of *Queen-Empress* v. *Subrahmania Ayyar*(1) and I entirely concur with Davies, Benson and Moore, JJ., in their opinion that under the Indian Criminal Law conspiracy is a mere species of abetment when an act or an illegal omission takes place in pursuance of that conspiracy and amounts to a distinct offence for each distinct offence abetted by conspiracy.

Under the English law the agreement or combination to do an unlawful thing or to do a lawful thing by unlawful means amounts in itself to a criminal offence. The Indian Penal Code follows the English law of conspiracy only in a few exceptional cases which are made punishable under sections 311 (Thug), 400 (belonging to a gang of dacoits), 401 (belonging to a gang of thieves), 402 (being a member of an assembly of dacoits) and 121 A (conspiring to wage war). In these cases whether any act is done or not or offence committed in furtherance of the conspiracy, the conspirator is punishable and he will also be punishable separately for every offence committed in furtherance of the conspiracy. In all other cases, conspiracy is only one species of "abetment of an offence" as that expression is defined and explained in section 108 and stands on the same footing as abetment "by intentional aiding." In regard to both these species of abetment, an act or illegal omission, in pursuance of the conspiracy or for the purpose of intentional aiding, is essential. If two or more persons conspire, the gist of the offence of abetment by conspiracy is not only the conspiracy but the taking place of an act or illegal omission in pursuance of the conspiracy and in order to the doing of the thing abetted. If a person at one and the same time instigates another to murder ten or more persons,

(1) Criminal Miscellaneous Petition No. 41 of 1900 (unreported.)

Digitized by Google

or to steal watches in the possession of ten or more persons, he will certainly have abetted ten or more murders and abetted ten or more thefts. It is perfectly immaterial whether the instigation was at one and the same moment of time or at different times. Similarly if two or more persons conspire to commit the murder of ten or more persons or to steal the watches belonging to ten or more persons, and one or more of them commits the murders or thefts in pursuance of that conspiracy, the others will be guilty of as many abetments of murders or abetments of thefts as have been committed. In my opinion the test is not whether the instigation or conspiracy constituted one act, but whether the act or acts abetted by instigation or conspiracy would, if committed by a person capable in law of committing an offence with the same intention or knowledge as that of the abettor, amount to one offence or more offences than one. In the former case there would be but one offence of abetment, but in the latter case as many offences of abetment as the number of substantive offences.

Section 10 of the Indian Evidence Act has, in my opinion, no bearing on the question as to how far conspiracy to commit an offence or actionable wrong is an offence under the Indian Penal Code.

It is a startling proposition to say that a man remains chargeable as an abettor by conspiracy or otherwise although he may also be chargeable, and that not in the alternative but cumulatively, as having committed the offence abetted. That is exactly what has been done in both the cases. The first and second accused in Sessions Case No. 53 and the accused in No. 1 have been charged both with the substantive offence of murder on the 11th June and the offence of conspiring to murder the deceased by murdering the deceased on the 11th in pursuance of such conspiracy. You can no more charge a man as an abettor as well as a perpetrator of the offence abetted, and that not in the alternative but cumulatively, than you can charge a man with an attempt to commit an offence and the commission of that very offence. In this connection it will be well to draw attention to section 144, Indian Penal Code, which provides that whenever any person, who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence. This section provides that he shall be deemed to have committed the offence itself and not simply that he shall be liable to the same punishment as if he had committed the offence.

In Sessions Cases No. 53 and No. 1, the first and second accused in the former and the accused in the latter are alleged to have been present when Ranga Reddi was alleged to have been murdered, and in fact to have taken the most active and leading part in the perpetration of the murder. Under these circumstances it is very strange that they should have been charged both with the murder of Ranga Reddi and with the abetment of such murder. The Public Prosecutor, when this was pointed out, said that he did not press his appeal against the acquittal or seek to uphold the conviction of the accused in Sessions Case No. 1 of 1901 on the count of conspiracy, the accused Subbi Reddi in that case having been convicted of and punished for both the substantive offence of murder and of abetment of the same by conspiracy, but that he relied on the instances of conspiracy proved with reference to the said counts as material evidence in regard to the charge of murder in both the cases and also the charge of abetment of murder against the ninth accused in Sessions Case No. 53 by giving information of Ranga Reddi's movements on 11th June. It is unnecessary to consider the question of misjoinder of offences raised by

Digitized by Google

the learned counsel for the respondents in Appeal No. 1028. In my opinion Appeal No. 1028 should be dismissed and the conviction of Subbi Reddi in Sessions Case No. 1 on the count of conspiracy quashed.

Note:—After delivery of judgment in this case, Mr. Justice Bhashyam Ayyangar addressed the Public Prosecutor and other members of the Bar appearing as counsel in the case, as follows:—" Now that judgment has been delivered in this case, I think it right that I should mention in public Court that, during the hearing of this appeal which extended over the greater portion of three weeks, I received by post three private communications addressed to me in connection with this case. They are all in the English language two bearing English signatures and one a Telugu signature. Whether these letters are genuine in the sense that the signatures are those of the authors or writers, or whether they are only pseudonymous, I am not now in a position to say. The first letter which I received and opened on the 2nd of April but which I read only this morning is a long one extending over four full pages of foolscap. It is a comment upon the evidence, or rather imaginary evidence, in the case and advances a number of arguments in favour of the conclusion which the writer wants to force upon me. The writers of the other two letters, each from his own standpoint, convey to me advice as to how I should deal with the case and in whose favour I should decide it both in the interests of justice and in my own interests. The authors of these three letters, whoever they may be, have committed a grave contempt of Court in sending by public post private communications to a Judge of this Court with the sole and deliberate object and set purpose of influencing his decision in a judicial matter of the highest importance to the public. These persons and others similarly disposed to tamper with justice ought to know that it is a high contempt of Court to communicate with or seek in any way to influence a Judge upon the subject of any judicial matter which he has to determine and that a Chartered High Court in India is a superior Court of Record which can summarily deal with contempts of Court though the same be committed otherwise than *in facie curiae*, which has the power to punish the offender by commitment in a summary way, a power which no doubt will be sparingly used but will certainly be used when there is the 'pressure of public necessity' and even then not to vindicate the dignity of the Court but in the interests of justice and in view to repress tampering with justice.' I now hand these three letters with their envelopes to the Registrar of the Court."

1901 *April* 24. **I. L. R. 24 Mad. 641.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Davies.

KING-EMPEROR *v.* KRISHNA AYYAR.§

Criminal Procedure Code—Act V of 1898, s. 403 [4]—Previous acquittal—Acquittal by assessors on charge of abetment of dacoity with murder—Subsequent conviction by jury of receiving stolen property—" Court competent to try the offence subsequently charged."

Five persons were charged before a Sessions Judge, sitting with assessors, with having committed dacoity with murder under section 396, Indian Penal Code, and a sixth, with abetting them. The abettor was acquitted. He was, however, subsequently charged before the Sessions Judge, sitting with a jury, with receiving stolen property knowing that it had been obtained by dacoity, under section 412 of the Indian Penal Code. The jury returned a verdict of guilty, and the accused was convicted and sentenced. The facts on which the accused was convicted of receiving stolen property were the same as those upon which he had been acquitted of abetment of dacoity with murder, the dacoity by which the stolen property was alleged to have been received being the same as that which had formed the subject of the previous charge. On its being contended that the Court had power to try the accused a second time under sub-section 4 of section 403 of the Criminal Procedure Code, inasmuch as a charge of receiving stolen property must be tried by a jury; and that in consequence the Court by which the accused had first been tried was not a Court competent to try the present charge.

Held, that the conviction was bad.

APPEAL against a conviction and sentence on a charge of dishonestly receiving stolen property knowing that it was obtained by dacoity, under

§ Criminal Appeal No. 33 of 1901.

Digitized by Google

section 412, Indian Penal Code. Accused had previously been tried, together with five others, before a Judge and assessors, in Sessions Case No. 67 of 1900, on the file of the Sessions Court of Madura, with abetment of dacoity with murder, under sections 396 and 109 of the Indian Penal Code. The other five accused in that case were charged with dacoity with murder. The evidence was that on the morning of 1st April 1901, a dacoity had taken place to the east of a tank at Sengulam; and that in the course of that dacoity one Venkatachalam Pillai had been killed. The only question was whether the six accused then before the Court were the persons who had committed or abetted the dacoity. The evidence was that money had been found in a niche in the house of appellant, and also in the house of one Ranga Ayyangar, which had been placed there by the appellant. The result of the trial was that all the other five prisoners were found guilty and sentenced to transportation for life. The present appellant was however acquitted, the Sessions Judge, agreeing with the assessors, finding that there was no evidence that he had taken part in the dacoity or that he had aided or abetted it. Appellant was subsequently charged and tried before a jury, in Sessions Case No. 109 of 1900, on the file of the same Court, with the offence of receiving stolen property, as already stated. In the latter case, the property was alleged to have been obtained at the same dacoity, namely, that committed on 1st April 1901, near Sengulam tank, and in the course of which Venkatachalam had been killed. The jury returned a verdict of guilty and the Sessions Judge delivered the following judgment:—"I fully agree with the verdict of the jury. I have no doubt that the accused was concerned in the conspiracy that culminated in the Sengulam dacoity and the murder of Venkatachalam. He must have known that the money he hid in Ranga Ayyangar's terraced house was stolen property, and his friendship with Somasundaram Pillai must have made him know that the money was part of the proceeds of the dacoity. I see no reason to make any distinction between those who took part in the dacoity and him who remained in the back-ground and wanted to take a big share of the proceeds of the dacoity. I therefore sentence him to transportation for life."

Against this conviction and sentence, the accused preferred this appeal.

Sundara Ayyar for the accused.

The Public Prosecutor (Mr. *E. B. Powell*) in support of the conviction.

JUDGMENT.—The ground of this appeal is that the accused has already been acquitted on the same facts, and that by virtue of section 403 of the Criminal Procedure Code he cannot be tried for the offence for which he has now been convicted.

The accused was first charged with abetment of dacoity with murder. He was tried by the Sessions Court with the aid of assessors and was acquitted. He was afterwards charged with the offence of receiving stolen property, and was tried before the Sessions Judge and a jury, and the jury returned a verdict of guilty. The Judge accepted the verdict and convicted the accused of the offence of receiving stolen property. The Public Prosecutor concedes that he is unable to show that the facts on which the accused was convicted of the offence of receiving stolen property differ from the facts on which he was acquitted of the offence of abetment of dacoity with murder. But he relies on sub-section (4) of section 403 of the Criminal Procedure Code which is in the following terms:—

"A person acquitted or convicted of any offence constituted by any act "may, notwithstanding such acquittal or conviction, be subsequently charged

Digitized by Google

" with, and tried for, any other offence constituted by the same acts which he " may have committed if the Court by which he was first tried was not com- " petent to try the offence with which he is subsequently charged. " Under the rule made under the powers conferred by section 269 of the Code of Criminal Procedure a charge of receiving stolen property must be tried by a jury.

We are of opinion that " the Court by which he was first tried, " *i.e.*, the Court of Sessions, was competent as a Court of Session to try the offence of receiving stolen property. The illustrations (*f*) and (*g*) show that the words " was not competent to try " mean " had not jurisdiction to try." The charge of receiving stolen property not being a charge triable with the aid of assessors, it was open to the Judge to empanel a jury to try it. Even if he had proceeded to try the case with the aid of assessors and no objection had been taken before the Court had recorded its finding the trial would not have been invalid on that ground only, and if the Judge had convicted, the conviction could not have been impeached ; see section 536 (2) of the Code of Criminal Procedure. These provisions of the law are quite inconsistent with the contention put forward by the prosecution that the Court by which the accused was first tried was not " competent to try " the charge of receiving stolen property. The appeal must be allowed and the conviction set aside. The accused must be set at liberty.

1901 *May*. 3. **I. L. R. 24 Mad. 660.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Davies.

KING-EMPEROR *v.* TAKASI NUKAYYA.*

Workman's Breach of Contract Act—Act XIII of 1859, ss. 1, 2—Failure to comply with order of Court—Criminal Procedure Code.—Act V of 1898, s. 4 (o)—" Offence. "

The offence created by the Workman's Breach of Contract Act (XIIIof 1859) is not the neglect or refusal of the workman to perform his contract, but the failure on his part to comply with an order made by the Magistrate directing the workman to repay the money advanced or perform the contract.

(NOTE :—This case has been Approved of in I. L. R. 28 Madras 37.)

COMPLAINT under the Workman's Breach of Contract Act, (XIII of 1859), section 1. A complaint was lodged by a Mr. Chapman as agent of a Mr. Putman, charging defendant, a workman, with having taken Rs. 500 from complainant's master for work to be performed, and with having failed to perform the work. When complainant's deposition was taken, it appeared that the contract had been entered into, not by him, but by Mr. Putman, and the objection was raised that, under section 1 of the Act, the complaint had been wrongly brought. Mr. Chapman, thereupon, withdrew the complaint, with permission of the Court. The Magistrate, however, recorded that the accused was " acquitted under section 248 of the Code of Criminal Procedure." A fresh complaint was subsequently lodged against the same defendant by Mr. Putman, in respect of the same default. The Magistrate then delivered the following judgment:— " Mr. Putman of Ellore complains against the accused under section 1 of the Contract Act. A complaint for the same breach was filed by Mr. Putman's agent (Mr. Chapman) and it having been withdrawn, the accused was acquitted under section 248, Code of Criminal Procedure—*vide* judgment in Calendar

* Criminal Appeals Nos. 22 and 23 of 1901,

Digitized by Google

Case No. 72 of 1900. The accused now objects that, under section 403, Code of Criminal Procedure, he is not liable to be tried again for the same offence. The complainant urges that the trial under the first part of section 2 of the Contract Act is not a criminal proceeding and as such the Code of Criminal Procedure does not apply to such trials. But he does not point out what the procedure should be for such trials. He relies on *Averan Das Mochi* v. *Abdul Rahim*(1) . . . . This ruling is quite a recent one having been issued in February 1900. But it is quite opposed to the local High Court's proceedings No. 436, dated 14th March 1879 (Weir's 'Code,' pages 458 to 460), in which it has been clearly laid down that 'a breach of contract to which Act XIII of 1859 relates is an offence other than an offence for which a Police officer may arrest without a warrant.' If, as held by the Madras High Court, a breach of contract is a criminal offence, the Code of Criminal Procedure applies to such offences and such cases being summons cases, the procedure laid down for summons cases should be observed under section 5 of the Criminal Procedure Code. If this view be correct, a person acquitted under section 248, Code of Criminal Procedure, cannot be re-tried for the same offence on the same facts. In the present case the facts are the same and the only change is in the complainant. The first complaint was withdrawn as it was found out that the contract was not entered into with the complainant or that he was the employer or master or acted as an agent as specified in section 1 of the Act. The present complainant alleges himself to be the employer and that the contract has been entered into with him. In the previous case accused was acquitted after trial had been commenced. Consequently under section 403, Code of Criminal Procedure, the accused cannot be re-tried for the same breach. Following the local High Court's ruling quoted above, which is quite clear, I stop all further proceedings and acquit the accused under section 245, Code of Criminal Procedure.

Against that order of acquittal the Public Prosecutor preferred these appeals.

Mr. *D. Chamier*, for the Public Prosecutor, contended that the first order which purported to acquit the defendant was no bar, as it was, in fact, not an acquittal at all. It was impossible for the Magistrate to have acquitted on the first charge, because no offence had at that time been committed. The mere failure to perform a contract is not an offence under Act XIII of 1859. An offence, in respect of which punishment may be inflicted, is only committed when a workman against whom an order has been already made under the Act, disobeys that order. His disobedience to the order constitutes the offence under section 2 of the Act.

The accused was not represented.

JUDGMENT.—*In Criminal Appeal No. 22.*—The offence created by the Workman's Breach of Contract Act (XIII of 1859) is not the neglect or refusal of the workman to perform his contract, but the failure by the workman to comply with an order made by the Magistrate that the workman repay the money advanced, or perform the contract. In the present case, the complainant withdrew the case before the Magistrate had made any order. Consequently, there had been no offence under the Act and there was nothing to acquit him of. It is not necessary for us to consider whether the Code of Criminal Procedure applies to offences under the Act. Here there was no offence and the Magistrate was quite wrong in proceeding upon the assumption that the Code

(1) I.L.R., 27 Calc., 131 at pp., 132 and 133.

Digitized by Google

of Criminal Procedure applied and that it was his duty to "acquit" under section 248 of the Code. The order of the Magistrate in so far as it allows the complainant to withdraw the case will stand. In so far as it purports to acquit the defendant it must be set aside.

In Criminal Appeal No. 23.—It follows from what has been said above that the Magistrate's order based on the view that the defendant had already been "acquitted" in the same matter must also be set aside. We direct the Magistrate to restore the case to his file and deal with it according to law.

1901 *April* 17, 18. *July* 18. **I. L. R. 24 Mad. 662.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

KING-EMPEROR *v.* ANTAKKE.§

Penal Code—Act XLV of 1860, s. 317—Exposure of child with intention to abandon—Ingredients of offence.

Upon a charge being preferred against a mother of exposure and abandonment of her child, under section 317, Indian Penal Code, the Sessions Judge believed that the accused had left the child at a particular spot with the intention that it should be found and cared for by the owner of a neighbouring house. He acquitted her, holding that the offence charged had not been committed, inasmuch as the child had been deliberately placed where it would be, (as in fact it was), found and looked after:

Held, that the acquittal was wrong. The gist of the offence under section 317 is the exposure or leaving with intention to wholly abandon, and the manner of exposing or leaving, and the consequences likely to ensue are not essential ingredients, though they may be taken into consideration in passing sentence.

APPEAL preferred by the Public Prosecutor under section 417 of the Code of Criminal Procedure against an acquittal.

The facts are set out in the following judgment.

The Public Prosecutor, (Mr. *E. B. Powell*), for the Crown.

JUDGMENT.—The accused, who is a beggar woman and a widow, deposited her illegitimate child about three months old close by a channel some 200 yards from the house of one Kartha, and went away to another village without informing any one of her movements, and evidently without any intention of returning to the child. The child was found by Kartha and was taken care of by him, but it was a sickly child previously and died after a few days. The evidence does not show whether the exposure caused, or contributed to, the death of the child.

The Sessions Judge came to the conclusion that the accused intended that the child should be found and cared for by Kartha, as she left it near the spot whence his household draw their water from the channel. The Sessions Judge therefore acquitted the accused of the offence with which she was charged under section 317, Indian Penal Code, observing that that section "must "be interpreted on the principle expressed in the English Statute, and that, "in order to be criminal, the exposure and abandonment must be under such "circumstances as endanger the safety of the child. Here the child was deli-"berately placed, where it would be, as it was, found and looked after. Hence "the offence with which the prisoner is charged was not committed (*Queen-"Empress* v. *Felani Hariani*(1))".

---

§ Criminal Appeal No. 276 of 1901.

(1) 16 W. R., (Cr. R.), 12.

Digitized by Google

The Public Prosecutor now, on behalf of the Government, appeals against the acquittal. The case cited by the learned Sessions Judge is not an authority for the view taken by him and the same observation applies to the case of *Queen-Empress* v. *Mirchie*(1) referred to by the Public Prosecutor.

We have no doubt but that the view taken by the learned Sessions Judge is incorrect. The language of section 317 of the Indian Penal Code is altogether different from the language of the English Statute 24 and 25 Vict., chapter 100, section 27. The words of the latter are "whosoever shall unlawfully "abandon or expose any child being under the age of two years whereby the "life of such child shall be endangered, or the health of such child shall have "been or shall be likely to be permanently injured shall be guilty of a misde-"meanour." The words of the Indian Penal Code are "whoever being the "father or mother of a child under the age of twelve years, or having the care "of such child, shall expose or leave such child in any place with the intention "of wholly abandoning such child shall be punished, &c." Under the English Statute, it is necessary to prove that the life of the child was endangered, or that its health was permanently injured or was likely to be so injured by the exposure. Under the Indian law there is no such limitation. The gist of the offence under the Indian law is the exposure or leaving of the child in any place with the intention of wholly abandoning it. Here, as in many other places in the Penal Code, the Legislature looks mainly to the intention of the accused person rather than to the consequences of the act done, which form an essential element of the offence under the English law. The language used in section 317, Indian Penal Code, is perfectly clear and unambiguous, and where this is so, it is contrary to correct canons of interpretation to go outside that language and to read into the section words which do not find any place in it and which altogether alter its scope and effect. Had the Legislature desired to re-produce the English law, it would have found no difficulty in doing so in appropriate words.

The manner of the exposure or leaving and the consequences likely to ensue from it are not essential ingredients of the offence under the Indian law, though they may often be properly taken into consideration in estimating its gravity and in apportioning the sentence.

We must set aside the acquittal and convict the accused Antakke of an offence under section 317, Indian Penal Code. Looking to the destitute condition of the accused and to the finding that the child was left where it would probably be found and cared for, we think that the ends of justice will be satisfied by a comparatively light sentence.

We direct that the prisoner Antakke be punished with six months' rigorous imprisonment.

---

(1) I.L.R., 18 All., 364.

Digitized by Google

1901 *July* 22, 30. I. L. R. 24 Mad. 675

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

KING-EMPEROR *v.* AYYAN (ACCUSED IN CRIMINAL REVISION CASE No. 127 OF 1901), AND VELLAYAPPA UDAYAN (ACCUSED IN CRIMINAL REVISION CASE No. 128 OF 1901).§

Criminal Procedure Code—Act V of 1898, s. 530—Trial of an accused by Magistrate not empowered by law—Charge of giving false evidence under s. 193, Indian Penal Code—Trial by First-class Magistrate though facts disclosed offence under s. 194 as well—Jurisdiction.

Certain witnesses made statements in a preliminary enquiry before a Magistrate, in a case of alleged murder, and contradicted those statements at the trial before the Court of Session. The latter then sanctioned their prosecution for giving false evidence in a judicial proceeding, an offence punishable under section 193 of the Indian Penal Code, and triable by a Magistrate of the first class. The Deputy Magistrate, by whom they were tried, convicted them, and the accused appealed, the appeals being transferred to another Sessions Court for hearing. The Sessions Judge held that inasmuch as the false statements had been made in connection with a charge of murder, the offence for which the accused should have been tried fell under section 194, Indian Penal Code, and that, in consequence, they could be tried only by a Court of Session and not by a Magistrate of the first class. He considered their trial by a First-class Magistrate to be void under section 530 of the Code of Criminal Procedure, and set aside their conviction, committing one of them for trial by a Court of Session on a charge under section 194 of the Indian Penal Code, and making no order in respect of the other accused as he considered the imprisonment already undergone was sufficient :

Held, that the order was wrong as the proceedings of the First-class Magistrate were not void within the meaning of section 530 of the Code of Criminal Procedure.

Queen-Empress v. Gundya, (I. L. R., 13 Bom., 502) referred to.

THE facts of this case appear in the head-note, and, more fully, in the judgment.

A. T. Ambrose for accused in Criminal Revision Case No. 127 of 1901,

T. Ramanujachariar for accused in Criminal Revision Case No. 128 of 1901.

JUDGMENT.—Certain witnesses made statements in a preliminary enquiry into a murder case before a Magistrate and contradicted those statements at the trial before the Sessions Court of South Arcot. The Sessions Court then sanctioned their prosecution for offences punishable under section 193, Indian Penal Code, in that they had made contradictory statements, both on oath, one or other of which must necessarily be false. They were accordingly convicted by the Deputy Magistrate of an offence punishable under that section for having given false evidence by making statements, one or other of which must have been false. The Deputy Magistrate took no evidence to show which of the two statements was false and recorded no finding on that point. The accused appealed to the Sessions Court of South Arcot, and their appeals were transferred to the Sessions Judge of Chingleput who, on hearing the appeals, came to the conclusion that the statements made by the appellants at the preliminary enquiry were probably false, and as the case was one of murder, he held that the offence committed by the appellants was propably one punishable under section 194, Indian Penal Code, and was therefore triable exclusively by the Court of Session and not by a Magistrate of the first class. He held that as the facts indicated an offence under section 194, Indian Penal Code, the Magistrate had no jurisdiction to try the appel-

§ Criminal Revision Cases Nos. 127 and 128 of 1901.

Digitized by Google

lants for an offence punishable under section 193, Indian Penal Code. He accordingly set aside the conviction under that section. In one case (Appeal No 20) he did not direct any further proceedings, as he considered the imprisonment already undergone sufficient punishment. In the other case [Appeal No. 21] he ordered the appellant to be committed for trial by the Sessions Court on a charge under section 194, Indian Penal Code. On a perusal of the calendars, this Court called for the records with a view to revise the orders of the Sessions Judge, and in sending up the records the learned Sessions Judge has submitted a note, setting forth in much detail his view of the law and arguments in support thereof.

When he wrote this note we presume the learned Sessions Judge had received the Judgment of this Court in *King Emperor* v. *Virasami* (1) in which, dealing with a precisely similar case from his Court a divisional bench of this Court held that the Sessions Judge had taken an incorrect view of the law. The accused was not charged with an offence punishable under section 195, Indian Penal Code. The Deputy Magistrate tried him for an offence punishable under section 193, Indian Penal Code, and he had jurisdiction over that offence. Under the rulings of this Court, it cannot be said that the Deputy Magistrate acted without jurisdiction, even though the offence actually amounted to one punishable under section 195. We think that the learned Sessions Judge might well have accepted that decision. As, however, he still thinks that the decisions of this Court support his view it seems necessary to reiterate the correct view of the law. The Sessions Judge relies on section 530 (*p*) of the Criminal Procedure Code. It runs: "If any Magistrate not "being empowered by law in this behalf . . . . tries an offender his pro-"ceedings shall be void." The meaning of this is that if a Magistrate tries an offender for an offence beyond his jurisdiction his proceedings shall be void. In the present case the Deputy Magistrate did not try accused for an offence beyond his jurisdiction. He tried him for an offence punishable under section 193, Indian Penal Code, *i.e.*, for an offence triable by a First-class Magistrate and therefore within his jurisdiction. His proceedings therefore were not void and the Sessions Judge was wrong in treating them as void. Where the facts disclose an offence within the jurisdiction of the Magistrate it seems to us a complete fallacy to say he is not empowered by law to try the person charged for the offence which is within his jurisdiction because the same facts disclose a more serious offence which is beyond his jurisdiction. He is expressly so empowered. Whether in so doing he adopts a proper course is another question. No doubt it is improper on the part of a Magistrate to intentionally ignore circumstances of aggravation which show that an offence beyond his jurisdiction was in fact committed as well as an offence within his jurisdiction, as, for instance, if a Second-class Magistrate should ignore the violence used in committing theft and should deal with the case himself as one of theft (section 379), instead of sending the accused before a First-class Magistrate to be tried for robbery (section 392). Here the action of the Second-class Magistrate would be improper but his proceedings would not be void. If the improper action of the Second-class Magistrate had led to a failure of justice as, for instance, by causing the punishment to be inadequate, it would be open to the proper authorities to apply a remedy by instituting a second prosecution on the same facts for the more aggravated offence (section 403, Criminal Procedure Code). It would also, in our opinion, be open to the revising

(1) Criminal Revision Case No. 78 of 1901 (unreported.)

Digitized by Google

and appellate authorities to set aside the Magistrate's proceedings and order a fresh trial, if such a course was required in the interests of justice but not otherwise; and the reason for setting them aside would be, not that they were void *ab initio*, but because they were improper and the interests of justice required them to be set aside. The Sessions Judge has failed to appreciate the difference between proceedings which are without jurisdiction and therefore void, and proceedings which are improper and therefore liable to be set aside, though not void. It is this failure which we think, has led the Sessions Judge to misunderstand the various judgments of this Court to which he refers. Whether the High Court as a Court of Revision or the Appellate Court ought to interfere in any particular case depends entirely on the facts of the case and whether such interference is called for in the interests of justice.

The view that we have stated is, we think, in accordance with that taken by the Bombay High Court in *Queen Empress* v. *Gundya*[1] as to the construction of section 530 [*p*], Criminal Procedure Code, and with the whole tenor of the decisions of this Court both before and since that provision of the Code was enacted in 1882. For present purposes it is sufficient to refer to the cases quoted by the Sessions Judge from Weir's 'Law of Offences,' 3rd edition, at pages 259, 701, 965, 967 and 1060. If the learned Sessions Judge will re-read these cases and bear in mind the distinction which we have pointed out between proceedings which are without jurisdiction and therefore void, and proceedings which are improper and therefore liable to be set aside though not void, he will, we think, find that they lend no countenance to his views as to the proper construction to be placed on section 530 [*p*] but are in accordance with the law as stated by us. The language of these cases is so explicit that it is unnecessary to refer to them in detail. The learned Sessions Judge has, however, so completely misunderstood and (no doubt unintentionally) misquoted the case at page 259 that it is necessary to refer briefly to it. In that case a First-class Magistrate had tried and convicted two offenders for offences punishable under section 392, Indian Penal Code. The Sessions Judge referred the cases on the ground that the offences were punishable respectively under sections 394 and 397, Indian Penal Code, and that the Magistrate therefore had no jurisdiction to try the offenders for an offence punishable under section 392. The High Court pointed out that under the law then in force the Magistrate had no jurisdiction to try an offence under section 394, and the High Court went on to observe that it was for the Magistrate, in his discretion, to decide whether he would dispose of the case himself [*i. e.*, as one under section 392] or commit the accused to the Court of Session (*i. e.*, as one under section 394). It further observed that as the case was of a trivial nature "the Magistrate exercised a sound discretion in disposing of it under section 392." It would be difficult to imagine a decision more directly opposed to the present Sessions Judge's view. We observe, however, that he supposed that an offence under section 394 was then, as it is now, triable either by a First-class Magistrate or by a Court of Sessions and this has, no doubt, misled him. The Criminal Procedure Code of 1861 was then in force and under it an offence under section 394, Indian Penal Code, was triable exclusively by a Court of Session, as indicated by the High Court in its judgment. It was not until the Criminal Procedure Code of 1872 was passed that an offence under section 394 became triable by a First-class Magistrate or a Court of Session.

[1] I. L. R. 13 Bom. 502.

Digitized by Google

In the second of the two cases dealt with by the High Court the accused had committed an offence punishable under section 397, Indian Penal Code (robbery armed with a deadly weapon). The Magistrate tried him for an offence under section 392 and convicted him. The High Court set aside the conviction and ordered a commitment to the Court of Session, not, as the present Sessions Judge supposes, because an offence under section 397 is triable exclusively by the Court of Session, but because an offence under that section must be punished with a minimum of seven years' rigorous inprisonment, and it was therefore impossible for a Magistrate, whose powers are limited to two years' imprisonment, to impose a sentence such as the law required. The High Court, no doubt, speaks of the provision as to the minimum sentence taking the case "out of the jurisdiction of the Magistrate." But we do not understand that the High Court meant that the trial by the Magistrate for an offence under section 392 was void. What the High Court said was, "The "sentence . . . . is illegal and must be quashed. The prisoner should "be committed to the Sessions Court." That order was no doubt the most appropriate order that could be made in the case, but having regard to the manner in which this High Court in the same proceedings disposed of the case under section 394, we do not understand that the High Court considered the trial under section 392 as held without jurisdiction and therefore void. The view rather seems to have been that as the sentence required by law had not been and could not be passed by the Magistrate, the case must go before a Court competent to pass such sentence, and it was therefore expedient to quash the minor sentence of the Magistrate and order a commitment to the Sessions Court where a legal sentence could be passed. The Sessions Judge has set aside the convictions in the two cases before us on the sole ground that the Deputy Magistrate had no jurisdiction to deal with the cases, and that his proceedings were therefore void under section 530 [*p*], Criminal Procedure Code. As the view of the law taken by the Sessions Judge is incorrect, and as on the merits he was of opinion that both the accused had given false evidence we set aside his orders in both cases. We think that the sentences imposed by the Magistrate were adequate and that there is no need to order further proceedings in regard to the offences which the Sessions Judge considers may have been committed under sections 194 and 195, Indian Penal Code. The sentences imposed by the Magistrate must be given effect to.

Digitized by Google

VOL. XXV.

1901 *August* 8, 16. **I. L. R. 25 Mad. 15.**

Before Mr. Justice Davies and Mr. Justice Moore.

THE MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS (COMPLAINANTS), PETITIONERS, *v.* MAJOR BELL (DEFENDANT), COUNTER-PETITIONER.§

Criminal Procedure Code—Act V of 1898, s. 197—Necessity for sanction to prosecute public servant—Cases in which the fact that accused is a public servant is a necessary element in the offence—City of Madras Municipal Act (Madras)—Act 1 of 1884, s. 341.

Under section 341 of the City of Madras Municipal Act, any person bringing or causing to be brought timber within the City of Madras without a license, obtained on payment of a fee, is liable to a fine. The Superintendent of the Gun Carriage Factory in Madras, who is an officer holding a commission in the Royal Artillery, brought or caused to be brought timber within the aforesaid limits without license. On a complaint being lodged against him under the section, it was contended that he was a public servant within the meaning of section 197 of the Code of Criminal Procedure and that the Court could not take cognizance of the offence inasmuch as the sanction referred to in section 197 had not been obtained:

Held, that sanction was not necessary, as the offence charged was not one which could be committed only by a public servant, nor did it involve as one of its elements that it had been committed by a public servant.

Nando Lal Basak v. *Mitter*, (I. L. R., 26 Calc., 852), followed.

(*Note:* This case is Referred to in I. L. R. 30 Cal. 927.)

COMPLAINT preferred by the Municipal Commissioners for the City of Madras against Major C. T. Bell, R.A., under section 341 † of the City of Madras Municipal Act, for having brought timber into the City of Madras without payment of import license fees due thereon. Sanction for the prosecution had not been obtained, and it was contended that it was not necessary. A previous complaint had been preferred of a similar nature, against the same defendant, who had, however, been then charged as Superintendent of the Gun Carriage Factory. The present complaint set out the name and private address of the defendant, and made no mention of his official position as Superintendent of the Gun Carriage Factory. The previous summons had been dismissed.

The Chief Presidency Magistrate made the following Order:—"This is an application by the municipality charging Major Bell, Superintendent of the Gun Carriage Factory, with having, on various specified dates, brought into Madras City, certain quantities of timber without obtaining a license on payment of the fees due thereon, and without payment of the licensing fees, as required by section 341 of the City of Madras Municipal Act I of 1884, thereby committing an offence punishable under the section quoted.

§ Criminal Revision Case No. 74 of 1901.

† Section 341 of the City of Madras Municipal Act (I of 1884) enacts as follows:—"No timber or firewood shall be brought within the City, without a license specifying the place and conditions of storing, to be issued by the President under the bye-laws, on payment of a fee which shall not exceed the following rates: timber, Rs. 5 per ton; firewood, 6 annas per ton. Whoever without such license, or after such license has been suspended or cancelled, brings or causes to be brought within the City any timber or firewood, shall be liable to a fine not exceeding one hundred rupees. When any timber or firewood, in respect of which a license fee has been paid under this section, is exported beyond the limits of the City, nine-tenths of the fee levied thereon shall be refunded."

Digitized by Google

"The application is substantially the same as that made before me in November last. It has been amended by inserting the name of Major Bell as the accused in place of the Superintendent, Gun Carriage Factory. I am therefore in effect asked to revise my own order. This I cannot do. Viewing that decision, for which no reasons were assigned in the light of the arguments now put forward, I make the following remarks :—

"In presenting the present application, counsel for the municipality referred to section 1 (2) of the Criminal Procedure Code and urged that in the absence of a special proviso, section 197 of the Code could not be applied to the detriment of his client. The latter section requires a mere formality to be observed before cognizance can be taken of the offence; this cannot, I think, be said to "affect," in the sense in which the word is used in section 1 [2], the Local Act in question.

"It was also argued that sanction under section 197 was unnecessary. The learned counsel quoted *Nando Lal Basak* v. *Mitter*[1], wherein it was held that the sanction required related only to those acts or omissions by a Judge or public servant, which are declared, by any Act or Statute relating to India, to be offences, when they are committed by a Judge or public servant in their capacities as such.

"Had Major Bell of his own initiative caused any steps to be taken, which would render him liable to pains and penalties under the Municipal Act, the ruling relied on might possibly apply.

"In this instance the act committed was not a personal one, Major Bell was directed by Government, as he informed the Court, to do that for which the municipality now seek to prosecute him for doing.

"The Secretary of State is responsible for the acts of public servants done within the scope of their authority. If proceedings can be instituted against Major Bell, which I doubt, the offence herein alleged against him appears to me essentially one requiring the sanction of Government under section 197 of the Code before cognizance can be taken of it. The application is refused."

Against that order the Municipal Commissioners preferred this criminal revision petition under sections 435 and 439 of the Code of Criminal Procedure and article 15 of the High Court Charter Act, 1861, and article 28 of the Letters Patent.

Mr. *K. Brown*, for the petitioners.—Sanction is unnecessary and the trial should be proceeded with. *Nando Lal Basak* v. *Mitter*[1] shows that no sanction is necessary under section 197 of the Code of Criminal Procedure, unless the public servant commits an offence in his official capacity. The principle of the cases is that sanction is only necessary where the act complained of can have no special signification except as an act done by a public servant. The fact that the accused is a public servant must be a necessary element in the offence. The case of *Reg* v. *Parshram Keshav*(2), referred to in the Calcutta case, was decided on the Code of 1861, which contained a provision in section 167 * practically the same as the section of the present Code.

(1) I.L.R., 26 Calc., 852. (2) 7 Bom. H.C.R., (Cr.), 61.

* Section 167 of Act XXV of 1861 [Criminal Procedure Code] enacted as follows :—"A charge of an offence punishable under the Indian Penal Code, of which any Judge or any pub-

Digitized by Google

[DAVIES, J.—At the date of that decision, the word "offence" was defined as applying only to offences under the Indian Penal Code, but now the definition includes an offence under any law.] The enlargement of the definition does not lessen the authority of *Reg* v. *Parshram Keshav*(1), because the Code of Criminal Procedure then in force covered all offences in the Indian Penal Code, under which the charge was laid. [MOORE, J., enquired whether it must be taken that whatever the defendant had done, had been done by him in his capacity of Superintendent to the Gun Carriage Factory.] The timber was consigned to the Gun Carriage Factory. The decision in *Reg* v. *Parshram Keshav*(1) was approved by West and Pinhey, JJ., in *Imperatrix* v. *Lakshman Sakharam*(2) and the Bombay cases have been approved by Prinsep and Hill, JJ., in *Nando Lal Basak* v. *Mitter*(3). The judgment of Parker, J., sitting as a single Judge, in *In re Gulam Muhammad Sharif-Daulah*(4) is really not applicable, as it was decided on section 197* of the Code of 1882. The earliest section relating to sanction is section 167 of the Code of 1861, (Act XXV of 1861), and is practically similar in effect to section 197 of Act V of 1898; and *Reg* v. *Parshram Keshav*(1) was decided on section 167 of Act of 1861. Section 466 † of the Code of 1872, [Act X of 1872], contains the words "in his capacity as such public servant," which are not unlike those used by Parker, J., in *In re Gulam Muhammad Sharif-ud-Daulah* (4), namely, "in his official capacity." The word "capacity" is now omitted, and the only question is whether the defendant is charged "as such publics ervant." The reasoning in *In re Gulam Muhammad Sharif-ud-Daulah* (4) might be good as based on the former Code, but cannot govern a case to be decided under the present Code. The sixth form of indictment in Mayne's 'Criminal

---

lic servant not removeable from his office without the sanction of the Government, is accused as such Judge or public servant, shall not be entertained against such Judge or public servant except with the sanction or under the direction of the Local Government, or of some officer empowered by the Local Government, or of some Court or other authority to which such Judge or public servant is subordinate, and whose power so to sanction or direct such prosecution the Local Government shall not think fit to limit or reserve."

(1) 7 Bom. H.C.R., (Cr.), 61.
(2) I.L.R., 2 Bom., 481 at p. 485.
(3) I.L.R., 26 Calc., 852.
(4) I.L.R., 9 Mad., 439

* Section 197 of Act X of 1882 [Criminal Procedure Code] enacts as follows :—"When any Judge, or any public servant not removeable from his office without the sanction of the Government of India or the Local Government, is accused as such Judge or public servant of any offence, no Court shall take cognizance of such offence, except with the previous sanction of the Government having power to order his removal, or of some officer empowered in this behalf by such Government, or of some Court or other authority to which such Judge or public servant is subordinate, and whose power to give such sanction has not been limited by such Government. Such Government may determine the person by whom, and the manner in which, the prosecution of such Judge or public servant is to be conducted, and may specify the Court before which the trial is to be held."

† Section 466 of Act X of 1872 (Criminal Procedure Code) enacts as follows :—"A complaint of an offence committed by a public servant in his capacity as such public servant, of which any Judge or any public servant not removeable from his office without the sanction of the Government is accused as such Judge or public servant, shall not be entertained against such Judge or public servant, except with the sanction or under the direction of the Local Government, or of some officer empowered by the Local Government, or of some Court or other authority to which such Judge or public servant is subordinate, and whose power so to sanction or direct such prosecution the Local Government shall not think fit to limit or reserve. No such Judge or public servant shall be prosecuted for any act purporting to be done by him in the discharge of his duty, unless with the sanction of Government. The sanction must be given before the commencement of the proceedings. The Local Government may limit the person by whom, and the manner in which, the prosecution is to be conducted, and may specify the Court before which the trial is to be held."

Digitized by Google

Law ' supports my contention. It contains the phrase " being a police peon and as such a public servant." No doubt sanction would be necessary for a charge brought in that form. Here the defendant is not charged as a public servant, and section 197 has no application at this stage of the case. Section 197 might easily have included the words used in the Police Act of 1861, section 43, *i. e.*, " in such capacity; " or those used in Act XVIII of 1850, *i.e.*, " in his judicial capacity." Those Acts were both enacted at about the time when the section relating to sanction was first introduced into the Criminal Procedure Code. It is submitted, therefore, that if the defendant is not charged as a public servant the Magistrate is bound to take cognizance of the offence, and it is immaterial if it is disclosed that he is a public servant. The offence under section 341 of the City of Madras Municipal Act may be committed by any one, whether public servant or not, whereas an offence in chapter IX of the Code of Criminal Procedure can only be committed by a public servant who is really acting in that capacity. Here it may be the duty of the defendant to remove timber, but the offence consists,—not in removing it, but in removing it without obtaining the necessary license. It is also submitted that section 197 has no application to a prosecution under the Madras Municipal Act, this being a " special or local law," within the meaning of section 1 of the Code of Criminal Procedure, and only some of the provisions of the Code of Criminal Procedure are made applicable by the City of Madras Municipal Act.

The Advocate-General (Hon. Mr. *J. P. Wallis*), for the defendant.—Section 5 (2) of the Code of Criminal Procedure applies the whole Code to " all offences under any other law, " and provides that such offences shall be " investigated . . . . and otherwise dealt with," and so section 197 is applicable to this case and sanction is necessary. This is an " offence " within the meaning of section 4 (*o*) of the Code of Criminal Procedure and there is nothing in section 197 to show that its operation should be limited, while the definition of an "offence" in section 4 (*o*), as including "any act or omission made punishable by any law for the time being in force" must be taken to include "any offence," and there is no authority for dividing offences into categories, and holding that the Code applies to some and not to others. There is no real conflict between section 4 and section 5 of the Code of Criminal Procedure. The Code relates entirely to procedure, and the proviso in the second paragraph of section 1 must be construed as relating only to any special or local law relating to procedure, if there is one, and if there is not, the Code of Criminal Procedure is applicable. The City of Madras Municipal Act contains no provisions relating to procedure, and so the procedure to be followed in charges under it must be taken from the Code of Criminal Procedure. Where there is an absence of authority the sections of the Code must be construed on their plain wording. Section 197 uses the phrase "any offence" and should be read with section 4[*o*].

Mr. *K. Brown*, in reply.

The Court delivered the following judgments :—

MOORE, J.—The Municipal Commissioners for the City of Madras made a complaint before the Chief Presidency Magistrate against Major Bell, the Superintendent of the Gun Carriage Factory, alleging that he had, on certain occasions, specified in the written complaint, brought or caused to be brought from the Salt Cotaurs Station of the Madras Railway Company within the City of Madras certain logs of wood which had been consigned to him as Superintendent without obtaining a license on payment of the fees due thereon, and had thereby committed an offence punishable under section 341 of the City

Digitized by Google

of Madras Municipal Act The Chief Presidency Magistrate rejected the complaint on the ground that before cognizance could be taken of the offence with which Major Bell was charged, the sanction of Government should be obtained under section 197 of the Criminal Procedure Code. This is an application put in on behalf of the Municipal Commissioners praying the High Court to revise the proceedings of the Chief Presidency Magistrate, and direct him to proceed with an enquiry into the complaint preferred to him.

The question for consideration is whether Major Bell, the Superintendent of the Gun Carriage Factory, is accused of having committed the offence laid to his charge as such Superintendent. A number of decisions of the various High Courts have been referred to at the hearing of this matter, but owing to the manner in which the section of the Criminal Procedure Code now under consideration has been altered from time to time from 1861 to 1898, these decisions do not go far to help us in interpreting the section as it now stands. For example, section 107 of the first Criminal Procedure Code (Act XXV of 1861) related to charges of offences punishable under the Indian Penal Code only and the Circular of the Calcutta High Court issued in 1864 and the dicision of the Bombay High Court in *Reg* v. *Parshram Keshav*(1), must be read in the light of that fact. If section 197 of the present Criminal Procedure Code referred to cases under the Penal Code only there can be no question that it must be decided that no sanction is necessary for Major Bell's prosecution. In section 4 (o), however, of the Criminal Procedure Code now in force "offence" is defined as meaning "any act or omission made punishable by any law for the time being in force."

Further, section 466 of the Criminal Procedure Code of 1872 (Act No. X) which corresponds with section 167 of the Act of 1861, provides that no complaint of an offence committed by a public servant in his capacity as such servant should be entertained without sanction, and there is also in this section the following most important paragraph, "No such Judge or public servant shall be prosecuted for any act purporting to be done by him in the discharge of his duty unless with the sanction of Government." If this paragraph were to be found in the present Criminal Procedure Code I can entertain no doubt that we should be obliged to hold that Major Bell could not be proceeded against without sanction. The unreported case of *Sreemanto Chatterjee* decided in 1881 and alluded to (*vide* page 860) in the judgment in *Nando Lal Basak* v. *Mitter*(2) was decided under this section and it was there held by Mr. Justice Pontifex that by virtue of the paragraph now under consideration, sanction was necessary in the case of the public servant whom it was then proposed to prosecute. Mr. Justice Field, however, expressed the opinion that the first paragraph of section 466 was intended to apply to those cases in which the offence charged is an offence which can be committed by a public servant only, cases, that is, in which being a public servant is a necessary element in the offence. This expression of opinion is of importance in view of the fact that the first paragraph of section 197 of the Criminal Procedure Code of 1898 differs but little from the first paragraph of section 466 of the Act of 1872, and that the second paragraph of this latter section has not been reproduced in either the Criminal Procedure Code of 1882 or that of 1898.

There is one slight alteration in the first paragraph of section 197, as found in the Acts of 1882 and 1898, as compared with the corresponding section (466) in the Act of 1872, to which considerable importance has been attached

(1) 7 Bom. H.C.R., (Cr.), 61. (2) I.L.R., 26 Calc., 852 at p. 860.

Digitized by Google

at the hearing of this petition. This is as follows:—In the older Act the section opens, "A complaint of an offence committed by a public servant in his capacity as such public servant, &c." While in the two later Acts the words "in his capacity as such public servant" have been omitted. It does not appear to me that much importance can be attached to this alteration. I cannot see any real distinction between an offence committed by a public servant in his capacity as such public servant, of which a public servant is accused as such public servant [Section 466 of Act X of 1872] and "an offence of which a public servant is accused as such public servant" (*vide* section 197 of the Criminal Procedure Code of 1898). The wording of the revised paragraph has been made simpler and less involved than it was previously, but the meaning, I think, remains the same.

On the other hand, great importance must, in my opinion, be attached to the exclusion from the Acts of 1882 and 1898 of the paragraph in the Act of 1872 providing that no public servant can be prosecuted for any act purporting to be done by him in the discharge of his duty unless with the sanction of Government. I agree with Mr. Justice Field in the interpretation that I have already quoted put by him on the section as it stands after the omission of this paragraph, an interpretation which has been followed by the Calcutta High Court in a recent case where the learned Judges, after reviewing all the decisions hold that "the language of the section—'is accused as such Judge'—must involve, as one of its elements, that it was committed by a person filling that character." Accepting as correct the interpretation put in these two decisions on this section by the Calcutta High Court it follows that the sanction of Government was not necessary in the present case. It cannot be held that the offence of bringing wood into the City of Madras without a licence is one which could be committed by a public servant only or that such an offence involves as one of its elements that it was committed by [*e.g.*] the Superintendent of the Gun Carriage Factory. It would, in my opinion, be unreasonable to assume that the most important paragraph to which I have already alluded, protecting public servant not removeable from office except by Government from prosecution without sanction for all acts done by them in the discharge of their duty, was not dropped out of the Code of Criminal Procedure deliberately and for some cogent reason. Such reason was, I think it may be fairly presumed, a consideration of the grave inconveniences which would result if it were to be held that all public servants who are not removeable from office without the sanction of the Government of India or the Local Government were to be exempted from criminal liability for all acts amounting to offences done by them while acting in their official capacity unless sanction could be obtained for their prosecution under section 197 of the Criminal Procedure Code [*vide Nando Lal Basuk Mitter* [1]].

I am, for the foregoing reasons, of opinion that in the present case sanction was not necessary and that the Chief Presidency Magistrate should therefore be directed to take the complaint against Major Bell on his file and dispose of it according to law.

DAVIES. J.—I concur.

Mr. *Douglas Grant*—Attorney for the petitioners.

Mr. *E. Barclay*—Attorney for the counter-petitioner.

---

(1) I.L.R., 26 Calc., 852 at p. 862.

Digitized by Google

P. C. 1901 *June* 26, 28, *August* 2. **I. L. R. 25 Mad. 61.**

PRIVY COUNCIL.

SUBRAHMANIA AYYAR (APPELLANT), *v.* KING-EMPEROR [RESPONDENT].

[On appeal from the High Court of Judicature at Madras.] *

Criminal Procedure Code—Act V of 1898, ss. 233, 234, 235 [1]—Misjoinder of charges—Trial by jury on indictment in which charges have been wrongly joined—Irregularity in criminal proceedings—Count charging continued acts of abetment of extortion and bribery—Penal Code—Act XLV of 1860, ss. 109, 161 and 384—Evidence Act—Act I of 1872, s. 167.

The appellant was tried at the Criminal Sessions of the High Court, and convicted, on an indictment the first count of which contravened the provisions of sections 233 and 234 of the Code of Criminal Procedure [which provide that every separate offence shall be charged and tried separately, except that three offences of the same kind may be tried together in one charge if committed within the period of one year], and did not fall within the provisions of section 235 [1] [which provides that if, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence]. On a case certified under article 26 of the Letters Patent and heard by the Full Court, it was held by the majority of the Court that the union of the first count with the others made the whole indictment bad for misjoinder, but that it was open to them to strike out the first count, rejecting the evidence with regard to it, and deal with the evidence as to the remaining counts of the indictment. This was done with the result that the conviction was upheld on one count only, the sentence being reduced.

Held, by the Judicial Committee that the disregard of an express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by section 537 of the Criminal Procedure Code. Such a phrase as " irregularity " is not appropriate to the illegality of trying an accused person for more different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one indictment.

Smurthwaite v. *Hannay*, ([1894] A.C., 494), referred to. *In the matter of Abdur Rahman*, (1900) I.L.R., 27 Calc., 839), dissented from.

Nor could such illegal procedure be amended by arranging afterwards what might or might not have been properly submitted to the jury. To allow this would leave to the Court the functions of the jury, and the accused would never have been really tried at all upon the charge afterwards arranged by the Court. The trial having been conducted in a manner prohibited by law was held to be altogether illegal and the conviction was set aside.

(*Note* :—This case has been Judicially noticed in the following cases *viz* :—Followed in 29 Cal. 385 ; 4 Bom. Law R. 54, 433, 440. Distingnished in 24 All. 255 ; 8 Cal. W. N. 344. Explained in 26 Bom. 533 ; 26 Mad. 594. Referred to in 26 Mad. 127 ; 8 Cal. W. N. 180 ; 26 All. 195 ; 1904 All. W. N. 165 ; 6 Bom. Law R. 725 ; 31 Cal. 928. Approved of 1904 All. W. N. 223. Followed in 28 Mad. 438. Distinguished in 32 Cal. 183, 1085, 1088. Ref. 28 All. 214.)

APPEAL from a decision of the High Court under article 26 of the Letters Patent of 1865, which modified the verdict of a jury in a case tried in the ' Original Criminal Jurisdiction of the Court,' and the sentence pronounced in pursuance of such verdict, and sentenced the appellant to two years' rigorous imprisonment and a fine of Rs. 5,000, and in default of payment of the fine to a further term of nine months' imprisonment.

The appellant, Subrahmania Ayyar, was superintendent of the military accounts department, Madras. One J. L. P. D'Santos was supervisor of the same department subordinate to the appellant.

---

* *Present* : LORDS CHANCELLOR [HALSBURY], MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY.

Digitized by Google

On 8th November 1899 the Chief Presidency Magistrate of Madras framed ten charges against the appellant and D'Santos for offences under sections 109, 161 and 384 of the Penal Code, and committed them for trial on the said charges to the High Court of Madras. The case came on for hearing at the First Criminal Sessions for the Town of Madras for 1900, when the appellant and D'Santos were jointly charged under the above sections upon an indictment which contained seven counts.

The first count stated as follows :—

" That they, the said Subrahmania Ayyar and the said J. L. P. D'Santos, being public servants to wit. respectively, deputy examiner, superintendent and supervisor of the accounts branch of the military accounts department in or about the month of March 1896 did conspire and combine together and thereafter until the month of November 1898 did continue so to conspire and combine, for the purpose of extorting money and obtaining illegal gratifications from clerks in the accounts branch of the military accounts department for himself, the said Subrahmania Ayyar, in pursuance of and according to which said conspiracy and combination the said Subrahmania Ayyar did obtain for himself through the said J. L. P. D'Santos divers sums of money, to wit, from one Kalyana Chetti during the years 1896-97 and 1898 sums amounting in the aggregate to Rs. 680 ; from one Balasundara Mudali the sum of Rs. 100 on or about August 27th, 1896, the sum of Rs. 50 on or about March 1st, 1897, and the sum of Rs. 100 on or about May 10th, 1897 ; from one Srinivasa Chari the sum of Rs. 100 on or about October 2nd, 1898 ; and from one Vedachala Chetti the sum of Rs. 5 in August 1898, the sum of Rs. 5 in September 1898, the sum of Rs. 3 in October 1898, and the sum of Rs. 3 in November 1898, and that they have thereby committed an offence punishable under sections 109 and 384 and sections 109 and 161 of the Penal Code, and within the cognizance of the High Court of Judicature at Madras aforesaid."

The second, fourth and sixth counts charged the appellant with having on or about 27th August 1896, the 1st March 1897 and 10th May 1897, respectively, dishonestly induced one Balasundara Mudali to pay to himself through the said J. L. P. D'Santos the sums of Rs. 100, Rs. 50 and Rs. 100, the first and second of such acts being charged as an offence punishable under sections 161 or 384 of the Penal Code, while the third was charged as an offence under sections 109 and 161.

The third, fifth and seventh counts charged D'Santos with having abetted the appellant in the commission of the offences set out in the second, fourth and sixth counts, respectively, and as being thereby punishable under sections 109 and 161 or 384.

The case certified under article 26 of the Letters Patent by the officiating Advocate-General after setting out the counts of the indictment state so far as it is material for this report as follows :—

" 2. That the said Subrahmania Ayyar pleaded not guilty to the first, second, fourth and sixth counts of the charges framed against him, and was tried by the Hon'ble Mr. Justice Boddam and a special jury between the 14th February and 12th March 1900 when the said Subrahmania Ayyar was convicted on the first, second and sixth counts of the charges framed against him, and acquitted under the advice of the said learned Judge on the fourth count, and the said learned Judge thereupon sentenced him to three years' rigorous imprisonment and a fine of Rs. 8,000.

Digitized by Google

" 3. That before the jury were empanelled Mr. Daly, who appeared as Counsel for the Crown, moved before the learned Judge that pardon should be tendered to D'Santos and that he should be examined as a witness for the Crown.

" 4. That the learned Judge thereupon directed that the pleas of the accused D'Santos on the various counts of the charges framed against him, namely, the first, third, fifth and seventh counts, should be first recorded, before pardon was tendered.

" 5. That the said D'Santos pleaded guilty to each of the said counts under the advice of Mr. Daly, Counsel for the Crown.

" 6. That the said learned Judge then proceeded to tender pardon to the said D'Santos under section 338 of the Criminal Procedure Code, when it was objected by Counsel for Subrahmania Ayyar that the tender of pardon would be *ultra vires*, firstly, because the offences in question were not exclusively triable by the High Court, and secondly, because pardon could not be tendered to the said D'Santos as he had already pleaded guilty.

" 7. That the said learned Judge overruled the objection taken by Counsel for Subrahmania Ayyar and tendered pardon to the said D'Santos under section 338 of the Code of Criminal Procedure, and the said D'Santos was examined as a witness for the Crown on 26th and 27th February 1900 and his evidence was placed by the learned Judge before the jury along with the other evidence in the case.

" 8. That when the indictment was read out and before plea objection was taken by Counsel for Subrahmania Ayyar to his trial on the first count on the ground, firstly, that the said count which charged both the accused with one offence of conspiracy, disclosed no offence under the Penal Code ; secondly, that even if it did, it could not be tried at one trial under sections 233 and 234 of the Code of Criminal Procedure along with the second, fourth, and sixth counts ; and thirdly, that assuming the said count should be construed as charging the said Subrahmania Ayyar with various and distinct offences in respect of several matters of alleged extortions of money and illegal gratifications, exceeding three in number, therein specified as having occurred between March 1896 and November 1898, three of which form respectively the subject matter of the second, fourth, and sixth counts against the said Subrahmania Ayyar, it could not, under the provisions of sections 233 and 234 of the Code of Criminal Procedure be tried at one trial, and that such a trial would prejudice the said Subrahmania Ayyar in the view of the jury, and embarrass him in his defence ; that the said objections were overruled by the learned Judge and the indictments were allowed to stand and the evidence allowed to be adduced on behalf of the Crown in respect of the first count which evidence was not relevant to the second, fourth, and sixth counts."

The material clauses of the certificate given by the officiating Advocate-General were—

" (*a*) That in my judgment the learned Judge who presided at the First Criminal Sessions of the High Court of Judicature at Madras for 1900 erred in law in deciding that it was competent to him to tender a pardon to D Santos notwithstanding that none of the offences in respect of which the said Subrahmania Ayyar was being tried was, within the meaning of the Criminal Procedure Code, exclusively, triable by the High Court, and that therefore the learned Judge erred in law in admitting the evidence given by D'Santos as a witness for the Crown after pardon had been tendered to him and in placing the same before the jury.

Digitized by Google

"(*b*) That in my judgment the said learned Judge erred in law in not striking out the first count from the indictment but trying and convicting the said Subrahmania Ayyar on it and in allowing evidence to be adduced by the Crown in respect of the first count as regards matters of alleged extortions of money and illegal gratifications therein specified other than those forming the subject matter of the second, fourth, and sixth counts and placing them before the jury.

"(*c*) That in my judgment the said learned Judge erred in law in trying the said Subrahmania Ayyar on the first, second, fourth, and sixth counts at one trial."

Upon this certificate the case was heard twice before the Full Court of six Judges (SIR ARNOLD WHITE, C. J., and SHEPHARD, DAVIES, BENSON, BODDAM, and MOORE, JJ.). It was heard first upon the questions of law, and afterwards upon the facts.

On the questions of law all the Judges held that the offer of a pardon to D'Santos was illegal, but all with the exception of DAVIES, J., held that his evidence was still admissible.

As to the first count, while the CHIEF JUSTICE, and SHEPHARD and BODDAM, JJ., held that it was good, BENSON, DAVIES and MOORE, JJ., held that it was bad. All the Judges except BODDAM, J., held that, whether it was good or bad, its union with the remaining counts made the whole indictment bad for misjoinder. But all the Judges except DAVIES, J., who gave a qualified opinion, thought that it was open to them to strike out the first count and deal with the evidence applicable to the remaining counts.

On the final hearing upon the facts, all the Judges were of opinion that the appellant should be acquitted on the second count. They also agreed in thinking that D'Santos was utterly untruthful and that no reliance whatever could be placed upon his evidence. As to the sixth count, which alone remained, all the Judges, except DAVIES, J., were of opinion that after excluding the evidence of D'Santos and disbelieving, as they did the evidence of Sivachandra, there was enough left to support the conviction of the appellant on the sixth count. DAVIES, J., thought that the charge being laid as one of bribery, the evidence of Balasundara was the evidence of an accomplice which, according to the invariable practice of the Courts in India, required corroboration. As to Sivachandra he said "Now, whether this story be true or false it is no corroboration of Balasundara's story and brings nothing home to the first accused. I therefore find that there is no legal evidence upon which the sixth count can be supported. Supposing again that I am wrong in appreciating the evidence, surely it was a case in which the jury might have doubt . . . . and might have given the accused the benefit of the doubt." Then he relied on the judgment of the Lord Chancellor in *Makin* v. *Attorney-General for New South Wales* (1) as showing that, where the accused was entitled to the finding of a jury, it was not open to the Court, upon different evidence from that which had been before the jury, to pronounce that he was guilty.

The result was that in modification of the original sentence the Court sentenced the appellant to a term of two years' rigorous imprisonment and a fine of Rs. 5,000, and in default of payment of the fine to a further term of nine months' imprisonment.

(1) [1893] [1894] A. C., 57.

Digitized by Google

The following are the material portions of the judgments of the Court on the questions of law :—

SIR ARNOLD WHITE, C.J.,—The first point of law which is raised in the certificate of the officiating Advocate-General is with reference to the pardon tendered to the second accused . . . . The question of the legality of the pardon turns entirely upon the construction of sections 337 and 338 of the Code of Criminal Procedure. On principle it is difficult to see why the discretionary power of the Judge of a Sessions Court or of a Judge of the High Court to tender a conditional pardon should, when a case has been committed to a Sessions Court or to the High Court, be limited to cases which were, in the first instance, " exclusively triable by the Court of Session or High Court." However, the effect of the words " such offence" in section 338 is to restrict the scope of the section to the offences referred to in section 337, namely, offences triable exclusively by the Court of Session or High Court. The offences in the present case were not triable exclusively by a Court of Session or the High Court. It has been expressly decided by the Calcutta High Court that a Sessions Judge cannot tender a pardon to an accused under section 338 of the Code of Criminal Procedure when the offence for which he has been committed is not triable exclusively by the Court of Session--*Queen-Empress* v. *Sadhee Kasal* (1). On the construction of sections 337 and 338 I am constrained to hold that it was beyond the powers of the learned Judge to tender a conditional pardon, and that the learned Judge erred in law in deciding that it was competent to him to tender a pardon to the second accused.

With reference to the question of the legality of the pardon the certificate of the officiating Advocate-General proceeds to state that " therefore " (*i.e.*, by reason of the fact that it was not competent for the learned Judge to tender a pardon to the second accused), in the judgment of the officiating Advocate-General " the learned Judge erred in law in admitting the evidence given by the second accused as a witness for the Crown and in placing the same before the jury." In my view the question of the admissibility of the evidence of the second accused as a witness for the Crown must be considered independently of the question of the legality of the pardon. The course of events at the trial was this. On behalf of the Crown an application was made that a conditional pardon might be tendered to the second accused. The learned Judge declined to consider the application until the second accused had pleaded to the charges preferred against him. The second accused then pleaded guilty on the first, third, fifth and seventh counts of the indictment and his plea was recorded. The learned Judge then tendered a pardon to the second accused under section 338 of the Code of Criminal Procedure following the words of section 337, and the second accused was then removed from the dock. This is the statement of the learned Judge as to what took place at the trial and his statement is conclusive. If the learned Judge had made it a condition of pardon that the second accused should plead guilty, other questions would no doubt have arisen for consideration. The learned Judge however made no such condition, and the real question therefore which we have to consider is whether, apart from the question of pardon, the second accused, in the events which happened, became a competent witness for the Crown. This question is not raised in the certificate of the officiating Advocate-General, but inasmuch as it has been fully argued on both sides, and inasmuch as it is impossible for this Court to " review the case " as we are empowered to do by article 26 of the Letters Patent without determining this point, I proceed to deal with it.

(1) (1884) I. L. R., 10 Calc., 936.

Digitized by Google

The English practice, when an accomplice is to be called for the Crown, is either (i) not to include him in the indictment, (ii) to take his plea of guilty or otherwise withdraw his case from the jury before calling him, (iii) to offer no evidence against him on the indictment and take an acquittal before calling him, or (iv) to enter a *nolle prosequi*. In the case of *Winsor* v. *The Queen*(1) it was held by the Exchequer Chamber on a writ of error from the Court of Queen's Bench that when two prisoners were jointly indicted and pleaded "not guilty," but only one was given in charge to the jury, the other was an admissible witness although his plea of " not guilty " remained on the record undisposed of. Unless precluded from so doing by any express provision of the law of India, I should be prepared to apply the principle of this decision to the facts of the present case and to hold that, when the second accused had pleaded guilty, as between him and the Crown, no issue remained to be tried, and that his incompetency to give evidence was removed, notwithstanding that, at the time he gave his evidence, his plea of guilty remained on the record undisposed of.

In support of the view that the evidence of the second accused was inadmissible, it has been argued that the plea of guilty, in itself, did not amount to a conviction; that at the time he gave his evidence the trial of the second accused was not at an end and that he then was an " accused person " and therefore incompetent to give evidence on oath. Our attention was drawn to a number of sections of the Code of Criminal Procedure [sections 243, 245, 246, 255, 257, 263 [*g*] and [*h*], 305, 306, 307, 309, 412 and 562], as showing that the Code of Criminal Procedure contemplates some further proceeding by the tribunal before which the admission of guilt is made or the plea of guilty is pleaded, before the admission or the plea becomes a " conviction." The word " conviction " with its cognate expressions would seem to be used somewhat loosely in the Procedure Code. For example in section 271 "convicted " seems to mean nothing more than "sentenced" since the Code contains no other provision for dealing with an accused person who pleads guilty. It may be that it would have been more strictly regular if the learned Judge, after recording the plea of guilty, had stated or recorded in set terms that he convicted the second accused on his plea of guilty. But, in my judgment, the question of the admissibility of the evidence of the second accused ought not to be decided on the narrow and technical ground that he had not been " convicted " in the sense in which the word is used in certain sections of the Code of Criminal Procedure, but on the broad ground that when he gave his evidence he was not in charge of the jury and no issue remained to be tried between him and the Crown.

The authorities relied upon by the defence are in no way in conflict with this view. In *Reg.* v. *Hanmanta*(2) the Bombay High Court held that the evidence given by a person who had received a pardon in the case of an offence not exclusively triable by the Court of Session was not relevant inasmuch as the witness had not been acquitted or discharged or convicted. So far as can be gathered from the report the witness would seem to have pleaded " not guilty." In any case the question of the effect of a plea of guilty was not raised or considered. The same observation applies to the judgments of the Allahabad High Court in *Empress of India* v. *Asghar Ali*(3) and *Queen-Empress* v. *Kallu*(4). The cases in which it has been held that, when one of two persons jointly charged pleads guilty, his confession is not admissible aga-

(1) (1866) L.R., 1 Q.B., 390.
(2) (1877) I.L.R., 1 Bom., 610.
(3) (1879) I.L.R., 2 All., 260.
(4) (1884) I.L.R., 7 All., 160.

Digitized by Google

inst the other, are illustrations of the proposition that, when an accused person has pleaded guilty, nothing remains to be tried as between him and the Crown. In *Queen-Empress* v. *Pahuji*(1) *A* and *B* were charged with murder. *A* pleaded guilty, but he was not convicted or sentenced till the conclusion of the trial of *B*. the Sessions Judge took into consideration as against *B* a confession made by A. The Court held that after A had pleaded guilty he could not be treated as being jointly tried with B, and his confession therefore was not admissible as against *B* under section 30 of the Indian Evidence Act. In *Reg.* v. *Kalu Patil* (2) it was held by the Bombay High Court that a prisoner who pleads guilty at the trial and is convicted and sentenced cannot be said to be tried jointly with other prisoners committed on the same charge who plead not guilty: and in *Venkatasami* v. *The Queen* (3) where the prisoner at the time he gave his evidence had pleaded guilty but had not been sentenced, a Judge of this Court decided the same point in the same way. A Divisional Bench of this Court has recently decided (see *Queen-Empress* v. *Chinna Pavuchi*(4)), that a trial does not necessarily come to an end with a plea of guilty. Using the word trial in its popular and not in its technical sense this is a proposition which is indisputable. In the present case the 'trial' —in the non-technical sense—of the second accused had obviously not come to an end when he gave his evidence seeing that after he had given his evidence he was sentenced on his plea of guilty. But the question is not whether his trial had come to an end, but whether his incompetency to give evidence had been removed. In my judgment when the second accused gave his evidence, he was not an incompetent witness, and an oath could be lawfully administered to him. I think his evidence against the first accused was rightly admitted.

The next question for consideration is whether the first count of the indictment is bad . . . . . The count alleges that the two accused in the month of March 1896 conspired, and until November 1898 continued to conspire to extort money and obtain illegal gratifications from clerks for the first accused, and that, in pursuance of this conspiracy, the first accused obtained for himself through the second accused divers sums of money from four individuals. The count specifies the moneys thus alleged to have been obtained. For the purposes of the question now under consideration it is sufficient to say that the sums of money thus specified are more than three in number, and that the period during which, it is alleged, these sums of money were obtained exceeds one year. The count then charges both accused with having committed an offence under sections 109 and 384 and sections 109 and 161 of the Penal Code. Under the English Law the agreement or combination to do an unlawful thing or to do a lawful thing by unlawful means amounts in itself to a criminal offence. The only provision in the Indian Penal Code which makes the mere combining or conspiring without more, a criminal offence is contained in section 121-A, which provides:—" Whoever within or without British India conspires to commit any of the offences punishable by section 121, or to deprive the Queen of the sovereignty of British India or any part thereof, or conspires to overawe, by means of criminal force, or the show of Criminal force the Government of India or any local Government, shall be punished with transportation for life or any shorter term or with imprisonment of either description which may extend to ten years. *Explanation.*—To constitute a conspiracy under this section it is not necessary

(1) (1894) I.L.R., 19 Bom., 195.
(2) (1874) 11 Bom., H.C.R., 146.
(3) (1883) I.L.R., 7 Mad., 102.
[4] [1899] I.L.R., 23 Mad., 151.

Digitized by Google

that any act or illegal omission shall take place in pursuance thereof." Section 107 of the Penal Code provides that a person abets the doing of a thing who "engages with another person in a conspiracy for the doing of that thing if an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing." Explanation 2 to section 108 provides that "to constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused." Section 107 does not create any offence. It merely specifies three ways in which the doing of a thing may be abetted. Under this section the offence of an abetment of an offence by instigation may be committed, although nothing is done as the result of the instigation, but it is a necessary ingredient of the offence of an offence by conspiracy that an act or illegal omission should take place in pursuance of the conspiracy. Thus, a charge of abetment of an offence by conspiracy which did not allege an act done in pursuance of the conspiracy would, under the Indian law, be bad upon the face of it. Section 108 provides:—"A person abets an offence who abets either the commission of an offence, or the commission of an act which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor." Section 109 provides the punishment for the offence of abetting an offence. It is in these terms:—Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence." This section does not say "if the offence is committed," but "if the act abetted is committed." This shows that in cases of abetment by conspiracy a punishable offence has been committed as an act has been done in pursuance of the conspiracy. I do not think the words "act abetted" are used in section 109 as a synonym for "offence." No doubt there are sections of the Penal Code, in which the word "act" is used as meaning "offence." But in section 109 and in the illustration thereto a distinction seems to be drawn between an act abetted, and an offence committed. The first count charges a continuous abetment of an offence by conspiracy. The allegations as to things done or in the phraseology of the English Law "overt acts" are not allegations of separate offences, and are not charged as such; they are allegations of things done in pursuance of the conspiracy which may or may not amount to offences in themselves. These acts are charged in order that the jury may draw the inference, if, in their opinion, the evidence supports such inference, that the offence of abetment of extortion or abetment of bribery by conspiracy has been committed. In my opinion the first count only alleges one offence—that of the abetment of an offence by conspiracy. In my opinion, apart from the question as to whether changes in the substantive law could be effected by the provisions of a Code of Procedure, it was not the intention of the Legislature, by the introduction into the Procedure Code in 1872 of the section which corresponds with section 233 of the present Code, to alter or modify, either as to form or substance, the law of abetment by conspiracy as laid down in the Penal Code. Further, the proposition that, in laying a charge of conspiracy by abetment, the number of overt acts, which can be alleged, is restricted to three by reason of sections 233 and 234 of the Code of Criminal Procedure is inconsistent with the express provisions of section 10 of the Evidence Act, 1872. It has been objected that the first count contains charges of abetment by conspiracy of two offences—bribery and extortion. Having regard to the provisions of sections 235 (2) and 236 of the

Digitized by Google

Code of Criminal Procedure, this objection cannot be sustained. In my opinion the first count charges only one offence, the form in which it is drawn does not contravene any of the provisions of the Procedure Code, and the count, in itself, is a good count.

The next point of law which has to be considered is the question of the legality of the trial of the first accused on the first, second, fourth and sixth counts at one trial. As to this the officiating Advocate-General certifies that, in his judgment, the learned Judge erred in law in trying the first accused on the first second, fourth and sixth counts at one trial. In my opinion the indictment, as a whole, is bad for misjoinder, and the learned Judge erred in law in trying the first accused on the first, second, fourth and sixth counts at one trial. The first count charges, as against the first accused, the offence of abetment of bribery, or of extortion, by conspiracy. This is a distinct offence. The second count charges against him a specific act of bribery or extortion committed on 27th August 1896. This is a distinct offence. The fourth count charges against him a specific act of bribery or extortion committed on 1st March 1897. This is a distinct offence. The sixth count charges against him a specific charge of bribery committed on 10th May 1897. (It was admitted by the junior Counsel for the Crown that it was intended by this count to charge the substantive offence, and not the abetment of an offence. The reference to section 109 must be taken to be a clerical error. Otherwise the count is meaningless.) The offence charged in the sixth count is a distinct offence. We have thus an indictment in which the accused is charged with more than three distinct offences in contravention of sections 233 and 234 of the Code of Criminal Procedure. The question then is—can the indictment as a whole, be supported on the ground that it charges offence committed in one series of acts so connected as to form the same transaction within the meaning of section 235 of the Code of Criminal Procedure ? I think the answer to this question must be in the negative. If the series of acts alleged in the second, fourth and sixth counts of the indictment are not themselves so connected as to form one transaction, it is obvious that the offence of abetment by conspiracy connot be said to have been committed " in one series of acts so connected together as to form the same transaction." In my judgment neither the words of the section nor the illustrations thereto would justify the construction of the words " the same transaction" as applicable to the acts alleged in the second, fourth and sixth counts of the indictment in the present case. This view, moreover, is strongly supported by authority. I need only refer to the cases of *Queen-Empress* v. *Fakirapa*(1), *In the matter of Luehminarain* [2], and *Queen-Empress*v. *Chandi Singh*[3]. Section 222 [2] of the Code of Criminal Procedure is an express provision that, when the accused is charged with criminal breach of trust, or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, and the charge as framed shall be deemed to be a charge of an offence within the meaning of section 234. An express enactment was thus considered necessary in the case of a series of acts of dishonest appropriation of money, or of criminal breach of trust, to bring the case within the scope of section 234. In the absence of any express enactment applicable to the facts of the present case it seems to me that the contention that the acts

[1] [1890] I.L.R., 15 Bom., 491.
[2] [1886] I.L.R., 14 Calc., 128. [3] [1887] I.L.R., 14 Calc., 395.

Digitized by Google

alleged in the second, fourth, and sixth counts form the same transaction cannot be supported. Moreover, the proviso to section 222[2] shows the intention of the Legislature that no further departure from the law as laid down in sections 233, 234, and 235 should be made than was necessary for the purposes of that particular enactment. * * * *

At the conclusion of the argument on the points of law raised in the officiating Advocate-General's certificate, it was intimated to Counsel that the majority of the Court being of opinion that the first count ought to have been struck out of the indictment, the Court would review the case against the first accused on the evidence on the record relating to the charges preferred against him in the second and sixth counts of the indictment, the first accused having been acquitted on the fourth count. An objection was then raised by Mr. Norton on behalf of the defence, that in view of the opinion of the majority of the Court that the first count ought to have been struck out of the indictment, it was not competent to this Court to review the case on the evidence or any portion of the evidence, and that inasmuch as [as the defence contended] article 26 of the Letters Patent gave no power to order a new trial, the first accused was entitled, on the findings of the Court upon the points of law, to be acquitted or discharged. It was argued that section 233 of the Code of Criminal Procedure is in its terms imperative; that a trial which had been conducted in contravention of the provisions of the section was an illegal trial; that inasmuch as the jurisdiction of this Court was based upon article 26 of the Letters Patent, the Crown could not pray in aid the provision of section 537 of the Code; and that, even if they could, section 537 applied only to proceedings in which an irregularity had been committed, and not to a trial which was illegal *ab initio*. In support of this contention the defence relied upon the decisions in the cases [amongst others] of *Queen-Empress* v. *Chandi Singh*[1], *In the matter of Luchminarain* [2], *Queen-Empress* v. *Fakirapa*[3], *Pulisanki* v. *The Queen* [4], and on a passage in the judgment of the Calcutta High Court in the case of *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee*[5]. The short answer to this contention appears to me to be that the question is not whether any irregularity or illegality in the trial is curable, but whether under the powers conferred by article 26 of the Letters Patent this Court has power to review the case notwithstanding the irregularity or illegality. The condition precedent to the exercise of the powers conferred by article 26 of the Letters Patent, the granting of a certificate by the Advocate-General that in his judgment there has been an error in the decision of a point of law, or that a point of law should be further considered, has been fulfilled. This is the only condition precedent prescribed by the article to the exercise of the powers conferred by the article. Section 233 is a provision in a Code of Procedure, and, in my judgment, a contravention of the Provisions of this section does not render a trial "illegal," so as to preclude this Court from exercising the jurisdiction conferred upon it by article 26 of the Letters Patent, if the conditions precedent prescribed by the article to the exercise of that jurisdiction have been fulfilled.

It was also argued that it was not competent for this Court to review the evidence inasmuch as, by so doing, we should be usurping the functions of a jury, and substituting the judgment of the Court for the verdict of a jury. This was the view taken by Mr. Justice Bayley in the judgment delivered by him in the case of *Reg* v. *Navroji Dadabhai*[6]. The majority of the Court,

(1) (1887) I.L.R., 14 Calc., 395.
(2) (1886) I.L.R., 14 Calc., 128.
(3) (1890) I.L.R., 15 Bom., 491.
(4) (1882) I.L.R., 5 Mad., 20.
(5) (1896) I.L.R., 23 Calc., 983 at p. 990.
[6] [1872] 9 Bom. H.C.R., 358.

Digitized by Google

however, were of opinion that they had jurisdiction to review the evidence and pass such judgment thereon as they thought fit. In *Queen* v. *Hurribole Chunder Ghose*(7) Sir Richard Garth in the course of his judgment said (page 218) :—" Apart, however, from section 167 of the Evidence Act, I think that, under article 26 of the Letters Patent by virtue of which this case has been submitted to us for review, we have a right either to quash or confirm the conviction, as we may think proper. The section enables the Court, after deciding upon the point reserved or certified, to pass such judgment or sentence as it may think right. If, therefore, upon reviewing the whole case, we are of opinion that, upon the evidence properly received, there is sufficient ground to convict the prisoner, I consider that we ought to allow the conviction to stand. "

In *Imperatrix* v. *Pitamber Jina*(1) the Bombay High Court took the same view. In *Queen-Empress* v. *O' Hara*(2) a Full Bench of the Calcutta High court, after hearing argument upon the point, held that it was competent for them in dealing with a case under the Letters Patent to review the case upon the evidence, notwithstanding that at the trial there had been improper reception of evidence and misdirection by the learned Judge who tried the case. Thus in Bombay and Calcutta it appears to be now settled law that it is competent for a Court dealing with a case under the Letters Patent, to review the case on the evidence properly admissible at the trial. The defence has been unable to call our attention to any decision or dictum, where the question before the Court has been the powers of the Court under the Letters Patent which is in conflict with the established practice in Calcutta and Bombay, excepting the judgment of Mr. Justice Bayley in *Reg.* v. *Navroji Dadabhai*(3). With regard to Mr. Justice Bayley's judgment it is to be observed that for the purposes of his judgment he appears to have assumed that section 167 of the Evidence Act did not apply to criminal cases. It is now well settled, as was conceded by the defence, that section 167 applies to criminal as well as to civil proceedings. The argument for the defence, so far as the question of the improper admission of evidence is concerned, is inconsistent with the express words of section 167. The defence, however, contended that the decisions to which I have referred above ought not to be followed, having regard to the judgment of the Court for the consideration of Crown Cases Reserved in *The Queen* v *Gibson*(4) and that of the Judicial Committee in *Makin* v. *Attorney-General for New South Wales*(5). The former case was decided before the decision of the Calcutta High Court in *The Queen-Empress* v. *O'Hara*(2). The latter was after that decision. As regards the latter case the question turned on the construction of a section of the New South Wales Criminal Law Amendment Act, 1883, which is taken almost word for word from section 2 of the Crown Cases Act (11 & 12 Vict., cap. 87). This section does not give to the tribunal to whom the points of law are referred powers to " review the case." The English Legislature in enacting article 26 of the Letters Patent might have followed closely the provisions of the Crown Cases Act. They did not think fit to do so. It must be taken that the variation in the language adopted by the framers of the Letters Patent in article 26 from that of the section of the Statute which evidently served as a model was not an accidental variation, but had reference to a substantial difference in the circumstances. The Court for the consideration of Crown Cases Reserved having regard to the function which it has to perform has no need to have any record of

(7) 1876) I.L.R., 1 Calc., 207 at p. 218.
[1] [1877] I.L.R., 2 Bom., 61.
[2] [1890] I.L.R., 17 Calc., 642.
[3] [1872] 9 Bom. H.C.R., 358.
[4] [1887] L.R., 18 Q.B.D., 537.
(5) (1893) (1894) A. C., 57.

Digitized by Google

the evidence in the case before it save so far as is required to explain how the reserved points of law came to be raised. A case stated is sufficient for the purpose. Anything like an examination or weighing of the evidence is not necessary, because the Court does not assume the function of a jury. In legislating for this country, the framers of the Letters Patent found that they had to provide for a different state of things, because they presumably had before them the Evidence Act of 1855, section 57 of which casts upon a Court dealing with objections to the admissibility of evidence admitted in another Court whose decision is under consideration, the duty of appreciating the weight of the evidence which remains after that which ought not to have been admitted is put aside. Court is enjoined not to reverse the decision if the residuum of evidence is sufficient to justify the decision, or if the decision would not have been affected by the admission of evidence improperly rejected.

If we are right in holding, as has been frequently held, that this section applies to decisions in criminal matters, the departure from the phraseology of the Statute of 1848 is explained. Obviously a case stated by the Judge would not avail and nothing short of a review of the whole evidence would suffice if the Court is to be placed in a position to comply with the provisions of the Evidence Act. I cannot accede to the argument that, notwithstanding the fact that the Legislature in the Letters Patent departed from the model of the Crown Cases Act and introduce certain words giving a power to review the case, the section is nevertheless to be construed as if the powers of this Court, in dealing with a case under article 26 of the Letters Patent, were no greater than the powers of the Court for the consideration of Crown Cases Reserved. In *Queen-Empress* v. *Ramchandra Govind Harshe*(1) it was held by the Bombay High Court in 1895 that the law as settled in England by *The Queen* v. *Gibson*(2) and as stated by the Privy Council in *Makin* v. *Attorney-General for New South Wales*(3) with reference to the granting of new trials when evidence has been improperly admitted does not apply to India, and that when part of the evidence which had been allowed to go to the jury was held to be inadmissible, it was open to the High Court in appeal either to uphold the verdict upon the remaining evidence on record, or to quash the verdict and order a new trial. A different view, however was taken by the Calcutta High Court in *Wafadar Khan* v. *Queen-Empress*(4). It is not necessary to express an opinion as to which of these two conflicting decisions, with reference to the powers of a High Court as a Court of Appeal in cases where evidence had been improperly admitted, is right. It is sufficient to say that in my judgment neither the decision of the Court for the consideration of Crown Cases Reserved, nor that of the Judicial Committee apply when the Court is acting in exercise of the powers conferred upon it by article 26 of the Letters Patent. The real intention of the Legislature in article 26 is not easy to determine, but I think the construction which has been placed upon it by the Calcutta and Bombay High Courts is the right one. It is at any rate consistent with the words of the article, and it seems suitable to the special circumstances in which the administration of the Criminal law is carried on in this country.

I think the objection which has been raised as to our jurisdiction to review the case upon the evidence should be overruled.

SHEPHARD, J.—Agreeing generally with the judgment of the Chief Jus-

(1) (1895) I.L.R., 19 Bom., 749.
(2) [1887] L.R., 18 Q.B.D., 537.
(3) (1893 | 1894) A.C., 57.
(4) (1894) I. L. R., 21 Calcutta 955.

Digitized by Google

tice, I intend to confine my observations to the question raised with reference to the first count of the indictment. In this particular case the question has become comparatively unimportant in consequence of the fact that the majority of the Court are agreed that as the four counts cannot stand together, the first count must be struck out. Still, as the question has been fully argued, I think I ought to explain my views on the matter. If I have rightly understood the arguments on behalf of the prisoner, two distinct points are made against the first count. One point is that the count charges, not one but, several offences; the other and more generally important point is that a count charging a conspiracy to commit one offence and averring the doing of acts in pursuance of that conspiracy which amount to offences is not a good count according to the Indian Penal Code.

As regards the first point, it is urged on behalf of the Crown that what is charged is one conspiracy and not several conspiracies, and that the allegation of acts done in pursuance of the conspiracy are not allegation of offences committed, and that, therefore, it is wrong to say that more than one offence is charged. It seems to me that this is the right view. Whether, in fact, there was one engagement and not several successive engagements, whether such a conspiracy as is charged is likely to be proved to the satisfaction of a jury, and whether it is wise or fair for the prosecution to make such a charge where evidence of offences committed in pursuance of the alleged conspiracy is forthcoming—these are matters with which we are not now concerned. The simple question is whether the words in the count indicate one offence or more than one. If the count after averring the conspiracy had gone on to allege that acts not in themselves criminal had been done in pursuance of the conspiracy, it could hardly be questioned that the only charge made was that of combining together to obtain money in an illegal manner from the clerks of the department. It could not then have been urged that because the clerks were numerous, or because the agreement was maintained for a series of months that there were in fact several agreements. The evidence might have shown that that was the case, but that, as I have said, is a matter which does not concern us. Let me put the case of a man instigating another to do an act which may result or is intended to result in the death of several persons at the same time, supposing that, in fact, nothing more is alleged to have been done. According to the Penal Code mere instigation without more may be charged as an offence. Can it be said that, although the instigation consisted of one single act done at one moment of time, it must be taken that there were several instigations each of which should be charged separately? It appears to me that as there may be one instigation to commit several criminal acts, so there may be one conspiracy to do such acts—an engagement in a criminal partnership—and that is what the first count charges. The count goes on to aver in conformity with the requirements of section 107 the acts done in pursuance of the conspiracy. It cannot be said that these acts, whatever may be the character of them, are charged as criminal. The gist of the averment is that they are acts done in pursuance of the conspiracy—acts which, under section 10 of the Indian Evidence Act, are relevant for the purpose of proving the alleged conspiracy.

It was suggested from the Bench, I think, and not at the Bar that the reference in the count to section 109 of the Indian Penal Code indicating the offence abetted had been committed, shows that the intention was to charge several offences. The question whether section 109 or section 116 should be named is only material with reference to the sentence. If, by mentioning section 109, it was intended to allege that one of the two prisoners had committed

Digitized by Google

the offences which were the object of the conspiracy, then no doubt the count would be open to the objection that it charged two or more offences against one person, but I do not think that was intended. The obtaining of moneys which is averred as the act done in furtherance of the conspiracy is, within the meaning of section 109, an act committed in consequence of the abetment; and although it must almost necessarily have been itself a criminal act, it is not described in such terms as to make it criminal. If the first count had been the only count, and the prisoner had been sentenced under section 109 to a punishment which could not have been adjudged under section 116, I think the sentence would have been wrong, for the reason that the commission of the completed offence was not distinctly charged against him.

The main argument on behalf of the prisoner was based on the proposition that conspiracy is a crime unknown to the law of India. That is a proposition which has to be examined exclusively with reference to the language of the Penal Code, and without regard to the provisions of the Code of Criminal Procedure; for it is not suggested that the latter Code, either the present Code or its predecessor of 1872 has in any respect altered the substantive law. It is said that the framers of the Indian Penal Code have by treating conspiracy as a mode of abetment, evinced their intention to break away entirely from the English law, and that therefore no light on the subject can be derived from that source. I do not think this is the case The points in which the law of England resembles the law of the Indian Penal Code appear to me to be quite as important as the differences. According to English law conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. Dismissing the second alternative and substituting in the first " criminal " for " unlawful " the Penal Code designates as an offence the engagement between two or more persons in a conspiracy to commit an offence. The verb " conspire " is not used, and the offence is not called conspiracy, but in substance it is the engagement in a conspiracy or the conspiring which is the offence. It is none the less so because the constituents of the offence are found in two sections of the Code and not in one as is the case with section 121-A. It is true that in order to charge the offence of conspiracy under chapter V the prosecution must aver and prove, what is not necessary to aver and prove under section 121-A, that an act has been done in pursuance of the conspiracy. Here there is a departure from English law, but the importance of the difference is greatly diminished by the fact that the Court has power in England to order the overt acts or particulars of the conspiracy to be stated for the benefit of the prisoner. Although a person cannot be convicted of abetment by conspiracy unless it is proved that an act was done in furtherance of the conspiracy the fact remains that it is the agreement which constitutes the offence, and this, I think, is shown by the circumstance that if one of a dozen conspirators does such an act the rest may be convicted although they were absolutely ignorant of what was done: (see the illustration to sec. 10 of the Evidence Act). When once the conspiracy has advanced to such a point that acts in furtherance of it have been done by any member of the conspiracy the offence is complete, and I cannot understand why it should cease to be chargeable as such, because other offences have also been committed. In other words, I think that a man remains chargeable as an abettor, although he may also be chargeable as having committed the offence abetted. The cases may be rare but still cases may well happen in which it may be expedient or comparatively easy to prove the conspiracy and almost impossible

Digitized by Google

to prove that the offence or offences which the conspirators had in view were committed. In my opinion, therefore, a count charging conspiracy is not bad in law, because in the averment of acts done it alleges acts which might themselves be charged as substantive offences. So long as one engagement or conspiracy is alleged and that only is the distinct offence charged, I do not think the count offends against the provisions of the Criminal Procedure Code, because other offences are averred as acts done in pursuance of the conspiracy.

BENSON, J.—I concur in the judgment which has been delivered by the learned Chief Justice in the various points of law which have been raised before us, except in regard to the legality and propriety of the first count of the charge. In my opinion that count is bad in law in that it offends against the provisions of the Code of Criminal Procedure which are designed to protect an accused person against the danger and difficulty of having to defend himself against a multiplicity of charges at one and the same trial. The contention that the count is drawn in accordance with the practice and procedure which obtains in the Criminal Courts in England is beside the mark, since the Criminal Procedure Code is not in force in England and the law of procedure in the Criminal Courts of the two countries differs in many respects. The procedure of the Courts in India is regulated by the Criminal Procedure Code, and it is by its provisions that the validity of the charge must be determined.

Section 233 of that Code enacts that "for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately except in the cases mentioned in sections 234 to 236 and 239." Of these, the only exceptions that are of any importance in regard to the matter before us are those in sections 234 (1) and 235 (1). Section 234 provides that "when a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, he may be charged with, and tried at one trial for, any number of them not exceeding three;" and section 235 (1) provides that "If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for every such offence." Thus, the fundamental rule is that for each offence there must be a separate charge, and each charge must be dealt with in a separate trial; but, as exceptions to this rule, several offences committed by the same person in one and the same transaction may be tried together, as may also not more than three distinct offences of the same kind all committed within the space of one year.

Does the first count comply with these conditions? Shortly stated it is as follows:—That you Subrahmania Ayyar and D'Santos in March 1896 did conspire and combine together, and thereafter until November 1898 did continue to conspire and combine for the purpose of extorting bribes for Subrahmania Ayyar, in pursuance of which conspiracy Subrahmania Ayyar did obtain for himself through D'Santos divers sums of money, from various persons at various times, and thereby committed an offence punishable under sections 109 and 384, and under sections 109 and 161 of the Indian Penal Code. Four persons are named as having paid the bribes. The first of these is said to have paid (an unstated number of) sums aggregating Rs. 680 in the course of the three years 1896—1898; the second is said to have paid three sums, the third one sum, and the fourth four sums on various specified dates. Here it is necessary to bear in mind the distinction between the English and the Indian law in regard to conspiracy. Under English law the mere agreement to commit an offence is itself an offence, but under the Indian Penal Code this is not so

Digitized by Google

except as regards certain offences against the State under section 121, Indian Penal Code. So far as other offences are concerned conspiracy is dealt with merely as one of the modes of abetment, and the mere agreement or conspiracy to commit an offence is not an offence unless some act or illegal omission takes place in pursuance of the agreement and in order to the commission of the offence (sections 107 and 108). The act need not be a Criminal Act, still less the offence abetted. It is enough if any act is done in pursuance of the conspiracy and in order to the commission of the offence abetted. If the offence abetted is committed in consequence of the abetment, the punishment is the same as for the offence abetted [section 109]. Even if the offence is not committed in consequence of the abetment, still the abetment is an offence and may be punished under sections 115 and 116, though less severely than in the former case.

Let us now consider the first count of the charge against the accused.

The learned Advocate-General contends that what is charged in this count is merely a single conspiracy or agreement to extort bribes, and that though the conspiracy continued for some two years and eight months, and was evidenced by the payment of many sums of money by various persons and at various times during that period, yet only one offence is charged, viz., a conspiracy to extort bribes. In my judgment, however, it is difficult to accept this contention. If the allegations in the count are analysed they seem to set forth not a single agreement to extort, but a series of such agreements extending over nearly three years. It is not contended, nor is it possible to contend, that there was from the beginning a conspiracy to extort all the various sums mentioned in the charge. There was only an agreement to extort money generally at first, and from time to time thereafter as opportunity arose, there were further agreements or conspiracies to extort the particular sum or sums then in view. This, I think, is the only meaning which can with accuracy be attached to the words " did thereafter continue to conspire." The words cannot refer to a single agreement, but must refer to a succession of agreements. No doubt the agreements to extort the particular sums may have been in pursuance of an original arrangement; but each agreement to extort any sum followed by an act in pursuance of the agreement was by itself a separate and complete offence of abetment of extortion and might have been charged by itself as such offence. If each of these agreements had been separately charged, not more than three of them (occurring within one year) could have been tried together at one trial in accordance with section 234 of the Criminal Procedure Code. But the prosecution, by treating the first count as if it referred to a single offence only, has let in evidence in regard to what is in reality a series of many offences, and has thus rendered the protection designed by sections 233 and 234 nugatory. The prosecution cannot, in my judgment, get rid of the fact that a series of separate agreements or conspiracies are charged, by saying that those conspiracies were in pursuance of an original arrangement. The charge is not only that there was a conspiracy in March 1896, but that, thereafter, during nearly three years, the accused did continue to conspire and in pursuance of the same, did obtain various sums of money at various times and from various persons. Each time they conspired and obtained money in pursuance of the same there was a separate and complete offence.

It is easy to understand that there might be a conspiracy consisting of a series of agreements, extending over years, to commit a single offence as the final outcome of the conspiracy. Such a conspiracy might well be called a continuing conspiracy. So long as it was a conspiracy only, no offence would, under

Digitized by Google

the Indian law, be committed; but as soon as an act was done in pursuance of the conspiracy, and in order to commit the offence abetted, then the offence of abetment of an offence would be complete, and there would be only a single offence of abetment, though there had been a series of agreements leading up to it. In the same way there might be a single agreement to commit a number of offences. Such agreement (when followed by an act in pursuance of the agreement and in order to the commission of the offence) would be a single offence, not a series of offences. But neither of these is the kind of conspiracy charged against the accused in the present case. Here there are alleged a series of acts from March 1896 to November 1898, done in pursuance of the series of agreements implied in the word " did continue to conspire and combine." This series of agreements, followed by a series of acts done in pursuance of the agreements, constitutes, in my judgment, a series of separate and complete offences, for each of which a separate charge ought to have been framed under section 233 of the Criminal Procedure Code. A number of such offences cannot be charged together by saying that they evidence a continuing conspiracy to commit offences of the kind generally, since to do so would render nugatory a protection given by section 233. Three of these charges (but only three) provided they occurred within one year from first to last, might have been tried at one trial under section 234, Criminal Procedure Code. As there were in reality many more than three of these offences involved in the first count, and as they were spread over a longer period than one year, that count is, in my opinion, bad in law.

In dealing with this first count I have proceeded on the supposition that the acts referred to therein are not necessarily offences. The argument would be good, even though all the acts were innocent in themselves. There can, however, be little doubt but that the acts referred to were in themselves offences. Three of the acts are, in fact, charged in the second, fourth and sixth counts as separate offences, and there is nothing to suggest that the other acts were of a different character, while the reference in the count to section 109, Indian Penal Code, indicates that the offence abetted was actually committed. If the acts were in themselves offences, the argument against the propriety of the first count becomes the more cogent. The exception provided in section 235 (1) has, in my judgment, no application to the facts of the present case since it is impossible to hold that the series of acts to which I have referred were so connected together as to form " the same transaction " within the meaning of that section. There were at least four sets of transactions connected with the payments made by the four persons named in the count, and the only connection that appears between the transactions is that in each case the blackmail was paid to the same persons, viz, the accused.

In the result, then, the first count of the charge is, in my judgment, bad in law in that it offends against the limitation imposed by section 233, Criminal Procedure Code. * * * *

MOORE, J.— . . . . In my opinion the objection raised to the first count is a valid one, and it must be held that that count was bad in law. (After stating the count the learned Judge continued :—) It was, therefore, charged against the prisoners that they had made forty-one illegal collections from four clerks on forty-one distinct occasions dating from March 1896 to November 1898 Such being the case, it appears to me that it must be held that the prisoners were in fact charged on the first count with having committed forty-one distinct offences of abetment of extortion where the extortion was committed

Digitized by Google

in consequence of the abetment on forty-one different occasions ranging over a period of two years and eight months and of having committed forty-one similar distinct offences of abetment of bribery, and that the first count is therefore bad as having been framed in contravention of sections 233 and 234 of the Criminal Procedure Code, which provide that there must be a separate charge for every distinct offence, and that not more than three of such offences, and those three committed within one calendar year, shall be charged and tried at one trial. An attempt has been made to show that the count is good, as framed, by the argument that the several acts of extortion or bribery there set out should not be looked on as distinct offences but merely as illustrations showing the general nature of the acts committed by the prisoners in pursuance of the agreement or conspiracy entered into between them. It is also contended that it is not alleged in the count that the several sums there set forth as having been received by the conspirators were extorted by them or received as bribes. It is urged that they may have been taken as presents without any dishonest or improper intention, and that there is no allegation to the contrary in the count. It does not appear to me that there is any force in these arguments. The several acts of extortion and bribery set out in the count are not there mentioned as being illustrative of any other distinct specific act of extortion or bribery, but are there entered as the several acts of extortion and bribery, the commission of which was abetted by the prisoners by conspiracy. It also cannot be admitted that the count leaves it an open question as to whether the several sums were extorted or obtained as bribes or were received innocently as presents. It is there distinctly charged that the accused persons entered into a conspiracy to extort money and receive illegal gratifications, that in pursuance of that conspiracy they received certain sums, and that they thereby committed offences under sections 109 and 384 and 109 and 161 of the Indian Penal Code. If the acts abetted, *i.e.*, acts of extortion and bribe-taking, were not committed in pursuance of the conspiracy and nothing more followed than the innocent receipt of presents, a charge under section 109, it is clear, could not be sustained. I further cannot find in either the Code of Criminal Procedure or the Law of Evidence any warrant for setting out a number of acts as illustrative (whatever that may mean) of the main offence charged and then admitting a mass of evidence to prove the commission of these so-called illustrative acts. Such a procedure is, in my opinion, irregular and illegal. It is also urged that the several acts of extorion and bribery mentioned in this count should not be looked upon as being there set forth as separate offences of extortion and bribery carried out in consequence of abetment by the prisoners, but as overt acts committed in pursuance of the conspiracy into which it is alleged that the prisoners had entered, which are accordingly set out in the count as showing the existence of the conspiracy. The flaw in this argument, to my mind, is that it appears to be founded on the assumption that the offence with which the prisoners are charged is conspiracy. The charge has, in fact, as will be found by a reference to similar charges set forth in Archbold's 'Pleading and Evidence in Criminal Cases,' been framed as if it were a charge of conspiracy drawn up under the law in force in England, although it is, in my opinion, very doubtful if even under the English law such a count as this could be held to be good. In India, however, there is no such offence as conspiracy, with the single exception of conspiracy to wage war against the Queen (section 121-A, Indian Penal Code). What the prisoners are charged with is not conspiracy as such, but with having by conspiracy abetted the commission of forty-one distinct acts of extortion or bribery, which acts were committed in consequence of such abetment. Such a charge would, in my opinion, require to be set out in forty-one

Digitized by Google

separate counts. It is further contended that the series of acts alleged to have been committed by the prisoners were so connected together as to form one transaction and that, such being the case, the prisoners could, under section 235, Criminal Procedure Code, have been charged with and tried at one trial for all such offences. It appears to me, however, that it cannot possibly be held that forty-one acts of extortion or taking of bribes from four persons committed at various dates for a period of over two years were so connected as to form one transaction.

For these reasons I am of opinion that the first count of the charge now under consideration must be held to be bad; on the other questions raised in the certificate of the officiating Advocate-General I concur with the judgment that has been pronounced by the learned Chief Justice.

DAVIES, J.—The first point for our consideration on the certificate of the officiating Advocate-General, is whether the tender of a pardon to D'Santos, second accused in the case, by the learned Judge who presided at the trial was legal, and if it was not legal, whether the evidence given by D'Santos under colour of the pardon was admissible. On the first part of the question I am in agreement with my learned colleagues that the tender of the pardon was illegal, inasmuch as the offences that were being tried were not offences exclusively triable by the High Court. Secion 338 read with section 337 of the Criminal procedure Code is conclusive on the point. But as to the second part of the question I am unable to agree with them that the evidence given by D'Santos was nevertheless admissible. It is quite certain that when D'Santos gave his evidence he was not a convicted person, for it is only to a person under trial that a pardon can be tendered by a Judge. It is true that D'Santos had at the time pleaded guilty of the charges, but the learned Judge's record shows that he had not been convicted on that plea, and, in fact, he was not convicted until after his pardon had been forfeited, which was after he had given his evidence. It is also certain that at the time D'Santos gave his evidence he was not an acquitted person, nor had he been discharged. It follows, therefore, that he was still an accused person under trial awaiting judgment of either acquittal, conviction, or discharge. Thus, being an accused person in the case he could not, at the same time, be a competent witness therein, save and except that he was giving his evidence under a legal tender of pardon. The pardon tendered here being illegal, D'Santos was otherwise incapable, so long as he stood accused and unconvicted in the case, of giving evidence on oath (section 342, Code of Criminal Procedure, and section 5 of the Oaths Act, 1873). I therefore hold the evidence inadmissible on this technical ground that it had not the sanction of a valid oath or affirmation. Apart from this, however, I consider that the circumstnces under which D'Santos' evidence was given altogether vitiated it. It was given by him under the false impression that he was a pardoned person, not as a person expecting sentence on his plea of guilty. The statements made by D'Santos were made under the inducement of a pardon, and were therefore not made freely as by a self-condemned man. He was crouching under the shelter of a pardon, and not manfully making a clean breast of his guilt fearless of consequences. Had D'Santos been aware that the pardon that he had accepted was of no avail to him, who can tell, under such altered circumstances, what evidence he would have given, if he had given any? The view I am taking of the absolute inadmissibility of the evidence of D'Santos is the view taken by two learned Judges of the Bombay High Court, Melvill and Kemball, JJ., in *Reg* v. *Hanmanta*(1). Though my learned colleagues hold differently

(1) (1877) I.L.R., 1 Bom., 610.

Digitized by Google

they have practically put aside the evidence of D'Santos as of no value: so it is unnecessary for me to labour the point further.

The second question for our consideration is as to the lagality of the first count of the indictment with which I proceed to deal. My opinion on this matter is in accord with the opinions of Benson and Moore. JJ.

(After stating the first count and the charge that the two accused thereby committed an offence punishable under sections 109 and 384, and sections 109 and 161 of the Penal Code, the learned Judge continued) :—A reference to these sections will show that the charges against the accused were the abetment of extortion and the abetment of taking illegal gratification, and that the offences abetted had in each case been committed in consequence of the abetment. For such is the force of section 109 of the Penal Code. Now, the question becomes material, by whom were the offences committed. If it was by the first accused it is obvious that he could not be charged with abetting offences committed by himself. The abetted person is, and always must be, a different person from the abettor. For instance, the official who takes the bribe cannot be the abettor of the offence. He is the offender, and it is the person who offers the bribe who is the abettor as shown by illustration (*a*) to section 109 of the Indian Penal Code. The illustration (*c*) of the same section further elucidates the point. It runs as follows :—"*A* and *B* conspire to poison *Z*. *A* in pursuance of the conspiracy procures the poison and delivers it to *B* in order that he may administer it to *Z*. *B* in pursuance of the conspiracy administers the poison to *Z* in *A*'s absence, and thereby causes *Z*'s death. Here *B* is guilty of murder. *A* is guilty of abetting that offence by conspiracy and is liable to the punishment for murder." This shows that when only two persons conspire to commit an offence and one of them commits the offence, he is guilty of that offence and it is only the other who is guilty of the abetment. I do not suggest that two persons could not be charged with conspiring that one or the other of them should commit an offence, and I think such a charge would be good in a case where the offence was not committed. But when the offence is committed by one or the other of them that one ceases to be an abettor and becomes the principal, by which I mean the person who actually commits the offence abetted; and he must therefore be charged with the commission of the offence abetted, and not with the abetment thereof. In this case it is certain from the particulars given in the first count and in the succeeding counts, second to seventh, that according to the prosecution the first accused was the principal offender and that the second accused alone was the abettor. The first accused was therefore wrongly charged jointly with the second accused with the offence of abetment by conspiracy. The first count is consequently bad on account of this misjoinder. It is also bad for multifariousness. The patent flaw in the count, namely, charging the commission of the two offences,—(1) of the abetment of extortion, and (2) the abetment of bribery as one offence—is not as harmless as it would at first sight appear to be. If the prosecution really meant to charge a conspiracy in respect of only one of the offences, extortion or bribery, they should have struck out the other. But, as the charge was left to stand, the accused had no notice whether the several overt acts alleged against them were instances of offences of both bribery and extortion or of one of those offences exclusive of the other. In the former case the charge would be inconsistent, as bribery and extortion are two entirely distinct offences under the Penal Code, one falling under chapter IX "offences by or relating to public servants," and the other under chapter XVII "offences against property," and a conviction on the same facts could not have been had on both charges together, but only in the alternative. In the latter case the accused had a right to

Digitized by Google

be told which of the nine alleged illegal payments were obtained by bribery and which by extortion. There was thus a marked vagueness in this omnibus charge. Had it been made more definite in the matters referred to, its multifariousness would have been apparent on the face of it. A fuller examination of it will, however, sufficiently disclose how radically bad it is in that respect. The first of the nine illegal payments relates to an aggregate sum of Rs. 680 said to have been paid by one Kalyana Chetti in the years 1896, 1897 and 1898. No details are given of the exact or approximate dates of the payments or of the several amounts paid, but we are informed that the evidence of Kalyana Chetti would show that some thirty separate payments extending over a period of two and-a-half years were made, every separate payment constituting a separate offence. The general law is that for every distinct offence there shall be a separate charge, and every such charge shall be tried separately (section 233, Code of Criminal Procedure). But under the next section (234) a person may be tried at one trial for not more than three offences, if those three offences are of the same kind and are committed within the space of twelve months from the first to the last of them. Here however we have thirty offences not shown to be of the same kind and extending over two and-a-half years, which there is nothing to justify. The special provision in section 222, clause (2) of the same Code, for the case of criminal breach of trust or criminal misappropriation of money whereby a gross sum is allowed to be stated in the charge without specifying particular items or exact dates, is not applicable to this case which is one of bribery or extortion, and even in the excepted case the time which the gross sum may cover is limited to a year. The other eight items of the alleged illegal payments do not offend in respect of want of details, but they do in respect of time, ranging from August 1896 to November 1898. The second, third and fourth items are sums of Rs. 100, Rs. 50 and Rs. 100 said to have been paid by one Balasundara Mudali in August 1896, March 1897, and May 1897, respectively, and they form the subject of the specific charges against the two accused in the six other counts of the indictment. The fifth item is a sum of Rs. 100 said to have been paid by K. Srinivasa Chari in October 1898. The remianing items (6, 7, 8 and 9) are small sums, two of Rs. 5 and two of Rs. 3 said to have been paid by one C. Vedachalam in August September, October and November 1898. Now there can be no doubt that each one of these thirty-eight alleged illegal payments made either by the same person at different times or by different persons at the same time constituted a separate offence, that is, that there were thirty-eight distinct offences and that only three of them committed in the course of twelve months could properly have been tried together. There is no ground for the contention that the case ought to be treated as one falling under section 235 of the Criminal Procedure Code, whereby any number of offences may be tried at one trial if they are a " series of acts so connected together as to form the same transaction." If it could be urged with any force in regard to Kalyana Chetti's case that there was a running compact with him to pay so much every month how could that transaction possibly be the same as those entered into separately with each of the other three clerks at different times ? The only real ground on which it was attempted to justify the charge was that the charge was one of a continuing conspiracy and the various illegal payments were only set forth as proofs of that conspiracy. Excepting the offence of conspiracy to wage war against the Queen punishable under section 121-A of the Indian Penal Code, there is no other offence of conspiracy as such under the penal law of India. There is of course the offence of abetment by conspiracy, but to constitute the offence of abetment by conspiracy or by any other form of abetment, the abetment

Digitized by Google

must be of an offence or what would ordinarily be an offence (section 108 of the Indian Penal Code). So that abetment by conspiracy or otherwise cannot be charged by itself as a substantive offence. The abetment must be linked with, or refer to the particular offence, the commission of which was its object. In this case that offence was extortion or bribery and every time the commission of that offence was abetted a separate offence of the abetment of that offence was committed and a separate charge lay. It would be a clear evasion of the law to allow a wholesale clubbing of a number of separate offences under a single charge of abetment. Each offence abetted makes a separate offence of abetment, and more than one of such offences can be tried together only under the provisions of sections 234 and 235 Code of Criminal Procedure, which provisions have not been complied with in the present case. Such I venture to declare is the law and practice throughout India; at all events no authority to the contrary has been cited at the Bar. It is scarcely necessary to remark that the reason for the law is to prevent accused persons being prejudiced in the eyes of the Court or jury and confused in their defence by the multiplicity of accusations roughly heaped against them. I am therefore clearly of opinion that the first count of the indictment is unsustainable in law, and that the conviction upon it must be quashed.

The third question is whether the trial of the first accused on the first second, fourth, and sixth counts, that is on four different counts at one trial, was not illegal. On this question I am in agreement with the majority of the Court and follow the judgment of the learned Chief Justice on the point. I also agree with reference to the inquiry to be made into the evidence in the case, that the one count which should be struck out from further consideration out of the four should be the first count as it is bad in itself. * * *

As to the sixth and last question it seems to me immaterial to decide whether the learned Judge misdirected the jury inasmuch as the Court has resolved to go itself into the evidence in the case. With that resolution I agree, as it seems clear, that we have no power to order a new trial. But at the same time I think our review of the evidence should be limited to seeing whether independently of the evidence on the first count which forms the bulk of the record and which we are bodily rejecting, there is sufficient evidence left to justify the jury's verdict of guilty on the second and sixth counts of the charge, and that our inquiry should not be extended with a view to our giving our own independent judgment upon the facts. I take it that the "sufficient" evidence referred to in section 167 of the Evidence Act under which we are proceeding would in the case of a verdict by a jury be such good and accredited evidence as the jury were bound to have convicted upon; that is, if they had not convicted upon it, it would have been what we term a "perverse verdict." If there was doubtful or conflicting evidence upon which it was quite open to the jury fairly to return a verdict of "not guilty," I do not think it lies in us to say that the evidence was sufficient to support a conviction by a jury.

BODDAM, J.—I agree with the judgment of the learned Chief Justice except in one particular. Granted that the first count is good, I do not think that there is any objection to the indictment as a whole. I do not think that the joinder of the first count with the second, fourth, and sixth is forbidden by the Criminal Procedure Code. I think it comes within either section 235 or section 236 of the Code.

(After stating the first, second, fourth and sixth counts, the learned Judge continued :—) As it seems to me, the acts alleged in the second, fourth and sixth counts are identical with the acts alleged with others in the first count as

Digitized by Google

overt acts showing the conspiracy and are within section 235. The only difference lies in the way in which the acts are charged and the inference to be drawn by the jury from them. In the first count all the acts are alleged as one series of acts so connected together as to form the same transaction from which the jury are asked to infer (as they did) that there was a continuing conspiracy whereby the accused and D'Santos abetted one another in extorting bribes from clerks. In each of the remaining counts, respectively, viz., the second, fourth and sixth counts, one of the above-mentioned acts is set out separately, and is charged as itself constituting a separate offence. The accused was therefore only charged and tried for offences committed in one series of acts so connected together as to form one and the same transaction as he lawfully might be under section 235(1). Moreover, it also falls within section 235(3) which says—"If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one or more of such acts." Here, in the first count, the accused is charged with the offence to be inferred as constituted by the combined acts (along with others) which are alleged in the other counts as constituting separate offences, and he may therefore be tried at one trial for the offence to be inferred from the combined acts as well as for each offence constituted by the separate acts alleged. Even if this were not so, the case falls, to my mind, within section 236, which says—"If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences." Here all the series of acts stated in the second, fourth and sixth counts are alleged in the first count with others. They are there alleged in that count as proving one offence, viz., abetment by conspiracy to extort bribes from clerks, &c., and they are set out as overt acts. The very same acts are set out separately in the second, fourth and sixth counts and are charged as respectively constituting separate offences. It was doubtful if all the series of acts together constituted the offence as alleged in the first count, and therefore some of them are set out and charged as constituting other offences in the other counts respectively of the indictment, and the section says any number of such charges may be tried together. It seems to me clear that an indictment may contain any number of variations in charges which depend upon the same facts. The object of the Legislature is to confine the prosecution to proving only such facts as constitute one charge if taken together, but when they constitute together one charge there is nothing to prevent the same facts being separated and also made applicable to any number of other charges if they constitute several different offences. Here the whole of the facts are set forth and were proved in support of the charge contained in the first count, and the remaining counts contain merely a reiteration of some of the facts alleged in the first count and were proved or sought to be proved by the evidence called in support of the first count.

I, therefore, think that the indictment, as a whole, was unobjectionable.

* * * *

Mr. *J. D. Mayne*, for the appellant, contended that the conviction was illegal on the following grounds:—*First*—The evidence of D'Santos was inadmissible—(*a*) The pardon to D'Santos was wrongly granted, the case not being one triable exclusively by the High Court—*Queen-Empress* v. *Sadhes*

Kasal(1) and sections 337, 338, and 339 of the Criminal Procedure Code; the procedure as to the offer of the pardon being illegal, the evidence given under it was inadmissible: (*b*) D'Santos was "an accused person" within the meaning of the Criminal Procedure Code—see section 271. He was therefore not a person who could have an oath administered to him, or be a competent witness in the case; he came within the terms of section 5 of the Oaths Act (X of 1873)—Criminal Procedure Code, sections 209, 342 and *Queen-Empress* v. *Chinna Pavuchi*(2). A person on trial is an accused person until his innocence or guilt is finally determined by his conviction or acquittal; when giving his evidence D'Santos was still on his trial, and his evidence was therefore inadmissible: (*c*) No influence can be lawfully used to induce an accused person to withhold or disclose anything—section 343 of the Criminal Procedure Code; Evidence Act (I of 1872), section 24. The procedure taken as to D'Santos was in pursuance of an arrangement by the Crown with him by which he pleaded guilty with a view to getting a pardon; this was an inducement to confess, and his evidence was therefore inadmissible—*Reg* v. *Hanmanta*(3), *Queen-Empress* v. *Dala Jiva*(4) *Empress of India* v. *Asghar Ali*(5) and Evidence Act, section 132.

Second—The charge of conspiracy was illegal. The only substantive offence of conspiracy in the Penal Code is conspiracy against the sovereign; section 121 of the Indian Penal Code (Act XLV of 1860); see *Mulcahy* v. *The Queen*(6). No other conspiracy is an offence unless it amounts to abetment—Penal Code, sections 107, 108, 109; and then it is punishable as abetment, not as conspiracy. There is no abetment until an act or illegal omission follows on conspiracy, and nothing is punishable except abetment of an act committed (Penal Code, sections 109-114; see section 111), or not committed (Penal Code, sections 115, 116). The first count, as to conspiracy charges a series of acts, each of which amounts to an abetment, and the whole of which constitute a series of separate offences continuing for more than two years; this is illegal under sections 233 and 234 of the Code of Criminal Procedure.

Third—The trial of the appellant on the first, second, fourth and sixth counts at one trial was illegal as being a joinder of charges prohibited by section 234 of the Criminal Procedure Code, and cannot be justified as coming within sections 235 and 236. This misjoinder of charges, and the other errors, occasioned a failure of justice and were not mere irregularities which could be remedied by section 537 of the Criminal Procedure Code but made the conviction wholly illegal—[*a*] The High Court had no power to amend the indictment [Letters Patent, 1865, articles 26, 27, 28; Criminal Procedure Code, sections 226-231 and 439]. There is no provision of law giving them power to strike out a charge, and proceed to a conviction on the rest of the indictment the only remedy would be a new trial, and there was no power to grant a new trial in this case: [*b*] As to the effect of such errors on the conviction, the result of the cases is that it is wholly bad, and cannot be cured by section 537 of the Criminal Procedure Code, [*In the matter of Luchminarain*[7], *Queen-Empress* v. *Chandi Singh*[8], *Queen-Empress* v. *Fakirapa*[9], *In the matter of Abdur Rahman*(10), and the cases there cited].

Fourth—The Court had no power either under article 26 of the Letters Patent or section 167 of the Evidence Act or under the Criminal Procedure

(1) (1884) I.L.R., 10 Calc., 936.
(2) (1899) I.L.R., 23 Mad., 151.
(3) (1877) I.L.R., 1 Bom., 610 at p. 617.
(4) (1885) I.L.R., 10 Bom., 190.
(5) (1879) I.L.R., 2 All., 260
(6) [1868] L.R., 3 H.L., 306.
[7] [1886] I.L.R., 14 Calc., 128, at p. 131.
[8] [1887] I.L.R., 14 Calc., 395.
[9] [1890] I.L.R., 15 Bom., 491, at pp. 498, 505.
[10] [1900] I.L.R., 27 Calc., 839, at pp. 844, 845, 847.

Digitized by Google

Code, to decide the case on the residue of the evidence—[a] Letters Patent, article 26, gives the High Court power only to review the case with a view to decide the point of law referred, and, if necessary, to pass a fresh sentence; they cannot substitute a verdict of their own on the evidence for the verdict of the jury: [b] Evidence Act, section 167, gives no power to do so in a case like this where the objection to the conviction is not limited to improper reception of evidence; it cannot affect the Letters Patent, to which it does not refer, or extend the powers given by article 26. It has also been doubted whether it applies at all to Criminal cases [*Reg.* v. *Navroji Dadabhai*[3]: see section 57 of Act II of 1855, the former Evidence Act for India: (c) The Criminal Procedure Code has no provision giving any such power; see sections 267, 434 of that Code. The Act establishing the Court for the consideration of Crown Cases Reserved (11 & 12 Vict., cap. 78), section 2 was referred to and compared with article 26 of the Letters Patent In the English Act the power to review is omitted as all the necessary facts are stated in the case reserved, and the Court has power "to reverse, affirm, or amend any judgment or to make such other order as justice may require" [*Regina* v. *Mellor*(1), *The Queen* v. *Gibson*(2), *Reg.* v. *Navroji Dadabhai*(3), *Queen* v. *Hurribole Chunder Ghose* (4), *Imperatrix* v. *Pitamber Jina*(5), *Queen-Empress* v. *O'Hara*(6), *Wafadar Khan* v. *Queen-Empress*(7) and *Makin* v. *Attorney-General for New South Wales*(8), a case decided on section 423 of the Colonial Act [46 Vict., cap. 17] which is similar to article 26 of the Letters Patent combined with section 537 of the Criminal Procedure Code].

Fifth—Even if there was power in the Court to convict the accused on the residue of the evidence, there was not sufficient evidence to establish his complicity with the corrupt acts of D'Santos, and to support the conviction. The only evidence was that of Balasundara, an accomplice, and his evidence is not corroborated. It is settled law in all the Courts in India that an accused person cannot be convicted on the uncorroborated evidence of an accomplice.

Sixth—As to costs: if the conviction is set aside the case of *Macleod* v. *Attorney-General for New South Wales*[9] should be followed.

Mr. *A. Phillips*, for the Crown contended: *First*—That the charges were properly tried together. The acts alleged in the first charge as done in pursuance of the conspiracy were not charged as in themselves offences, and might be acts in themselves innocent, although as the fruit of a Criminal conspiracy they completed the offence of abetment. Out of the various acts completing the offence of abetment, three were selected as in themselves criminal acts. The conspiracy was the foundation and underlying basis of them all, and consequently charges founded upon any number of such acts could, it was submitted, be tried together under section 235 of the Criminal Procedure Code. Conspiracy to do a thing and the doing of that thing are "one transaction"; one transaction although more than one offence is committed, falling within different definitions in the Penal Code: sections 107, 108, 109 and 121-A were referred to. *Second*—That if the charges were not such as were proper to be tried together under the Criminal Procedure Code, article 26 of the Letters Patent requires the High Court to make such alteration in the sentence as justice requires. If the Legislature has prescribed the course to be pursued,

(1) (1858) D. & B., 468, at pp. 502, 519.
(2) [1887] L.R., 18 Q.B.D., 537.
(3) [1872] 9 Bom. H.C.R., 358, at p. 376.
[4] [1876] I.L.R., 1 Calc., 207 at pp. 216, 217.
(5) [1877] I.L.R., 2 Bom., 61.
[6] [1890] I.L.R., 17 Calc., 642.
[7] [1894] I.L.R., 21 Calc., 955.
[8] (1893) (1894) A.C., 57
(9) (1891) (1892) A.C., 455

Digitized by Google

in such a case the Court has, of course, only the duty of following that course. But in the present case the Legislature has not indicated the consequences of a deviation from the rule contained in section 233 of the Criminal Procedure Code, otherwise than by section 537 which is applicable only to irregularities which do not render the proceedings null and void. In the present case the deviation from the prescribed course did not, it was submitted, render the proceedings null and void. The acts which were alleged in the first charge, although more than three, could have been given in evidence under the charges which were not liable to objection; and consequently such evidence would, in any case, have been submitted to the jury. The High Court having substantially reduced the punishment originally inflicted, justice, it was submitted, was satisfied, and the sentence thus reduced should be allowed to stand. *In the matter of Luchminarain*[1], *Queen-Empress* v. *Chandi Singh*[2], *In the matter of Abdur Rahman*[3] and *Queen-Empress* v. *O'Hara*(4], were referred to.

Mr. *Mayne* replied.

Afterwards, on 2nd August 1901, the judgment of their Lordships was delivered by the LORD CHANCELLOR.

JUDGMENT.—In this case the appellant was tried on an indictment in which he was charged with no less than forty-one acts, these acts extending over a period of two years. This was plainly in contravention of the Code of Criminal Procedure, section 234, which provided that a person may only be tried for three offences of the same kind if committed within a period of twelve months. The reason of such a provision, which is analogous to our own provisions in respect of embezzlement, is obviously in order that the jury may not be prejudiced by the multitude of charges and the inconvenience of hearing together of such a number of instances of culpability and the consequent embarrassment both to Judges and accused. It is likely to cause confusion and to interfere with the definite proof of a distinct offence which it is the object of all criminal procedure to obtain. The policy of such a provision is manifest and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of criminal procedure.

Their Lordships think that the course pursued and which was plainly illegal cannot be amended by arranging afterwards what might or might not have been properly submitted to the jury.

Upon the assumption that the trial was illegally conducted it is idle to suggest that there is enough left upon the indictment upon which a conviction might have been supported if the accused had been properly tried. The mischief sought to be avoided by the Statute has been done. The effect of the the multitude of charges before the jury has not been averted by dissecting the verdict afterwards and appropriating the finding of guilty only to such parts of the written accusation as ought to have been submitted to the jury.

It would in the first place leave to the Court the functions of the jury and the accused would never have really been tried at all upon the charge arranged afterwards by the Court.

Their Lordships cannot regard this as cured by section 537.

Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many

(1) (1887) I.L.R., 14 Calc., 128, at p. 131. (2) (1887) I.L.R., 14 Calc., 395,
(3) (1900) I.L.R., 27 Calc., 839, at pp 844, 845, 847.
(4) (1890) I.L.R., 17 Calc., 642.

Digitized by Google

different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment. The illustration of the section itself sufficiently shows what was meant.

The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity.

Some, pertinent observations are made upon the subject by Lord Herschell and Lord Killowen in *Smurthwaite* v. *Hannay* (1). Where in a civil case several causes of action were joined Lord Herschell says that "if unwarranted by any enactment or rule it is much more than an irregularity," and Lord Russell of Killowen in the same case, "Such a joinder of plaintiffs is more than an irregularity, it is the constitution of a suit in a way not authorised by law and the rules applicable to procedure."

With all respect to Sir Francis Maclean and the other Judges who agreed with him in the case of *In the matter of Abdur Rahman* (2) he appears to have fallen into a very manifest logical error in arguing that because all irregularities are illegal as he says in a sense and this trial was illegal that therefore all things that may in his view be called illegal are therefore by that one adjective applied to them become equal in importance and are susceptible of being treated alike. But this trial was prohibited in the mode in which it was conducted, and their Lordships will humbly advise His Majesty that the conviction should be set aside. Their Lordships will make no order as to costs.

Appeal allowed: conviction set aside.

Solicitor for the appellant: Mr. *R. T. Tasker.*

Solicitor for the respondent:—*The Solicitor, India Office.*

1901 *September* 20, 27. **I. L. R. 25 Mad. 143.**

Before Mr. Justice Davies and Mr. Justice Moore.

KING-EMPEROR *v.* MOHIUDDIN SAHIB.§

Evidence Act—Act I of 1872, ss. 114, 133—Evidence of accomplice—Corroboration.

Certain persons were charged with the murder of N. The confessional statement of one of them and the evidence of an approver showed that the accused first attacked N, at a spot described as D; that they then carried him from D to a spot described as E; and that from E they carried him to a spot described as F, where he was killed. Three other witnesses deposed to the presence of the accused at D:

Held, that the evidence of the approver was sufficiently corroborated to justify a conviction.

Reg v. *Wilkes*, (7 C. & P., 272) and *Queen* v. *Elahi Bux*, (B.L.R., Sup. Vol. (F.B.),459), referred to.

APPEAL by four accused against convictions and sentences on a charge of murder. The body of one Nabi Sahib was found on 16th May 1901, and six persons were charged with having caused his death. On 19th May first accused made a confessional statement in which he implicated himself and the accused Nos. 2

[1] (1894) A. C., 494. [2] (1900) I.L.R., 27, Calc., 839.

§ Referred Trial No. 39 of 1901,

Digitized by Google

to 5. From this statement and from other evidence in the case it appeared that the injuries from which the deceased died were inflicted at three different spots which were described as D, E and F respectively. In his statement already referred to, first accused deposed that he and accused Nos. 2 to 5 and the third prosecution witness (who gave evidence as an approver) began their attack on the deceased at D; that accused Nos. 2 to 5 and the approver then carried him to E, and then to F, where he was killed. On 1st June this accused made a further statement, in which he admitted having struck the deceased, and that he had assisted in carrying him from E to F. The body was found close to F. This accused adhered to these statements when the charge was read to him on 27th June, but repudiated them at the Sessions Court. Of the witnesses called for the prosecution the third gave evidence as an approver. He implicated the first accused as having taken a prominent part in the attack on the deceased. He also deposed that accused Nos. 2, 3 and 4 were present at the attack at D; and that they assisted in carrying the deceased from D to E, and also from E to F. Whilst going from E to F they committed serious injuries on him. His evidence was corroborated in the following manner:—the fourth prosecution witness implicated these three accused as having taken part in the attack at D. The fifth and seventh witnesses also deposed to the presence of accused Nos. 2, 3 and 4 at D, and that they had taken some part in the attack there committed. On 1st June, these three accused admitted, before the committing Magistrate that they had been present at D; but their case was that they did not accompany the murderers to F. The Sessions Judge acquitted accused Nos. 5 and 6 and convicted accused Nos. 1, 2, 3, and 4, sentencing accused No. 1 to death and accused Nos. 2, 3 and 4 to transportation for life.

Accused Nos. 1 to 4 appealed.

K. R Subrahmania Sastri, for the accused, (after dealing with the evidence), submitted that the evidence of the approver (third prosecution witness) had not been sufficiently corroborated to justify a conviction. There was corroboration of his statement up to a certain point, namely, that the accused were present at D. But the murder was not committed, or at all events was not completed, at D. It was committed at F, or between E and F. He referred to Ameer Ali on 'Evidence,' page 811, citing *Reg* v. *Wilkes*(1) and *Queen* v. *Elahi Bux*(2), and submitted that the corroborative evidence which had been given of the approver's statement that the accused were present at D was not corroboration of his statement that they were also at E and F.

The Public Prosecutor (Mr. *E. B. Powell*), for the Crown, contended that the corroboration was sufficient, and that the evidence of an approver need not be confirmed in every particular; and that it is sufficient if it be confirmed in material particulars. He referred to *Queen-Empress* v. *Krishna Bhatta*(3):—

The Court delivered the following judgments:—

MOORE, J.—Six men were charged before the Sessions Judge with the murder of one Nabi Sahib. He has convicted Nos. 1, 2, 3 and 4 and acquitted Nos. 5 and 6. No. 1 has been sentenced to death and Nos. 2, 3 and 4 to transportation for life. They appeal.

The case against the first prisoner is very strong. The third prosecution witness, an approver, has described in detail the manner in which Nabi Sahib was killed and has shown that this prisoner took a prominent part in the attack.

(1) 7 C. & P., 272. (2) B.L.R., Sup. Vol., [F.B.], 459.
(3) Referred Trial No. 27 of 1895 (unreported).

Digitized by Google

on him. His evidence is corroborated in certain important particulars by the fourth witness, a boy of about 13 years of age, who is the nephew of the first prisoner. This boy was present when the attack commenced, but ran away before Nabi Sahib received very serious injuries. The fifth and seventh witnesses also saw the first prisoner with others strike Nabi Sahib, but they also left the place before the man was killed. Nabi Sahib was killed on the 12th May. His body was discovered on the 16th and on the 19th the first prisoner made a confessional statement which has been recorded under section 164 of the Code of Criminal Procedure by the Adoni Second-class Magistrate. He there says that the fifth prisoner hit Nabi Sahib with the handle of a hatchet and on that the second, third and fourth prisoners and the approver beat him. The first prisoner also hit him with the handle of a hatchet. This happened at the spot marked D on the plan. They then carried him, the first prisoner assisting, to a spot where there is what is called in the evidence a jammi tree (E in the plan). After that he was carried to the margosa tree (F in the plan) where he was killed. This prisoner did not in this statement admit that he assisted in carrying Nabi Sahib from E to F, or that he was one of those that actually struck him at F. On the 1st June the first prisoner in a further statement made before the Magistrate admitted that he had struck the deceased with the handle of an axe and that he had assisted in carrying him to E and thence on to F. He says "we tied up his hands and legs, took him to the hollow place near Nallagutta (Nallagutta is the place where the body was found. It is close to F) and made him lie down there." When on the 27th June the charge was read to him he adhered to what he had previously said and it was not till he was before the Sessions Judge that he repudiated his confessional statements. I believe the evidence of the approver which has been corroborated in certain most important particulars by the fourth, fifth and seventh witnesses. There are no grounds for supposing that the confessional statements made by the first prisoner were not given voluntarily. I have no hesitation in upholding the conviction of this man, but I consider that the sentence passed on him should be altered to transportation for life as I am satisfied, from a consideration of the evidence, that the first prisoner was not one of the prime movers in the attack on Nabi Sahib and that, if it had not been for the intervention of other persons, whose case is not now before this Court, Nabi Sahib might perhaps have been beaten, but would certainly not have been murdered. All the evidence in my opinion points to this conclusion.

Criminal Appeal No. 418 of 1901 has been put in by the second, third and fourth prisoners who have been convicted of murder and sentenced to transportation for life. The evidence of the approver shows clearly that these three men were present at the attack made on Nabi Sahib at the spot marked D, that they assisted in carrying him from that place to the spot marked E and also from E to F where the man was killed. The second prisoner is said by this witness to have held Nabi Sahib's head as he was being carried from E to F and when he had been thrown down at the latter spot the third and fourth prisoners each threw a stone on him. As I have already stated, I believe that evidence but a question has been raised at the hearing of this appeal as to whether it has been corroborated in such a manner as to justify the coviction of these prisoners. The law as to the extent to which such corroboration is required is clear. Section 133 of the Evidence Act lays down that a conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice, but the section must be read with illustration (*b*) appended to section 114 where it is stated that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In numerous reported

Digitized by Google

decisions relating to these provisions of the law it has been laid down that the testimony of the approver ought to be corroborated in some material circumstance, such circumstance connecting and identifying the prisoner with the offence or as a learned English Judge observed in a case that is constantly cited "The confirmation which I always advise juries to require is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged (*Reg* v. *Wilkes*(1) per Alderson, B.—*vide* also the judgment of Chief Justice Peacock in *Queen* v. *Elahi Bax*(2). It is therefore necessary to consider in some detail the evidence that has been produced to corroborate the approver in so far as prisoners Nos. 2, 3 and 4 are concerned. The fourth witness gives an account of the attack made on Nabi Sahib at the spot marked D. He states that when the fifth and sixth prisoners seized hold of Nabi Sahib prisoners Nos. 2, 3 and 4 were present. He says "the others were standing aside." . . . . "They all surrounded Nabi Sahib." . . . . "When I went to my house I told my mother that all surrounded and beat Nabi Sahib." In cross-examination he states that he did not see the second, third and fourth prisoners beat Nabi Sahib. This boy is, as has been pointed out already, a nephew of the first prisoner and he has before the Sessions Court shown a great anxiety to implicate his uncle and his uncle's companions, the prisoners whose case is now under consideration, as little as possible. When, however, he was examined before the Committing Magistrate on the 31st May, he deposed as follows:—"All beat . . . . accused Nos. 1, 2, 3 and 4 beat. I did not see with what they beat." If this evidence is believed, and I see no ground for discrediting it, it proves that the second, third and fourth prisoners took an active part in beating Nabi Sahib at the spot marked D in the plan. This evidence is corroborated to a certain extent by that given by the fifth and seventh witnesses. The former of these women deposes that when the men were disputing with Nabi Sahib about their bundles of wood she saw the second, third and fourth prisoners among the disputants. She then goes on to say that Nabi Sahib seized the first prisoner's bundle, threw it down and pushed him and adds "thereupon they surrounded him." She then described the manner in which Nabi Sahib was wounded by a blow struck with a hatchet. The seventh witness also was present when the altercation took place and she deposes that she saw the second, third and fourth prisoners among others get up and seize hold of Nabi Sahib by the waist. When examined before the Sub-Magistrate on the 16th May, the day that the body of the deceased was found, this witness said that she saw the first, third and fourth prisoners and the approver surrounding Nabi Sahib and beating him. The second prisoner, she says, "was standing afar." Before the Sessions Judge she admitted having made this statement to the Magistrate. When before the Committing Magistrate on the 1st June these three prisoners admitted that they were present at the early portion of the attack on Nabi Sahib, but pleaded that they did not accompany the murderers up to the place where the man was killed. It appears to me that the evidence of the fourth, fifth and seventh witnesses, which I have alluded to, affords such corroboration of the statements of the approver as is required by law in order to uphold a conviction. That evidence shows that not only were the prisoners Nos. 2, 3 and 4 present when the murderous attack on Nabi Sahib commenced, but also that they joined actively in that attack. Such evidence must, as it appears to me, be held to afford a confirmation of the accomplice in important facts which go to fix the guilt on these particular persons. It may also be added that the first prisoner

(1) 7 C. & P., 272. (2) B. L. R., Sup. Vol., F.B., 459.

Digitized by Google

in his confessional statements implicates these prisoners and these statements can be taken into consideration against them although they are not evidence in the strict sense of the word and cannot be held to afford corroboration of the tainted evidence of the accomplice. I am of opinion that the appeal presented by prisoners Nos. 2, 3 and 4 should be dismissed. I however, consider that the case of the second and third prisoners should be brought to the special notice of Government with a view to the reduction of the sentences imposed on them.

DAVIES, J.—I concur throughout.

1901 *December* 5, 6, *Jan.* 9. **I. L. R. 25 Mad. 457.**

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

BELL (ACCUSED), PETITIONER, *v.* THE MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS (COMPLAINANTS), RESPONDENTS.*

City of Madras Municipal Act [Madras]—Act I of 1884, s. 341—Liability of Government under taxing Acts when not expressly mentioned—Prerogatives of the Crown—Indian Councils Act, 1861—24 & 25 Vict., cap. 67, s. 42.

The Superintendent of the Government Gun Carriage Factory in Madras having brought timber belonging to Government into Madras without taking out a license and paying the license fees prescribed by section 341 of the City of Madras Municipal Act, was prosecuted to conviction by the Municipal Commissioners:

Held, on revision, that timber brought into Madras by or on behalf of Government is liable to the duty imposed by section 341 of the City Madras Municipal Act although Government is not named in the section. According to the uniform course of Indian Legislation, Statutes imposing duties or taxes bind Government unless the very nature of the duty or tax is such as to be inapplicable to Government.

Per curiam:—Under the Indian Councils Act, 1861, a Provincial Council has, subject to the same restrictions as those imposed by the Act on the Governor-General's Council, power to affect the prerogative of the Crown by Legislation.

[*Note*: This case is Ref: 27 Bom. 424; 6 Bom. L. R. 131; 27 Mad. 386].

PETITION to revise the conviction and sentence passed by the Chief Presidency Magistrate, Egmore, Madras. Petitioner was the Superintendent of the Government Gun Carriage Factory in the City of Madras. Acting in his official capacity he caused certain timber to be brought into the City of Madras without obtaining a license from the Municipality on payment of the fee prescribed by section 341 of the City of Madras Municipal Act (I of 1884). A prosecution having been instituted by the Municipal Commissioners, the defence was set up that the timber was the property of Government, that the duty, if any were payable, would be paid out of the public Indian revenue, and that a license was not necessary under section 341 of the Act, it being contended that the section was not applicable to Government timber. Petitioner was convicted and a nominal fine was inflicted.

Against this conviction the petitioner filed this criminal revision petition.

The Advocate-General (Hon. Mr. *J. P. Wallis*) for petitioner:—Three grounds are relied upon in support of the petition: first, that section 341 of the City of Madras Municipal Act is ancillary to section 338, which latter section contains an express exemption in favour of Government; second, that the fee levied by the Municipality is a toll, and the property of Government is exempted from liability to pay toll by section 174; and third, there are no express words, in the section binding Government, and in the absence of express words, Government is not bound by the taxing provisions of a Statute, as

* Criminal Revision Case No. 390 of 1901.

Digitized by Google

any rate unless the intention to bind it is manifest and irresistible which is not the case here. The present Act (I of 1884) is an amendment of Act V of 1878, the provisions relating to taxation being identical in both. Section 341 of the present Act is new and is not placed with the other taxing sections, which begin with section 98 and which contain exemptions in favour of Government. Where the king has any prerogative, title or interest it cannot be taken away by general terms; *Magdalen College Case*(1). The fact that the Madras Municipal Act contains exemption in favour of Government in some sections, and not in section 341 does not in itself justify the conclusion that it was intended to render the Government liable to the tax under the latter section. In *Smithett* v. *Blythe*(2), it was held that though an Act contained an exemption in favour of the Crown from payment of tolls to a lighthouse-keeper in respect only of ships of war, yet a line of mail packets started by Government was also exempt, on the general principle that the Crown is not bound in the absence of express words. The exemption which the Act did contain had been inserted *ex abundanti cautela*. In *Westover* v. *Perkins*(3), a royal carriage in which the royal family were not riding was held not liable to the tax. The definition of a "toll" in Sheppard's 'Abridgment' is also given there and applies to this case. In *Mayor, &c., of Weymouth* v. *Nugent*(4), the Statute contained two express exemptions, in favour of coal on packets, and horses and carriages; yet it was held that the effect of these was not to cut down the general immunity of the Crown, and the latter was held not liable to pay tolls on stone. The Crown is only bound by express words. See also Bacon's 'Abridgment,' Prerogative E. 5. In *Attorney-General* v. *Donaldson* (5), persons who were not members of the royal family, but who lived in a royal palace, were held not liable to pay sewer rates. See also *Mersey Docks* v. *Cameron*(6) a similar case. *Cushing* v. *Dupuy*(7) shows that the Privy Council has power to admit an appeal in bankruptcy from the Canadian Courts, though the Canadian Act provides that there shall be no appeal: the principle being that the prerogative of the Crown is not taken away except by express words. [He also referred to *Johnston* v. *Minister and Trustees of St. Andrews' Church, Montreal*(8), and *Theberge* v. *Laudry*(9) on the same point; and to *Wheaton* v. *Maple & Co.*(10), *Ex-parte Postmaster-General*(11) and *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*(12).] This is a "toll," and Government is exempt from payment of tolls by virtue of its prerogative. and also under section 174 of this Act. A general difinition of a "toll" is to be found in the 'Century Dictionary'; it is not confined to the privilege of passing through boundaries. Examples are given in *Westover* v. *Perkins*(3) such as "murage," "pavage," etc. A toll must be levied for some consideration, and here the consideration is the license—which is really a license to import. [He referred to *Ganpat Putaya* v. *The Collector of Kanara*(13) and *The Secretary of State for India* v *Mathurabhai*(14), as to the interpretation of Indian Statutes in accordance with the general rule that the Crown is exempt; to the 'Encyclopædia of the Laws of England,' article "Toll" and to Maxwell on the 'Interpretation of Statutes,' page 188.] The exaction of money from the Crown is a divesting of the Crown estate which cannot be done without express words.

[1] 11 Coke's Rep., 74*b*.
[2] 1 B. & Ad., 509.
[3] 2 E. & E., 57; 28 L.J., M.C., 227.
[4] 34 L.J., M.C., 81; 6 B, & S., 22.
(5) 10 M. & W., 117; 11 L.J., (Ex.), 338,
(6) 11 H.L.C., 443; 35 L.J., [M.C.], 1.
(7) L.R., 5 App. Cas., 409.
[8] L.R., 3 App.Cas., 159.
(9) L.R., 2 App. Cas., 102.
[10] [1893] 3 Ch., 48.
[11] L.R., 10 Ch. D., 595.
[12] 8 M.I.A., 529 at p. 550.
[13] I.L.R., 1 Bom., 7.
(14) I.L.R., 14 Bom. 213.

Digitized by Google

Mr. *K. Brown* for complainants:—Assuming the rule of construction contended for on the other side to be applicable to Indian Acts, yet on the construction of the Act the conviction is right. It is a question of construction and the question is what is the meaning of the City of Madras Municipal Act. There have been amendments of it—such as Madras Act VII of 1884, Act II of 1892, and Act II of 1901-The Indian Tolli (Army) Act, which repeals certain words in section 174. This Act is a fitter place to look to for light as to the definition of a "toll," and the definition which it gives does not include, *inter alia*, octroi duties. There can be no doubt that the duty leviable under section 341 is in the nature of an octroi duty rather than a toll. This view is supported by reference to section 170 and to schedule D. Section 119, which imposes a tax on buildings, contains no exemption in favour of Government. Exemptions are contained in sections 138, 148, 153, 170, 174, 332 and 338; and it is the case of the other side that all of these are unnecessary. If the test is whether the intention to tax Government is manifest from this Act, I answer that it is manifest. As there are so many sections in which Government is expressly exempted, and as section 341 contains no such exemption, the fair inference as to intention is that it was intended to tax the Crown. It is also worthy of note that two of the sections containing exemptions in favour of the Crown have been amended. 2 & 3 Wm. IV, cap. 71, section 3 was under consideration in *Westover* v. *Perkins*(1). In that section, no mention whatever is made of the Crown, though the King is exempted by sections 1 and 2. The fact that the Crown is mentioned is not conclusive; the manner in which it is mentioned has to be regarded. [He referred to *Ex-parte Postmaster-General*(2) and to the Prescription Act, section 1 of which relates to profits, section 2 to ways, and section 3 to light.] *Wheaton* v. *Maple & Co* (3) proceeded on the ground that as the Crown was expressly exempted in one section and not in another, there was no intention to exempt in the latter-see at page 54. As to the other cases cited they can only be useful with reference to the terms of the Acts construed. *Ex-parte Postmaster-General*(2) only raised the question whether the Crown could insist on its priority in spite of the fact that the property had become vested in the trustee for the general body of creditors Neither this case nor *Smithett* v. *Blythe*(4) help the petitioner very much. The sections on which *Westover* v. *Perkins*(5) was decided show how little it can apply to the present case. The exemptions in 3 Geo. IV, cap. 126, section 32 and 4 Geo. IV, cap. 95, section 24, are purely personal. It was distinctly found that the carriage was being used by permission of the Queen, and was used by the equerry in the exercise of his office. The Act upon which *Mayor, &c., of Weymouth* v. *Nugent*(6) was decided was a private one and it is impossible to ascertain a principle of construction from the decision without reference to the terms of the Act, which are not cited. *Attorney General* v. *Donaldson*(7) depended on the technical nature of the proceedings, which were peculiar to the Crown. [He also referred to Maxwell on 'Statutes,' 2nd edition, page 166; 3rd edition, page 186; *Mersey Docks* v. *Cameron*(8); Bacon's 'Abridgment,' Prerogative E. 5.] The City of Madras Municipal Act would be within the exception of the first paragraph based upon public good; moreover, as stated in Bacon, express words are not necessary to bind the Crown if the intention to do so is manifest. *Moore* v. *Smith*(9) shows this: a case that is dealt with on page 191 of Maxwell on 'Statutes,' 3rd edition. Hardcastle on 'Statutes' also deals with the rule

(1) 2 E. & E., 57; 28 L.J., (M.C.), 227. (2) L.R., 10 Ch., D., 595. (3) (1893) 3 Ch., 48 at p. 54.
(4) 1 B. & Ad., 509. (5) 2 E. & E., 57; 28 L.J., (MC.), 227.
(6) 34 L.J., (M.C.), 81; 6 B. & S., 22. (7) 11 M & W., 117; 11 L.J., (Ex.), 338.
(8) 11 H.L.C., 443; 35 L.J., (M.C.), 1. (9) 28 L.J., (M.C.), 126.

Digitized by Google

stated in Bacon at page 185 of the first edition. The questions of the existence of a prerogative, and of the existence of an intention to tax the Crown, are distinct; it has first to be considered whether there is an intention to tax. As to section 341 being ancillary to section 338, no authority has been cited for such a principle of construction. According to Lord Coke, the three kinds of Statutes which are binding on the king, though he be not mentioned, are those relating to the advancement of religion, to the interests of justice, and to the relief of the poor. But does the rule of construction contended for on the other side apply to Indian Acts? It is submitted that it does not. Sargent, C.J., in *The Secretary of State for India* v. *Mathurabhai* (1) differs from Westropp, J., and the *obiter dictum* of the former is directly opposed to *Arzan* v. *Rakhal Chunder Roy Chowdhry* (2)—a case against the Secretary of State. [He also referred to *Appaya* v. *The Collector of Vizagapatam* (3) and *Ganpat Putaya* v. *The Collector of Kamara* [4]] Where the Indian Legislature intends to put Government and its officials on an exceptional footing, that intention is not left to be implied but is expressed, as in the Procedure Code, the Limitation Act, the Easements Act and elsewhere. Such an intention cannot be read into the Acts enabling local authorities to levy taxes and impose dues. Compare the District Municipalities Acts and the Local Boards Acts. These enactments contain provisions of general application, from certain of which Government is exempted by express language. Act XI of 1881 may be referred to on this point, and on the question of intention. This Act empowers the Secretary of State to prohibit levy of taxes payable by him, even where there is no exemption in favour of Government. So it is part of the system that the Secretary of State should be taxed, and the Legislature has provided an easy method for preventing the levy of taxes such as that under consideration.

The *Advocate-General*, in reply cited Lord Coke's definition of a "toll" in the second Institute, page 58, and contended that the tax imposed by section 341 was a toll within this definition, and that the definition of a toll in the Tolls (Army) Act of 1901 could not affect the question, being only for the purposes of that Act: also that the latter Act did not show when liability arose, but only defined powers which might be used after it had arisen. The intention of the City of Madras Municipal Act could not be ascertained, nor could it be legitimately construed by perusing other Statutes. He contended that section 174 governed section 341.

BENSON, J.—Major Bell, the accused in this case, is the Superintendent of the Government Gun Carriage Factory in the City of Madras. He caused certain timber to be brought into the city on account of Government without obtaining a license and paying the fees prescribed by section 341 of the City of Madras Municipal Act I of 1884, and for this act he has been prosecuted at the instance of the Municipal Commissioners and has been fined the nominal sum of one rupee.

The learned Advocate-General asks us, in the exercise of our powers of revision, to set aside the conviction and sentence as contrary to law. The object of the prosecution and of this revision petition is to obtain an authoritative decision of this Court as to the applicability of section 341 to Government timber and firewood. The section enacts that "no timber or firewood shall be brought within the city without a license specifying the place and conditions of storing, to be issued by the President under the bye-laws, on pay-

[1] I.L.R., 14 Bom., 213.
[2] I.L.R., 10 Calc., 214. [3] I.L.R., 4 Mad., 155. [4] I.L.R., 1 Bom., 7.

Digitized by Google

ment of a fee which should not exceed the following rates :—Timber Rs. 5 per ton ; firewood Re. 0-6-0 per ton."

There is nothing in the section to limit the liability of Government timber though exemptions in favour of Government are found in several other sections of the Act. The *primâ facie* inference is that the Legislature intended to make the section applicable to such timber. The learned Advocate-General, however, contests this inference, and contends that the conviction is bad on three grounds, viz. :—

"1 Because the Magistrate ought to have held that the provisions of section 341 as to taking out a license for importing wood are merely ancillary to the provisions of section 338 as to taking out a licence for storing wood and that the exemption in favour of Government in section 338 applies also to section 341.

"2. Because, if as held by the Magistrate, the license fee leviable under section 341 is to be treated as a tax on importation it amounts to a toll, and Government property is expressly exempted by section 174 from payment of tolls.

"3. Because the Crown is not bound by the taxing provisions of a Statute unless there be express words to bind it, or in the absence of express words, unless the inference that it was intended to bind the Crown is manifest and irresistible, whereas on the true construction of this Statute, no such intention is anywhere to be found."

The first two grounds appear to me to be clearly untenable. The license mentioned in section 341 is quite distinct from that mentioned in section 338. The latter section requires the occupier of every place used for the sale and storage of wood and certain other inflammable materials to take out a license, just as other sections require those who keep livery-stables, slaughter-houses and bake-houses, or who exercise certain dangerous and offensive trades, to take out a license, the object being to give the Municipal authorities the power to control such places in the interest of the public. Section 341, properly understood, is a section which imposes an octroi or town duty under the guise of a license fee. This is manifest from the heavy incidence of the fee and from the proviso in the section for a drawback of nine-tenths of the fee in case the wood is exported, and also from the fact that the president has no discretion to refuse to grant a license. A person may import wood under section 341 without taking it to a place licensed under section 338, and a person may keep a place under section 338 without importing under section 341. I can see no reason for holding that the exemption from control in section 338 in favour of a place occupied by Government operates to exempt from taxation under section 341 the person who imports Government wood. Nor can it, with any show of reason, be said, that the exemption provided by section 174 in favour of Government as regards tolls, extends to the fee or town duty imposed by section 341. The tolls referred to in section 174 are those tolls, and those tolls alone, which the Commissioners are authorised to levy *eo nomine* by section 170 and which are specified in schedule D of the Act.

There remains the contention which was pressed upon us by the Advocate-General with much force and learning, viz., that the fees payable under section 341 are tolls, and that the Crown has a prerogative exemption as regards all tolls, and that, even if they are not "tolls," the Crown, or, in this country, the Secretary of State for India in Council as representing the Crown, is not bound by the taxing provisions of a Statute unless there be express words to bind the Crown, or in the absence of express words, unless the inference that it was

Digitized by Google

intended to bind the Crown, is manifest and irresistible, and that such intention is not to be found in the City of Madras Municipal Act. He contended that no intention to render the Crown liable under section 341 can properly be inferred from the fact that in other sections of the Act Government is expressly exempted from liability and he quoted a number of English cases in support of his contention. There is, no doubt, abundant authority to show that in England the Crown is by virtue of its prerogative exempt from the payment of tolls, but it is also clear from the Indian Councils Act, 1861 (24 & 25 Vict., cap. 67) that it is competent for the Indian Legislatures to make laws which may cut down the prerogative of the Crown in certain matters. This is clear with regard to the Governor-General in Council from section 24 which provides that " no law or regulation made by the Governor-General in Council (subject to the power of disallowance by the Crown as hereinbefore provided) shall be deemed invalid by reason only that it affects the prerogatives of the Crown."

I had at first some doubt whether the Governors in Council of this Presidency and of Bombay are competent to make any law which shall affect the prerogative of the Crown. This doubt was caused by the absence of any section similar to section 24 in regard to the powers of these local Legislatures and it was strengthened by finding that Sir C. Ilbert in his work on the " Government of India" (pages 223 and 226) assumed, for the same reason, that they have no such power. On further consideration, however, and after consultation with my learned colleague, I am of opinion that the local Legislatures are competent to make such a law, provided it does not affect the prerogative in regard to any matter specially exempted from their jurisdiction or from the jurisdiction of the Governor-General in Council. The authority to legislate as regards matters which affect the prerogative is not conferred on the Governor-General in Council by section 24. That authority is conferred by section 22 which gives the Governor-General in Council full legislative authority save in regard to certain specified matters, some of which affect the prerogative, and some of which do not do so. That section in substance re-enacts section 43 of 3 & 4 William IV, cap. 85, with this important difference that it omits the general words of the latter section which prohibited the Governor-General in Council from "making any laws or regulations which shall in any way affect any prerogative of the Crown. " That limitation had, in the interval, been removed by section 26 of 16 and 17 Vict., cap. 95, which provided that "no law or regulation made by the Governor-General in-Council shall be invalid by reason only that the same affects any prerogative of the Crown, provided, " etc. Thus section 22 of the Indian Councils Act, 1861, conferred on the Governor-General in Council a general power to legislate even in matters affecting the prerogative, except in regard to certain specified matters, and section 24 was enacted *ex majore cautela* so as to show beyond all doubt that the important change in the law made, subject to a qualification, by section 26 of 16 and 17 Vict., cap. 95 was, without any qualification, maintained in the new Councils Act, 24 and 25 Vict., cap. 67. The extent of the legislative powers of the Governor in Council of this Presidency and of Bombay is defined and limited in sections 42 and 43 of this Act. Under section 42 the Governor in Council of this Presidency may "make laws and regulations for the peace and good government" of the Presidency provided they shall not "affect any of the provisions of this Act or of any other Act of Parliament in force or hereafter to be in force in such Presidency." Section 43 then specifies certain matters which are not to be dealt with by the local Legislature save with the previous sanction of the Governor-General. In neither section is there any

Digitized by Google

general limitation in regard to matters affecting the prerogative. The limitations imposed on the Governor-General in Council by the latter part of section 22 must necessarily be held to apply to the subordinate Legislatures of this Presidency and of Bombay, but, subject thereto and to the restrictions imposed by sections 42 and 43, a law passed by the Legislature of this Presidency for its "peace and good government" is not in my opinion, invalid by reason only that it affects the prerogative of the Crown. The City of Madras Municipal Act is such a law, and even if the fees specified in section 341 thereof are to be regarded as "tolls" to which the prerogative of the Crown would apply in England [a proposition which I think is doubtful], there would be nothing contrary to law in the local Legislature requiring such fees to be paid on Government wood in the same way as on wood, the property of private persons.

If the fees are not to be regarded as "tolls," with a special prerogative exemption in favour of Government, still less can they be regarded as necessarily inapplicable to Government if they are, as I think they are, in reality a mere tax or town duty, similar to the duty imposed by Act I of 1890 [Madras] on all tobacco brought into the City of Madras. It would, no doubt, seem to be the case that in England, owing to historical causes, the Legislature has proceeded on the view that the Crown is not bound by a Statute unless named in it, and we, therefore, find that the Crown is in many Statutes expressly stated to be bound, but it is impossible to say broadly that in India the Crown is not by a Statute, or the taxing provisions of a Statute, unless expressly named in it. Such express inclusion is altogether exceptional. It would be more correct to say that, as a general rule, the Indian Legislatures have proceeded on the assumption that the Government will be bound by the Statute unless expressly or by necessary implication excluded from its operation. Government, when a party to litigation, pays Court-fees just as other suitors do because there is no special exemption in favour of Government in the Court Fees Act. On the other hand, Government is specially exempted from the payment of stamp duties under the General Stamp Act 1899, section 3, proviso 1, "in cases where but for this exemption the Government would be liable to pay the duty chargeable in respect of such instrument." This amounts to a statutory declaration that Government would be liable to pay the duty but for the special exemption. In like manner goods belonging to Government or specially exempted from duty under the Sea Customs Act and the Indian Tariff Act, and it would be easy to enumerate many other Acts in which exemptions are made in favour of Government on the evident assumption that but for such exemption the Government would be bound. Perhaps, however, the most important Act of all is the "Municipal, Taxation Act, 1881" passed by the Governor-General in Council. It gives the Governor-General in Council power by an order in writing to prohibit the levy by a Municipal Committee of any specified tax payable by the Secretaty of State for India in Council, but provides that in such case "the Secretary of State in Council shall be liable to pay to the Municipal Committee, in lieu of such tax," such sums (if any) as an officer appointed by Government may, in all the circumstances of the case, determine, to be fair and reasonable. The preamble to this Act does not allege that the imposition of a tax payable by the Secretary of State to a Municipal authority is opposed to the prerogative of the Crown. It assumes that such taxation is legal. The Act, in effect, is an acknowledgment by the supreme legislative authority in India that Municipal taxes may be legally and properly payable by the Secretary of State for India in Council. We have not been referred to a single Local or Municipal Act in

Digitized by Google

which Government or the Secretary of State is expressly named as liable to taxation. If such liability did not exist or if it depended, as the Advocate-General contends that it does, on the Government being expressly named in the Statute, this Municipal Taxation Act of 1881 would have had no scope for application and would have been unnecessary. The Legislature has treated such taxation as legal and proper, but has provided a special machinery for its assessment and levy, in order to guard against abuses or inconveniences that might arise if the machinery were that provided by the Acts as suitable in the case of private persons. A similar policy is embodied in the Indian Tolls (Army) Act II of 1901, and the Government buildings Act IV of 1899. It may be noted in passing that in the former Act, octroi or town duties are specially excluded from the definition of " tolls " from the payment of which the Act exempts military persons and certain military property and certain property of His Majesty. It is in my opinion impossible to hold that these Acts and similar exemptions in other Acts were made by the Legislature in ignorance of the prerogative rights of the Crown or merely *ex majore cautela* and without any legal necessity. The whole history and tenor of Indian legislation is opposed to the contention. It may be taken, then, that the local Legislature has power to impose taxation for purposes that make for the peace and good government of the presidency, and that such taxation is not invalid by reason only that it is payable by the Secretary of State for India in Council. The question, then, after all comes to this, whether on the true construction of the City of Madras Municipal Act I of 1884, there is clearly manifest intention to make section 341 applicable to wood imported by Government, and the intention is to be gathered, according to the ordinary rules of construction, from the general scope and tenor of the Act, and of the legislation *in pari materia* of which it forms a part. I am of opinion that the question must be answered in the affirmative. We find that in the City of Madras Municipal Act (V of 1878), which was in force before the Act of 1884, there were provisions for levying taxes on buildings and lands, on professions and salaries, and on vehicles and animals, and for levying tolls on vehicles and animals entering Municipal limits. Government buildings and lands were not exempted from taxation, though the Madras Harbour Works were exempted, as were also places used for public worship and burial grounds. Besides the general tax on buildings and lands, there were special taxes leviable on buildings and lands as a water rate, and as a lighting rate. In regard to neither was the Government generally exempt, but buildings and land in Fort St. George, which all belong to Government, were exempt from the lighting tax, though not from the water tax. This is notable as showing that the Legislature had in mind the question of exemption of Government buildings and lands and expressly gave that exemption in part, though not generally. Military officers were not exempt from the tax on salaries, but gun carriages, ordnance carts and waggons, cavalry horses and vehicles and animals belonging to Government, were exempt from the vehicle and animal taxes, and it was provided that no tolls should be paid " for the passage of troops, Government stores, Government vehicles or animals or any other Government property." Government was also exempt from the provisions of the sections which required persons exercising certain dangerous and offensive trades, keeping stables, cart-stands, &c., and places for the storage and sale of wood and other inflammable substances, to take out licenses and pay fees in respect thereof.

A section (328) corresponding to section 338 of the present City of Madras Municipal Act, existed in the Act of 1878, but it had no section corres-

Digitized by Google

ponding to section 341. Strong objections, to a great extent sentimental, were taken by military officers to the payment of a profession tax under the Towns Improvement Act which was then in force in the mufassal Municipalities, and this, together with certain abuses which had occurred in regard to the levy of the tax on Government buildings and lands, led the Legislature to pass Act XI of 1881, the Municipal Taxation Act already referred to, by which the Governor-General in Council was empowered to prohibit the levy of any specified Municipal tax payable (1) by Military Officers, (2) by the Secretary of State for India in Council, on certain terms as to compensating the Municipal authorities. It was after this Act was passed that the present City of Madras Municipal Act, 1884, was passed, and in it we find section 341 introduced for the first time. No exemption in favour of Government is made in this section. The effect of this section is to impose an octroi or town duty on timber and firewood brought into the City. Six years later a similar duty was imposed by Act I of 1890 (Madras) on all tobacco brought into the City, and again we find no exemption in favour of Government. Looking to the precise manner in which the Government is exempted from payment of certain taxes and fees and to the absence of any such exemption in the case of other taxes and fees, it seems to me that the clear intention of the Legislature was to give exemption in the cases specified, and not to give exemptions in cases not specified. The omission of any exemption in the case of Town duties appears to be intelligible enough, and to be in accordance with the general policy of the Supreme Indian Legislature as indicated by the Municipal Taxation Act, 1881. Under this Act, Government has the power to prohibit the levy of the tax if it sees fit to do so ; but to hold that the Legislature when enacting the City of Madras Municipal Act, 1884, did not mean to make section 341 applicable to Government, would, in my judgment, be opposed to the manifest intention of the Act, when construed in its natural sense according to accepted canons of interpretation applicable to Indian Satutes, and with reference to the course of legislation in India and the Acts which have from time to time been passed *in pari materia.*

In this view the conviction was right and the revision petition must be dismissed.

BHASHYAM AYYANGAR, J.—The petitioner is the Superintendent of the Gun Carriage Factory at Madras and in his official capacity caused to be brought within the City of Madras on the 7th November 1900 and the 4th February 1901, 21 logs of timber of the aggregate weight of 14¼ tons without obtaining a license from the Municipality of Madras, on payment of the fee prescribed by section 341 of Madras Act I of 1884. It is admitted that the timber so brought was the property of Government and was required for the purpose of building gun carriages for His Majesty's forces and that if the same were liable to duty under section 341, such duty will have to be paid out of the Public Indian Revenue.

The petitioner, having been convicted and fined by the Chief Presidency Magistrate for having brought the timber into the City without obtaining a license from the Municipality of Madras, this revision petition has been preferred for the purpose of determining whether the license prescribed by section 341 is necessary in the case of timber brought into the City of Madras by Government. The legality of the conviction of the petitioner is questioned solely on the ground that he was not bound to obtain the license prescribed by section 341, and it is the only question that has been argued. The learned Advocate-General, who appears for the petitioner, bases his contention on three grounds :—

Digitized by Google

i. that section 341 is merely ancillary to section 338 and that the exemption in favour of Government in the latter is therefore equally applicable to the former;

ii. that the exemption from payment of tolls made by section 174 in favour of Government is applicable to the license-fee prescribed by section 341, such fee amounting in fact to a toll; and

iii. that the Crown is not bound by the taxing provision of a Statute unless there be express words to bind it or unless the inference that it was intended to bind the Crown is manifest and irresistible whereas on the true construction of Madras Act I of 1884 no such intention is anywhere to be found.

The first two grounds are clearly untenable and present no difficulty. Section 338 enjoins that yearly licenses should be obtained in respect of every place set apart for the sale or storage (for other than private use) of timber or firewood, &c., by the occupier of such place. The fee and the rate of fee for the issue of such licenses are to be fixed by the Commissioners with the sanction of the Governor in Council under section 420, and "the president may, as he in his discretion and under such restrictions and regulations as he thinks fit, grant or refuse such license." The proviso to section 338, exempts from the operation of the section any such place in the occupation or under the control of Government. This section (338) was practically in force since 1867. But section 341 was enacted only in 1884 and is in no sense ancillary to, or dependent upon, section 338. It really imposes octroi duties or town duties on the importation of timber or firewood, the duty being regulated with reference to its weight. The importer is required, on payment of the duty, to obtain a license specifying the place and conditions of storing of the timber or firewood and the President has no discretion to refuse such license. The specification, in the license, of the intended place of storing will enable the Municipal Commissioners to find out if the occupier of such place of storage, if it be not in the occupation or under the control of Government, has obtained the license prescribed by section 338. The primary object of section 341 is the levy of import duty and that is entirely independent of section 338. Incidentally, no doubt, provision is made in section 341 in view to check the evasion of section 338 in cases to which that section is applicable. Timber or firewood imported by Government may or may not be stored in a place in the occupation or under the control of Government. It is impossible to connect section 341 and section 338 in such a way as to justify the engrafting on the former, of the exemption in favour of Government contained in the latter.

The second ground urged proceeds upon the assumptions that the scope of section 174 is much wider than it really is and that the duty leviable under section 341 can be regarded as a "toll." A reference to section 98, particularly to clause 9, shows that tolls leviable under the Act are only in respect of vehicles and animals entering the Municipal limits. Such tolls are dealt with in sections 170-178 under the heading of "tolls on animals and vehicles entering the Municipal limits" and the rates of tolls and the vehicles and animals in respect of which tolls are leviable are specified in schedule D. A reference to the schedule shows that the rate of tolls varies according as the animals or vehicles are laden or not laden. So far as Government is concerned section 174 exempts Government from payment of tolls for the passage of Government vehicles or animals, Government stores or any other Government property. The exemption can only relate to tolls leviable as such under section 170 of the Act and they are specified in schedule D. I do not advert to the amendment of that section by the Indian Tolls (Army) Act (II of 1901) as the amendment

Digitized by Google

does not affect the question under consideration. The duty leviable under section 341 is not for the passage of timber or firewood, within the meaning of section 174, but for importing the same into the City. The exemption in favour of Government in section 174, can only apply to duties leviable under the Act as "tolls" (section 170) and cannot be extended to section 341 even if the duty prescribed by the latter can be regarded as a "toll" in its general sense. In my opinion the duty imposed by section 341 on timber or firewood imported into the City of Madras is really an octroi-duty and that it is such is made perfectly clear by the amendment of that section by Madras Act II of 1892 providing for drawback upon timber or firewood exported from Madras, in respect of which import duty has been paid.

I do not think that "toll" even in its wide acceptation can comprise such a tax. "Toll" is defined in the 'Century Dictionary' as "a tax paid or duty imposed for some use or privilege or other reasonable consideration" and this definition, I think, brings out best the meaning of the word "toll" from a legal point of view. The learned Advocate-General, relying upon the definition of "toll" given in Sheppard's 'Abridgment' urges that the term will include octroi-duties or town-duties on the import of goods. That definition is quoted in the argument of Counsel in *Westover* v. *Perkins*(1) and I am by no means satisfied that an octroi-duty payable by the owner of goods—and not by the buyer as stated in Sheppard's definition—falls within the definition. It seems to me that the definition quoted above from the Century Dictionary succinctly expresses the idea conveyed by the definition in Sheppard's 'Abridgment.' I may here refer to the definition of "tolls" given in the Indian Tolls (Army) Act II of 1901, section 2 (*h*), which, while more comprehensive than "tolls" referred to as such in Madras Act I of 1884, expressly excludes customs-duties and octroi-duties or town-duties on the import of goods.

The learned Advocate-General bases his contention chiefly on the third ground. The substance of his argument is that the Crown is not bound to pay the duty imposed by section 341 because Government is neither expressly nor by necessary implication included within the purview of that section; and that the express exemption of the Crown from taxes imposed under several other sections of the Act cannot legitimately lead to the necessary implication that the Crown is liable to pay taxes imposed by section 341 and certain other sections in regard to which there is no similar exemption. The question was argued on both sides with reference to certain English and Indian decisions, in some of which it was held, that the Crown was not bound because it was not expressly named, and in others, it was bound though not expressly named. The extent to which decisions in English Courts, passed with reference to Statutes of Parliament and the prerogatives of the Crown under the English Law, will be a safe guide to the interpretation of Acts passed by the Indian Legislature and the prerogatives of the Crown in India, will depend very much upon the policy and course of Indian legislation and the powers of the Indian Legislature—especially of the Provincial Legislatures, whose competence to affect by legislation the prerogatives of the Crown is seriously doubted by Sir Courtenay Ilbert in his recent work on the "Government of India" (at pages 223 and 226).

Is is unnecessary to advert to the powers of the Indian Legislature and the course of Indian legislation prior to 3 & 4 William IV (1833), cap. 85,

(1) 2 E. & E., 57 at pp. 61-62; 28 L.J., (M.C.), 227.

Digitized by Google

which vested the legislative power of the Indian Government exclusively in the Governor-General in council. Section 43 of that Act defined the powers of the Indian Legislature as follows:—

"And be it enacted that the said Governor-General in Council shall have power to make laws and regulations for repealing, amending or altering any laws or regulations whatever, now in force, or hereafter to be in force in the said territories or any part thereof and to make laws and regulations for all persons, whether British or native, foreigners or others and for all Courts of Justice whether established by His Majesty's charters or otherwise and the jurisdictions thereof, and for all places and things whatsoever within and throughout the whole and every part of the said territories and for all servants of the said Company within the dominion of princes and states in alliance with the said Company; save and except that the said Governor-General in Council shall not have the power of making any laws or regulations which shall in any way repeal, vary, suspend or affect any of the provisions of this Act or any of the provisions of the Acts for punishing mutiny and desertion of Officers and Soldiers whether in the service of His Majesty or of the said Company, or any provisions of any Act hereafter to be passed in any wise affecting the said Company or the said territories or the inhabitants thereof or any laws or regulations which shall in any way affect any prerogative of the Crown, or the authority of Parliament or the constitution or rights of the said Company or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or the sovereignty or dominion of the said Crown over any part of the said territories." By section 59 of the same Statute it was provided that the Provincial Governors in Council were no longer to have the power of making laws except in case of urgent necessity and then only until the decision of the Governor-General of India in Council should be signified thereon. It will be noticed that by section 43 the Governor-General in Council was prohibited from making any law affecting the prerogative of the Crown. This provision, however, was modified by 16 & 17 Vict., cap. 95, section 26, which provided as follows:—"No law or regulation made by the Governor-General in Council shall be invalid by reason only that the same affects any prerogative of the Crown, provided such law or regulation shall have received the previous sanction of the Crown signified under the Royal Sign Manual of Her Majesty, countersigned by the President of the Board of Commissioners for the affairs of India."

When the Indian Councils Act 1861 (24 & 25 Vict., cap. 67), was passed, section 43 of 3 & 4 William IV, cap. 85 and section 26 of 16 & 17 Vict., cap. 95, were, among others, repealed and the legislative powers of the Provincial Governors in Council were restored. Section 22 of the Indian Councils Act defines the legislative powers of the Governor-General in Council and it substantially corresponds to section 43 of 3 & 4 William IV, cap. 85, except in one important particular, *i.e.*, that the prerogative of the Crown is not excepted from the legislative authority of the Governor-General in Council save of course, in so far as the matters specially excepted may comprise certain prerogatives of the Crown. Section 24 expressly provides that a law made by the Governor-General in Council shall not be deemed invalid by reason only that it affects the prerogatives of the Crown. This is simply a reproduction of the first part of section 26 of 16 & 17 Vict., cap. 95, which section was repealed. This section is really superfluous and can be regarded as inserted only '*ex majore cautela*,' as an important change was made in the law by subjecting the prerogative of the Crown to the legislative authority of the Governor-

Digitized by Google

General in Council, except in so far as such prerogative may relate to the allegiance of any person to the Crown or to the sovereignty or dominion of the Crown over any part of the Indian territories—which are specially excepted by the concluding paragraph of section 22. Section 42 empowers the Provincial Governors in Council to make laws and regulations "for the peace and good government" of the provinces, subject to the condition that no Act of Parliament then in force or thereafter to be in force in the provinces is to be affected by any provincial legislation. It will be noted that the matters which may be dealt with by the provincial Legislatures are not specifically enumerated as in the case of the Governor-General in Council, nor are the matters comprised in the last paragraph of section 22, which are excepted from the legislative authority of the Governor-General in Council, specially excepted in section 42 from that of the Provincial Governors in Council. It seems probable that it was considered unnecessary that the exceptions covered by the last paragraph of section 22, should be engrafted on section 42 inasmuch as section 42 empowers Provincial Governors in Council to make laws only for the "peace and good government" of the province, and that such power cannot possibly extend to any of the matters comprised in the last paragraph of section 22. Whether this is so or not, it is obvious that matters excepted from the legislative authority of the Governor-General in Council cannot be within the powers of subordinate provincial Legislatures. It is true, as pointed out by Sir C. Ilbert, that there is no section, with respect to the laws passed by provincial Legislatures corresponding to section 24 which relates only to laws passed by the Governor-General in Council affecting the prerogative of the Crown. Does this warrant the inference drawn by Sir Courtenay Ilbert that the provincial Legislatures do not possess the power which the Governor-General in Council has, of making laws which may affect the prerogative of the Crown? If the power of the Governor-General in Council to pass such a law was conferred by section 24, no doubt the inference would be irresistible, that in the absence of such a section the provincial Legislature can pass no such law. The power of the Governor-General in Council to pass a law affecting the prerogative of the Crown is derived not from section 24 but from section 22 which, unlike the corresponding section 43 of 3 & 4 William IV, cap. 85, does not except the prerogative of the Crown generally from the legislative jurisdiction of the Governor-General in Council. Section 42 defining the powers of the provincial Legislatures does not except the prerogative of the Crown generally from their jurisdiction and it can hardly be contended that there would be no need or occasion to affect any prerogative of the Crown in making effective laws and regulations for the "peace and good government" of the province.

The phrase "peace, order and good government" is used in several Acts of Parliament conferring legislative powers on Colonial assemblies. The 91st section of the British North America Act, 1867, provides that it shall be lawful for the Queen, with the advice and consent of the Senate and the House of Commons, to make laws for the "peace, order and good government" of Canada, in relation to all matters not coming within the class of subjects by this Act assigned exclusively to the Legislatures of the provinces. In *Russell* v. *The Queen* (1) a question was raised as to the validity of the Canada Temperance Act, 1878, passed by the Dominion Parliament and it was held by the Privy Council that the Act did not come within one of the classes of subjects assigned to the provincial Legislatures and was *intra vires* of the Dominion Parliament, being of a nature which fell within the general authority of Parliament to make laws for the order and good government of

(1) L. R., 7 App. Cas., 829.

Digitized by Google

Canada. In *Ashbury* v. *Ellis* (1) a contention was raised that the Act of Parliament, 15 & 16 Vict., cap. 72, which gave to the Legislature of New Zealand power "to make laws for the peace, order and good government of New Zealand provided that no such law be repugnant to the laws of England" did not give power to subject to its judicial tribunals persons who neither by themselves nor by their agent were present in the colony. It was argued that though the law was not repugnant to the laws of England, yet the moment an attempt was made by the Legislature of New Zealand to affect persons out of New Zealand, that moment the local limitations of the jurisdiction were exceeded and the attempt was nugatory. Their Lordships of the Privy Council overruled the objection, it being in their opinion "clear that it is for the peace, order and good government of New Zealand that the Courts in New Zealand should in any case of contracts made or to be performed in New Zealand have the power of judging whether they will or will not proceed in the absence of the defendant" and that whether a foreign Court will or will not enforce a judgment passed in the absence of the defendant under such circumstances, it is sufficient for trying "the validity of New Zealand laws in New Zealand to say that the peace, order and good government of New Zealand are promoted by the enforcement of the decrees of their own Courts in New Zealand." Though no question of prerogative being affected by the colonial Legislature was involved in either of the above cases, they afford illustrations of the liberal interpretation which has been placed by the Judicial Committee of the Privy Council on the expression "peace, order and good government."

In *Cushing* v. *Dupuy* (2) the question arose as to whether the Dominion Enactment, 40 Vict., cap. 41, section 28, amending the Canadian Insolvency Act and providing that the judgment of the Court of Appeal in matters of insolvency should be "final" could and did derogate from the prerogative of the Crown to allow appeals as an act of grace. Their Lordships of the Privy Council thought it unnecessary to consider and decide whether the Parliament of Canada had power to interfere, by legislation, with the royal prerogative, as in their opinion the 28th section of the Insolvency Act did not profess to touch it and that upon the general principle that the rights of the Crown can be taken away only by express words, the power of the Queen to allow appeals as an act of grace was not affected by the enactment. The attention of the Privy Council was drawn to an Act of the Parliament of Canada, 31 Vict., cap. 1, enacting rules of interpretation to be applied to all future legislation, when not inconsistent with the Act or the context, which, among others, provides that no provision or enactment in any act shall affect in any manner or way whatsoever, the rights of Her Majesty, her heirs, or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby.

An earlier decision of the Privy Council, to the contrary in *Cuvillier* v. *Aylwin* (3) which was followed in *The Queen* v. *Eduljee Byramjee* (4) and in *The Queen* v. *Alloo Paroo* (5) was virtually, if not expressly, overruled on the ground that the decision in that case "if not expressly overruled has not been followed and later decisions are opposed to it." A similar question arose before the Privy Council in 1856 in an appeal from the Sadr Dewani Adalat of Bombay, in *Modee Kaikhooscrow Hormusjee* v. *Cooverbhaee* (6) as to the operation of Act III of 1843 in barring the prerogative of the Crown from admitting appeals against an order rejecting a special appeal to the Sadr

(1) [1893] A. C., 339. (2) L. R., 5 App. Cas., 409. (3) 2 Knapp's P.C., 72.
(4) 3 M.I.A., 468 at p. 486. (5) 3 M.I.A., 488 at p. 496. (6) 6 M.I.A., 448 at p. 455.

Digitized by Google

Dewani Adalat which order was declared "final" by that Act. Their Lordships of the Privy Council held that the Act would have no such operation as Indian Legislature had no power to limit or affect the prerogative of the Crown without its previous sanction and it did not appear that the said Act was passed after obtaining such sanction. It was for the same reason that Act VI of 1856 (an Act for granting exclusive privileges to Inventors), passed by the Legislative Council of India, was disallowed by the Court of Directors on the advice of Her Majesty's law officers (*vide* Preamble to Act XV of 1859) that the exclusive privilege of the Crown to grant patents for inventions was affected by the Act. The Act VI of 1856 was accordingly repealed by Act IX of 1857, but was virtually re-enacted as Act XV of 1859, after having obtained previously the sanction of Her Majesty as required by section 26 of 16 & 17, Vict., cap. 95.

The Indian Councils Act, however, removed such limitation of the powers of the Indian Legislature. In that Act itself there is internal evidence that there is no such limitation even in respect of the powers of the provincial Legislatures, for section 43 contemplates provincial legislation, with the previous sanction of the Governor-General, for regulating coins and patents or affecting the relations of Government with foreign princes or states. A reference to sections 19 and 38 will show that both in the Governor-General's Council and in the Provincial Councils, bills may be introduced, with the previous sanction of the Governor-General or Governor as the case may be, affecting the public revenue of India or imposing any charge on such revenue. I draw attention to this special provision in connection with certain English decisions to be referred to hereafter in which it was held that although there is no special exemption of the King, yet he is exempted by virtue of his prerogative from the operation of every Act imposing a duty or a tax.

It has now been definitively decided by the Judicial Committee of the privy Council in more cases than one, both from India and the Colonies, that an Indian or Colonial Legislature is not a delegate of the Imperial Legislature, that it is restricted in the area of its powers, but within that area it is unrestricted. In *The Queen* v. *Burah*(1) their Lordships of the Privy Council, in overruling a Full Bench decision of the Calcutta High Court, that section 9 of Act XXIII of 1869 was *ultra vires* of the Indian Legislature, laid down the general law in these terms:— "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it and it can of course do nothing beyond the limits which circumscribe those powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have plenary powers of legislation, as large and of the same nature as those of Parliament itself." The same doctrine was laid down in a later case, *Hodge* v. *The Queen*(2) by their Lordships of the Privy Council in the following terms :—"It appears to their Lordships, however, that the objection thus raised by the appellant is founded on an entire misapprehension of the true character and position of provincial Legislatures. They are in no sense delegates of, or acting under mandates from, the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes, in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agent of, the Imperial Parliament, but authority, as plenary and as ample, within the limits

(1) L.R., 3 App. Cas., 889. [2] L.R., 9 App. Cas., 117.

Digitized by Google

prescribed by section 92, as the Imperial Parliament in the plenitude of its power possessed or could bestow. Within these limits of subjects and area, the local Legislature is supreme and has the same authority as the Imperial Parliament." This principle was approved of and followed in an appeal from New South Wales in *Powell* v. *Apollo Candle Company*(1). The same doctrine virtually finds legislative declaration in section 45 of 3 & 4 William IV, cap. 85.

In my opinion, therefore, there can be no reasonable doubt as to the competence of provincial Legislatures to pass laws within the area of their powers —which is narrower than the area of the powers of the Governor-General in Council—though such laws may affect the prerogative of the Crown. If it were otherwise, the powers of the provincial Legislature to make laws for the peace, order and good government of the province would be unduly hampered. There is no small degree of uncertainty as to the extent of the prerogatives of the Crown in India and the validity of no few enactments of the provincial Legislature will be called into question in Courts on the ground that they directly or indirectly affect the royal prerogative.

But in construing the general words of an enactment it may be important to consider whether any prerogative of the Crown will be affected by a literal construction; and for the purposes of this case, it will be necessary to consider whether exemption from statutory duties and taxes is, in the real sense of the expression, a "Crown prerogative." In the *Mayor of Lyons* v. *East India Company*(2) the principle of law bearing upon the prerogatives of the Crown in India was indicated by Lord Brougham in the following terms:—" It is agreed on all hands that a foreign settlement obtained in an inhabited country by conquest or by cession from another power stands on a different relation to the present question from a settlement made by colonising, *i. e,* peopling an uninhabited country. In the latter case, it is said that the subjects of the Crown carry with them the laws of England, there being of course no *lex loci.* In the former case, it is allowed that the law of the country continues until the Crown or the Legislature changes it. (*Vide* also *Cooper* v. *Stuart* (3), ... Then, is Calcutta to be considered as an uninhabited district settled by English subjects or as an inhabited district obtained by conquest or cession ? If it falls within the latter description, has the English law incapacitating aliens ever been introduced ? If that law has never been introduced, has there been such an introduction of English law generally that those parts which have been introduced draw along with them the law touching aliens ? An answer to these three questions . . . . will include a consideration of the only reason for the proposition upon which the judgment below is mainly rested, viz, that the royal prerogative extends necessarily and immediately to all acquisitions however made and that the forfeiture of aliens' real estate is parcel of that prerogative." In considering these three questions, their Lordships after adverting to the contention that there is something in the law incapacitating aliens, which makes it, so to speak, of necessary application wheresoever the sovereignty of the Crown is established, as if it were inherent in the nature of the sovereign power, and pointing out with reference to the law of various countries, that there is no warrant in the nature of the thing, for the position that this right is an incident of sovereignty, observe as follows:—" Besides, if reference be made to the prerogative of the English Crown, that prerogative in other particulars is of as high a nature, being given for the same purpose of protecting the State, and it is not contended that those branches are extended to Bengal. Mines of precious metals, treasure-trove, royal fish are all

[1] L.R., 10 App. Cas., 282. [2] 1 M.I.A. 175. [3] L.R. 14 App. Cas. 286 at p. 291.

Digitized by Google

vested in the Crown for the purpose of maintaining its power and enabling it to defend the State. They are not enjoyed by the sovereign in all or even in most countries and no one has said that they extend to the East Indian possessions of the British Crown." In the *Advocate General of Bengal* v. *Runee Surnomoye Dossee* (1) Lord Kingsdown, after adverting to the introduction and establishment of the English Criminal Law in India and its application to Natives as well as Europeans with reference to the prerogatives of the Crown (pages 428-30), to forfeiture of the personal property of persons committing suicide in Calcutta, arrived at the conclusion that the English Law of '*felo de se*' and forfeiture of goods and chattels did not extend to a native Hindu, though a British subject, committing suicide at Calcutta. It is unnecessary to refer to various other instances which will readily occur to one's mind, which according to the Common Law of England are comprised in the royal prerogative, but in the very nature of things are either inapplicable to or have not been introduced into India. On the other hand, it is probably true that the Crown has, according to the Common Law of India, certain prerogatives which it may exercise in India though not in England, notably the prerogative of imposing by an executive act assessment on lands and varying the same from time to time. The prerogatives of the Crown in India—a country in which the title of the British Crown is of a very mixed character—may vary in different provinces, as also in the Presidency towns as distinguished from the mufassal. The determination, with anything like legal precision, of all the prerogatives of the British Crown in India is by no means an easy task,

I shall now proceed to consider how far the canon of interpretation commonly stated in the form that "the Crown is not bound by a Statute unless named in it" can be safely applied to Acts of the Indian Legislature and in particular to taxing Acts. The various cases in the English reports, in which this canon of interpretation was considered and in some of which it was held that the Crown was not bound because it was not expressly named or included by necessary implication, and others in which the Crown was held bound though not so named or included will be found collected in Maxwell's Interpretation of Statutes' (3rd edition pages 186-193 and Hardcastle's 'Construction of statuory law, 2nd Edition pages 401-421. It may not be easy to reconcile all the cases or to deduce therefrom certain definite rules of interpretation. The leading canon seems to be that laid down by Lord Coke in the *Magdalene College case*(2), which the Master of the Rolls states as follows in *Ex parte Postmaster-General*(3):—"Where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the King shall be bound by such Act though not particularly named therein; but where a Statute is general and any prerogative, right, title or interest is thereby divested or taken from the King, in such case the King shall not be bound unless the Statute is made by express terms to extend to him." The Master of the Rolls after observing that that is the general rule and that the point came before the Court of Exchequer in *Attorney-General* v. *Donaldson*(4) and there Baron Alderson, in delivering the judgment of the Court, said:—"It is a well-established rule, generally speaking, in the construction of Acts of Parliament that the King is not included unless there be words to that effect," held that although the Crown was named in some of the sections of the Bankruptcy Act, 1869, it was not bound by the other provisions of the Act so as to deprive it

[1] 9 M. I. A., 391 at pp. 428-30.
[2] 11 Coke's Rep., 74 b.
[3] L. R., 10 Ch. D., 595 at p. 601.
(4) 10 M. & W., 117; 11 L. J., [Ex]. 338.

Digitized by Google

of its undoubted prerogative of "Extent." This is one of the cases which the learned Advocate-General relies upon. A reference to the judgment of the Master of the Rolls will show that the decision is based not only upon the general canon of interpretation, but also upon the positive conclusion he arrived at from the wording of the sections that the Legislature intended not to deprive the Crown of its undoubted prerogative.

Adverting to the first portion of Lord Coke's rule, Maxwell (at page 193) points out that it would probably be more accurate to say that the Crown is not excluded from the operation of a Statute where neither its prerogative rights nor property are in question. As regards the latter portion of the rule, judicial decisions have clearly established that the Crown is sufficiently named in a Statute, within the meaning of the rule, when the intention of the Legislature to include it is clear and manifest. The canon of interpretation simply amounts to this, that it is to be presumed that the Legislature does not intend to deprive the Crown of any prerogative right, or property unless it expresses its intention to do so in explicit terms or makes the inference irresistible. Such a rule of interpretation is not peculiar to the Crown. It is analogous to and founded upon the principle on which, for instance, the following canons of interpretation are equally applicable to the construction of Statutes— viz.: (i), it is a sound rule to construe a Statute in conformity with the common Law rather than against it, except where and so far as the Statute is plainly intended to alter the course of the Common Law *(The Queen* v. *Morris)* (1); (ii), it is a maxim that a Statute made in the affirmative, without any negative expressed or implied does not take away the Common Law (Coke); (iii), "where there are general words in a later Act capable of reasonable and sensible application, without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier legislation indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so" —'*generalia specialibus non derogam*' (*Seward* v. "*Vera Cruz*" [2]); [iv], the general rule undoubtedly is that the jurisdiction of Superior Courts is not taken away except by express words or necessary implication [*Albam* v. *Pyke* [3]], etc. These compendious canons of interpretation which are in the nature of maxims can only be regarded as mere guides to the interpretation of Statutes and ought not to be applied as if they were statutory clauses, enacted with all the precision and provisos of an Interpretation Act.

In *Theberge* v. *Laudary* [4] the Lord Chancellor in an appeal from the Superior Court of Quebec in Canada, while holding in that particular case that the Crown had not the prerogative of admitting an appeal from a judgment of the Superior Court under the "Quebec Controverted Elections Act, 1875," affirmed the general principle of construction in the following words:— "Their Lordships wish to state distinctly that they do not imply any doubt whatever as to the general principle that the prerogative of the Crown cannot be taken away except by express words; and that they would be prepared to uphold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative."

This emphatic statement of the rule being founded upon general principles of constructions is undoubtedly applicable as much to Indian enactments as to Colonial or Imperial Statutes; and if general words of an Indian enact-

[1] L. R. 1 C. C. R., 90 at p. 95.
[2] L. R., 10 App. Cas., 59 at p. 68.
[3] 4 M. & Gr., 421 at p. 424,
[4] L. R., 2 App. Cas., 102.

Digitized by Google

ment are such as according to their literal interpretation would divest the Crown of, or take away from it, any prerogative, right, title or interest, they would certainly have to be construed in a limited sense so as not to produce such a result which, it may be reasonable to infer, could not have been in the contemplation of the Legislature, in the absence of a clear indication of an intention to the contrary. But it is unduly stretching the language of the rule, to bring within its scope general words of a Statute imposing a tax and claim exemption for the Crown on the ground that the Crown is divested of any prerogative, right, title or interest, by giving full effect to the general words.

So far as exemption from any tax imposed by a Statute is concerned, the question for determination is whether according to the right construction of the Statute, the Crown is or is not made liable to pay the tax. In the former case, it is bound to pay; in the latter, it is not; in neither case is there any question of prerogative. The rule of construction above adverted to cannot itself be regarded as a prerogative of the Crown. A Statute imposing a tax upon Crown property, which tax will be payable out of the public revenue, cannot reasonably be regarded as divesting the Crown of any right, title or interest, within the meaning of the above rules—especially when such tax is levied for purposes connected with the good government of the country, for which purpose, such revenues are, in India vested in trust in the Crown, by section 39 of 21 & 22 Vic., cap. 106.

In the English reports, the above canon of interpretation has often been referred to, as in *Attorney-General* v. *Donaldson*(1), as a well-established rule, according to which, generally speaking, the Crown is not included in a Statute unless there be words to that effect; and the exemption of the Crown from payment of rates imposed by Statutes is referred to as an implied prerogative right of the Crown. The state of the English law on this question was fully reviewed and considered by the House of Lords in *Coomber* v. *Justices of Berks*(2). I cannot do better than quote the following extracts from the judgments of Lords Blackburn Watson and Bramwell in that case. Lord Blackburn (pages 65–66):— " In *The King* v. *Cook*[3] the general principle as to the construction of statutes imposing charges as containing an exemption of the Crown was laid down. That was a case raising the question whether the duty on post-horses was exigible in respect of post-horses carrying an express from the Governor of Portsmouth to one of His Majesty's Principal Secretaries of State, which was not on any private business whatever, but wholly related to the public concerns of this kingdom. It was held that it was not exigible. Lord Kenyon, delivering the judgment of the Court, says 'Now, although there is no special exemption of the King in this Act of Parliament [25 Geo. 3, cap 51] yet I am of opinion that he is exempted by virtue of his prerogative in the same manner as he is virtually exempted from the 43rd Eliz. and every other Act imposing a duty or tax on the subjects.' There may well be expressions in an Act imposing a duty or tax on the subjects, such as to show that the intention of the Legislature was to impose the duty on some property belonging to the Crown. But I do not think it made out that there is any such intention shown in the Income-tax Act. Reliance was placed in the argument on the general words of the rule 'which rule shall be construed to extend to all lands, tenements and hereditaments or heritages capable of actual occupation of whatever nature and for whatever purpose occupied or enjoyed.' But I do not think this can be construed as taking away the exemption, by virtue of the prerogative, of property actually occupied or enjoyed by the Crown . .

(1) 10 M. & W., 117; 11 L.J., (Ex.), 338. (2) LR., 9 App. Cas., 61 at pp. 65–66.
(3) 3 T.R., 519.

Digitized by Google

I should rather infer that those who framed the Act thought that unless expressly named, such an occupation would have been exempted . . . . There had been a considerable number of decisions on the poor-rate, which laid down a much wider principle than that laid down in *The King* v. *Cook*[1], namely, that whenever property was occupied for 'public purposes' it was exempted from poor-rate. In the *Mersey Docks* v. *Cameron*[2] it was decided by this House that the exemption to such an extent could not be supported. But, whilst this was decided, it was not said that all the cases which established exemptions on the ground indicated in *The King* v. *Cook*[1] were wrong. The passage at pages 464, 465, in the opinion of the majority of the Judges, which I delivered and which has been so often quoted, shows that those who joined in that opinion thought that many of them, such as those deciding that buildings occupied by the Post Office, the Horse Guards, or the Admiralty, were exempt, were obviously right and that those which decided that buildings occupied for Police and for the Assize Courts were exempt, though not so obviously right, were capable of being supported on a ground that did not touch the case then before the House. I do not think that opinion can be properly cited as an authority that those cases were rightly decided, but certainly their authority was not weakened by anything said in that opinion. The House, in *Mersey Docks* v. *Cameron*(2), did not decide that those cases to which I have referred were rightly decided; but the language of the Lord Chancellor (Lord Westbury) at page 505, seems to me to add to their authority. He there says, that the 'public purposes' to make an exemption 'must be such as are required and created by the government of the country and are therefore to be deemed part of the use and service of the Crown'; and in *Greig* v. *University of Edinburgh*(3), he more clearly shows what was his view by using this language, 'property occupied by servants of the Crown, and (according to the theory of the Constitution) property occupied for the purposes of the administration of the government of the country, became exempt from liability to the poor-rate.' Lord Cranworth (*Mersey Docks* v. *Cameron*(2)) by using the words 'more or less sound,' seems to me to guard against being supposed to decide that those cases which proceeded on this ground were all right in deciding that the purposes were those of the public government, to such an extent as to bring them within the principle of *The King* v. *Cook*(1), but he certainly does not at all impeach them. The Scotch cases on the Scotch poor law proceed on a similar ground. It has been pointed out that in the Scottish poor law, half the poor-rate is imposed on the owner in respect of property, and so far the case is more closely analogous to that of the income-tax; but, I think, that whether the rate is exigible in respect of property, or in respect of occupation, the ground of exemption must be the same, viz., as said by the Lord Chancellor (Cairns) in *Greig* v. *University of Edinburgh*(3), the Crown not being named in the English or Scotch Statutes on the subject of assessment, and not being bound by Statute when not expressly named, any property which is in the occupation of the Crown or of persons using it exclusively in or for the service of the Crown is not rateable to the relief of the 'poor' (pages 67—69 . . . . . I do not say that the Assize Courts, maintained by the county for the administration of the Queen's justice in the Queen's Courts, are quite so clearly occupied by the servants of the Crown, as those Courts which are maintained by the Woods and Forests out of the general revenue of the country. Nor do I say that the Police Station maintained by the county for the maintenance

(1) 3 T.R., 519. (2) 11 H.L.C., 443 at p. 508; 35 L.J., (M.C.), 1.
(3) L.R., 1 H.L., (Sc.), 350 at p. 354.

Digitized by Google

of the police is quite so clearly occupied by the servants of the Crown as a barrack maintained for soldiers, and paid for out of the general revenues of the country. But I think there is great reason for saying that both are maintained for the purposes of the administration, or those purposes of the Government which are, according to the theory of the Constitution, administered by the Sovereign. If it was a new point whether buildings occupied for the purpose of County Courts and County Police were liable to be rated for the poor-rate, I think there would be considerable force in the argument that the county occupying property in order to fulfil a duty to the Crown which it is required to fulfil at its own expense, is not occupying it for the Government, or in the service of the Government. But as for many years property thus occupied has been uniformly held exempt from the poor-rate, I do not think your Lordships ought now to hold that it is liable to poor-rate (pages 69-70) . . . . It seems to me that it is not material whether the assessment Statute imposing any tax, does so, like the Poor-rate Acts, for a local purpose, or like the Statute imposing a duty on post-horses, considered in *The King* v. *Cook* [1], or the income-tax, for an imperial purpose. In each there is an implied exemption on the ground of prerogative. And if the property is so held as to bring it within the ground of exemption for the one Statute, it must surely be brought within the ground of exemption for the other [page 71] . . . . Lord Watson.—It was accordingly argued for the appellant that your Lordships are free in this case to consider all questions as to the proper extent and limit of Crown privilege, as if these had now arisen for the first time for decision. The statement in point of fact upon which that argument was rested is not strictly accurate, because as has been pointed out by my noble and learned friend, the Court in *The King* v. *Cook*(1) gave effect to the privilege of the Crown not in the case of a local but of a general tax, holding that such privilege extended not only to the Act of Elizabeth, but to every Act imposing a tax upon the subjects of the Crown. But I should have been prepared to hold, apart from the authority of that case, that the appellant's contestation upon this point is untenable. The exemption of the Crown from the incidence of rating Statutes is a general privilege and is nowise dependent upon the local or imperial character of the rate. It takes effect in all cases, when the Crown is not named in the statute, or I should prefer to say, in all cases where the enactments do not take away the privilege, either in express terms or by plain and necessary implication. There is not, in my opinion, one kind of Crown exemption from the Statute of Elizabeth and another kind of Crown exemption from the Income Tax Acts, (page 76) . . . . Lord Bramwell.—The poor-rate is local. Whatever exempts part of the property in a rated locality, adds to the burden on the rest, and there is this additional hardship, that the exempted part may increase the burden itself by adding to the numbers chargeable on the rate. Moreover, the reasoning on which that exemption was founded may be doubtful. But it is the law; the law as confirmed in this House by the reasoning in the *Mersey Docks case*(2). . . . . For, as I have said, there is some hardship in exempting any property from a local rate, there is none in exempting from a general tax a class of property everywhere within the range of that tax. The payers and receivers of the poor-rate are not the same. If the Crown paid income-tax, it would be at once payer and receiver. And indeed in one view the question is unimportant. For if this kind of property pays everywhere, a less rate of income-tax will be necessary and a greater local rate everywhere. Whereas by our decision more income-tax may be required and less local rate. And this is what many people think desirable (pages 79-80)."

[1] 3 T.R., 519. (2) 11 H.L.C., 443 : 35 L.J., (M.C.), 1.

Digitized by Google

It is clear from the above extracts that unless the Crown is included expressly or by necessary implication, Crown property is not liable in England to any rates or taxes. Adverting to Lord Bramwell's adverse criticism of the course of decisions as to Crown exemptions, I may mention that it is stated in Castle's Law of Rating (2nd edition, 1886) at page 121, that, "within the last few years attempts have been made in Parliament to carry through an Act which will remove the exemption from rateability of Government property." Lords Kenyon and Blackburn refer to the exemption of the Crown, as an implied exemption by virtue or on the ground of prerogative. It may be inferred from the observation made by Lord Blackburn that framers of English Statutes generally proceed on the principle that unless the Crown be expressly included it will not be bound by the Statute, and whenever it is intended to bind the Crown, it is expressly named, *e. g.*, The Arbitration Act, 1889, section 23; The Patents, etc, Act, 1883, section 27; The Bankruptcy Act, 1883, section 150; The Interpretation Act, 1889, section 30; The Stamp Act, 1891, section 119.

The reference by Lords Kenyon and Blackburn to the prerogative of the Crown as the reason for its implied exemption must be understood as referring only to the above rule of interpretation and not to any prerogative of the Crown in its real sense. Similarly the privilege of the Crown to use an invention without compensation to the patentee, notwithstanding the grant of a patent for the exclusive right to the use of the invention and the implied exemption of the Crown from payment of tolls, notwith-standing a grant, by itself, of a right to levy tolls, are referred to as prerogatives of the Crown, though such privilege and exemption are only the result of the rule applicable to the interpretation of Crown-grants, the grant in either case being made in the exercise of one and the same branch of the royal prerogative (*Feather* v. *The Queen*(1)).

In the *Mayor, &c., of Weymouth* v. *Nugent*(2) on which the learned Advocate-General specially relies, Cockburn, C.J., explained as follows the immunity enjoyed by the Crown from payment of tolls:—"It may be said that the doctrine of the immunity enjoyed by the Crown from payment of tolls arose in time when tolls were levied by virtue of a grant from the Crown or under prescription which presumed a prior grant from the Crown, and therefore it might well be assumed that where tolls were granted by the Crown, it was not intended by the Crown that it should itself be barred by the grant; but whether that be the origin of the immunity or not, it has obtained from the earliest times, and it cannot be supposed that the Legislature could have intended to make the Crown liable to the payment of those duties, without making any mention of the Crown at all." Both on the ground of the exemption of the Crown from payment of tolls and on the ground that the Crown is not bound by an Act of Parliament unless it is expressly named therein, it was held in that case that the Crown was not bound to pay wharfage duties under 6 Geo. 4, cap. 116 for stones which were brought by a barge into the harbour for the purpose of being used on Government works which were being carried on there. The Chief justice refers to both these grounds, as being based upon "two great rules which, from an early period of our history, have obtained as to the royal prerogative." The decision was arrived at notwithstanding that there were only certain specified exemptions in the Statute in favour of the Crown, from which it was argued that it was to be inferred that it was intended by the Legislature, that there should be no other exemptions. This argument did not prevail, the Chief Justice holding that such exemptions were inserted '*ex majore cautela*' and where intended to meet cases, which it was thought would most likely arise.

(1) 35 L.J., (Q.B.), 200. (2) 34 L.J., (M.C.), 81; 6 B. & S., 22.

Digitized by Google

This decision follows the principle laid down in the earlier case of *Westover* v. *Perkins* (1) which is also relied upon by the learned Advocate-General and in which Lord Campbell said:— " From time immemorial the Sovereign has been exempt from toll and where tolls are enforced by Statute there is an implied exemption of the Sovereign's property. " In the case of *Smithett* v. *Blythe* (2) also cited in support of the petition, the question turned upon 3 Geo. 2. cap. 36, which confirmed a patent formerly granted by the Crown for taking tolls in respect of a light-house. There was a proviso that nothing in the Act should extent to charge the King's ships-of-war with the duties granted by the Act of patent. At the time of the passing of the Statute, the post office packets in respect of which toll was claimed from the Crown were not ships owned by Crown. It was held, that the exemption of His Majesty's ships-of-war did not by implication, render post offices packets, with some years after the passing of the Act became the property of the Crown, chargeable with toll.

These three cases proceed on one and the same principle and they relate to the implied exemption of the Crown from payment of tolls, in each of them it was held that such implication was not negatived by the mere fact that certain exemptions in favour of the Crown were expressly made none of which covered the exemption claimed.

It is unnecessary to refer specially to the *Mersey Docks case* (3) which is the leading authority on the implied exemption, from rates and taxes, of Crown property occupied by or on behalf of the Crown for purposes connected with any department of the government, as that decision has been followed and fully explained in the later decision of the House of Lords in *Coomber* v. *Justices of Berks* [4], already referred to and quoted from.

The cases of *Perry* v. *Eames* (5) and *Wheaton* v. *Maple & Co.* [6] which are also referred to, are not very much in point. Those cases turned upon sections 2 and 3 of the Prescription Act [2 and 3 William IV, cap. 71]. It was held that the former section in which the Crown is specially named did not apply to an easement of light which is specially and exclusively governed by section 3, in which the Crown is omitted, notwithstanding that the Crown is expressly mentioned in sections 1 and 2, and that therefore no easement of light against the Crown can be acquired by prescription under section 3.

I shall now proceed to refer to certain Indian decisions which have a bearing upon the question under consideration . In *Secretary of State for India* v. *Bombay Landing & Shipping Co.* (7) Westropp, C. J., after a full investigation of the various systems of law, including the Hindu and the Mahammadan laws, as to the prerogative priority of Crown-debts, held that a judgment debt due to the Crown was in Bombay entitled to the same precedence in execution as a like judgment debt in England, if there were no special legislative provision affecting that right in the particular case. In answer to the argument that section 183 of the Indian Companies Act (X of 1866) was such special legislative provision, he held that as the Crown was not either expressly or by implication bound by section 183, the prerogative of the Crown was not affected. In the soundness of this decision, on both the points I fully concur. In this case the general words of section 183 would, if literally construed, divest the Crown of one of

(1) 2 E. & E , 57 : 28 L. J., (M. C.), 227
(2) 1 B. & Ad., 509
[3] 11 H. L. C., 443 at p. 508; 35 L. J., [M. C.], 1.
[4] L. R., 9 App. Cas., 61.
[5] [1891] 1 Ch. 653.
[6] [1893] 3 Ch., 48.
[7] 5 Bom. H.C.R., [O.C.J.], 23.

Digitized by Google

its prerogatives and it was rightly held that the section cannot be so construed as it did not appear either in express terms or by implication that it was intended by the Legislature that the section should have such effect.

In *Ganpat Putaya* v. *The Collector of Kanara* (1) the question raised was whether the Crown has the first claim to the proceeds of a pauper suit to the extent of the amount of Court fee that would have been payable at the institution of the suit had the plaintiff not been a pauper. It was held that the Crown had such priority by reason of its prerogative and that section 309 of the Code of Civil Procedure (VIII of 1859) which enables Government to recover the same in the same manner as costs of suit are recoverable, does not divest the Crown of its prerogative. This provision simply enables the Government to recover the debt due to it on account of Court fees which forms an item of costs in the suit, by mere process of execution, instead of by a separate suit and it cannot therefore, be construed as taking away by implication the priority which the claim of the Crown has by virtue of its prerogative. West, J., states the canon of construction applicable to such a case as follows:—" It is a universal rule that prerogative and the advantages it affords cannot be taken away except by consent of the Crown embodied in a Statute. This rule of interpretation is well established and applies not only to the Statutes passed by the British, but also to the Acts of the Indian Legislature framed with constant reference to the rules in England. And the rule as applied to the present case is not an unreasonable one." This decision was approved of and follwed by the High Court of Allahabad in *Collector of Moradabad* v. *Muhamad Daimkhan* (2). I may here refer to section 212 of the of the Indian Companies Act, 1882, which corresponds to and substantially reproduces section 183 of the Act of 1886, with a proviso that nothing in that section applies to proceedings by Government and also to section 411 of the present Code of Civil Procedure (XIV of 1882) which corresponds to section 309 of Act VIII of 1859 with an additional clause that the amount due to Government shall be a first charge on the subject-matter of the suit. These additions simply give legislative sanction to the above decisions and have been made only '*ex majore cautela.*'

In *Ramachandra* v. *Pichai Kanni* (3) the question arose whether arrears of rent due by an Abkàri renter—which are not charged upon his land—take precedence of a hypothecation debt due by the renter. It was decided and in my opinion rightly, that it had no priority over a mortgage debt. But with all respect to the learned Judges who decided the case, I see no reason to doubt the decisions of the Bombay and Allahabad High Courts in the above two cases.

I shall now turn to a few more Indian decisions which bear on the question of the law of limitation and prescription as affecting the Crown. In *The Secretary of State for India* v. *Mathurabhai* [4] the Chief Justice, following the rule of interpretation of Statutes applicable to the Crown, which was laid down in *Ganpat Putaya* v. *The Collector of Kanara* [5] already referred to held that section 26 of the Indian Limitation Act [XV of 1877] in which the Crown was not mentioned and which section has since been transferred to the Indian Easements Act with an additional special provision prescribing a period of 60 years for acquisition of rights of easements by limitation against the Crown, was not applicable to the Crown and that no right of easement can be acquired against the Crown under that section.

(1) I.L.R., 1 Bom., 7. (2) I.L.R., 2 All., 196.
[3] I. L. R., 7 Mad., 436. [4] I. L. R., 14. Bom., 213. at p. 218. [5] I. L. R., 1 Bom, 7.

Digitized by Google

In *Arzan* v. *Rhakal Chunder Roy Chowdhry* [1] it was assumed that section 26 which provided a period of only 20 years for acquisition of rights of easement by prescription was applicable as against the Crown. In *Appaya* v. *The Collector of Vizagapatam* [2] the question was whether the Crown was bound by the three years period of limitation prescribed for application for execution of decrees, and it was held that it was bound. "We are of opinion that the Government is not entitled to any exemption from the provisions of the Limitation Act relating to applications. If the maxim on which the Counsel for the Crown relies applies to this country—and the Crown is not bound by the provisions of any Act unless they are expressly declared binding on the Crown—it may be inferred from the circumstance that this act contains provisions prescribing a limitation to the Government for the institution of suit and presentation of Criminal appeals, that the Legislature contemplated that the Crown should be bound by the provisions of the Act and should enjoy a privilege to the extent expressed and no further—*expressum facit cessar tacitum*" pages 156-157. The same view was taken by the High Court of Bombay in *Venubhai* v. *Collector of Nasik*[3].

In the *Secretary of State* v. *Virarayan*(4) the question as to how far the Crown was bound by the earlier laws of limitation prior to Act IX of 1871, in which the Crown was not at all mentioned, was raised, but not decided (page 185).

Adverting to the English maxim of interpretation that the Crown is not bound by a Statute unless expressly named, Mr. Sedgwick, an American author, observes :—" But in this country generally I should doubt whether this construction could be safely assumed as a general rule. The English precedents are based on the old feudal ideas of royal dignity and prerogative ; and where the terms of an Act are sweeping and universal, I see no good reason for excluding the Government, if not specially named, merely because it is Government." ('Construction of statutory and constitutional laws,' page 27.) Mr. Endlich, another American author, says :—" The test, therefore, in every case in which the question whether or not Government is included in the language of a Statute, has to be met and determined, cannot be a mere general rule either one way or the other, arbitrarily applied, but must be the object of the enactment, the purposes it is to serve, the mischief it is to remedy and the consequences that are to follow—starting with the fair and natural presumption that primarily the Legislature intended to legislate upon the rights and affairs of individuals only."

Turning now to the policy and course of Indian legislation, which, I may say, for upwards of fifty years has been under the direction and control of some of the most eminent English jurists and parliamentary draftsmen—not to say that some of the more important measures were actually drafted and settled by eminent English Judges before being introduced into the Indian Legislative Council,—it is noteworthy that as a general rule Government is specially excluded, whenever the Legislature considered that certain provisions of an enactment should not bind the Government; and this feature is specially noticeable in measures of taxation, whether imperial, provincial or local and whether such taxes are levied by Government or by local, authorities' [X of 1897, 3 (28)] who as a rule have to administer their funds subject to the control of Government. I know of only one instance—possibly there may be a few more, though I doubt

(1) I. L. R., 10 Calc. 214.
(2) I.L.R., 7 Bom., 552, foot-note.
(3) I.L.R. 4 Mad., 155.
(4) I.L.R.. 9 Mad., 175.

Digitized by Google

it in which the Crown is expressly included, *i. e.*, section 17 of the Inventions and Designs Act, 1888, which is substantially a reproduction of section 27 of the English Patents, &c., Act, 1883.

By way of illustration I may mention the following instances in which Government has been specially exempted :—

Indian Contract Act, section 74.—The exception provides that when any sum is fixed by way of liquidated damages payable to Government, the whole amount shall be recoverable and not merely reasonable compensation to be fixed by the Court.

Specific Relief Act, section 9.—Government is excepted from the operation of this section under which a summary suit may be brought by a person dispossessed, without his consent, of immoveable property otherwise than in due course of Law. Section 45—The Secretary of State for India in council, the Government of India and the Local Governments are exempted from writs of Mandamus to be issued by the High Court. Section 56 *(d)*—exempts the various departments of the Government of India and of the Local Governments from writs of injunction.

Indian Registration Act, section 90—exempts from the operation of the Act various documents issued by Government.

Indian Easements Act, section 2 *(a)* and *(b)*-exempts certain prerogatives and customary rights of the Crown from the operation of the Easements Act.

The Crown Grants Act XV of 1895—exempts Crown grants from the operation of the Transfer of Property Act, both retrospectively and prospectively.

The Civil Procedure Code, sections 295 [proviso], 356 *(b)* and 411—preserve the precedence of Crown-debts. 616 *(a)*—exempts from the operation of the chapter relating to appeals to the Queen in Council, the prerogative rights of Her Majesty to receive and admit appeals.

The Indian Companies Act, section 212 [proviso]—exempts proceedings by Government against Companies in liquidation from being invalidated under the section.

Sea Customs Act 1878, section 20 (proviso)—exempts goods belonging to Government from liability to customs duties. There is a corresponding exemption in the Indian Tariff Act.

Indian ports Act, 1889, section I (4) i—exempts from the operation of the Act vessels belonging to or in the service of Her Majesty or the Government of India.

Indian Stamp Act, 1899, section 3, proviso (1), is as follows:— " That no duty shall be chargeable in respect of any instrument executed by or on behalf of or in respect of the Government, in cases where but for this exemption the Government would be liable to pay the duty chargeable in respest of such instrument. " This is a legislative declaration that but for this exemption Government would be liable to pay stamp duty in cases in which according to the rules laid down in section 29, the liability will devolve upon Government and not upon the other party to the instrument. Such declaration is very significant in that neither in section 29 nor in any other section is Government expressly or by necessary implication included. There is no similar exemption in favour of Government under the Court Fees Act. Government pays Court fees like other litigants and if successful, recovers the same as costs from the adversary and thus it will be seen that Government is really benefited. There is also another weighty reason against the exemption of Government from paying Court fees, for the result of such exemption would naturally be to increase the burden of Court fees upon the rest of the litigants by raising

Digitized by Google

the scale of fees. Under the various Municipalities Acts Government is specially exempted from payment of certain specified tolls and taxes, but not from others. In the City of Madras Municipality Act (Madras Act I of 1884) itself —section 154 *(a)* exempts " gun-carriages, ordnance carts or wagons, cavalry horses or any vehicle or animal belonging to the Government " from payment of taxes on vehicles or animals; section 164 *(a)* exempts gun-carriages, ordnance carts or wagons or other such property of Government from liability to registration and payment of fees therefor section 174 exempts Government from payment of tolls under 170, the provisos to sections 332 335 and 338 exempts places in the occupation or under the control of Government from the operation of those respective sections and the necessity for obtaining licenses on payment of fees.

India Act XI of 1881 has a most important bearing upon the questions immediately under consideration. Section 3 provides that notwithstanding anything contained in any enactment for the time being in force, the Governor-General in Council may by an order in writing prohibit the levy by a Municipal corporation of any specified tax payable by the Secretary of State for India and section 5 provides that so long as any order thus made under section 3 is in force, the Secretary of State shall be liable to pay to the Municipal corporation in lieu of such tax such sums as an officer from time to time appointed in this behalf by the local Government may, having regard to all the circumstances of the case from time to time determine to be fair and reasonable. There is no provision in any of the Municipalities Acts I am aware of, which expressly subjects the Government to any tax or duty payable under the Act. And if the contention on behalf of the petitioner that it is not liable to pay any tax or duty, unless there be express provision imposing the same on Government, be well-founded, there would have been no object in passing the said enactment and it will have to remain a dead letter. The policy of the Indian Legislature is clearly indicated by the said Act XI of 1881, viz., that Government should be liable to Municipal rates and duties unless specially exempted by law; but that when there is no such exemption, the Governor-General should be empowered by law to suspend the ordinary procedure for the levy and collection of a tax or duty payable to a Municipal corporation, without depriving the Municipality of the probable amount which Government would reasonably have to pay if the duty or tax was paid and collected according to the ordinary procedure. A similar policy underlies the Government Buildings Act IV of 1899 and the Indian Tolls (army) Act II of 1901.

The learned Advocate-General relying upon the observations of Lord Herschell in *Bank of England* v. *Vagliano Brothers*[1] urges that these and other similar enactments should not be referred to in construing section 341 of Madras Act I of 1884. This contention is, in my opinion, entirely inadmissible and the authority invoked in no way supports it. In that case the question turned upon the construction of section 7 (3) of the English Bills of Exchange Act, 1882, and Lord Herschell, in differing from the Court of Appeal as to the construction of the said provision, observed that " the proper course in the construction of an enactment is in the first instance to examine the language of the Statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view " and that in his opinion,

(1) (1891) A. C., 107 at pp. 144, 145.

Digitized by Google

the Bills of Exchange Act was certainly not intended to be a mere Code of the existing law and that it is not open to question that it was intended to alter and did alter it in certain respects and that it should not be presumed that any particular provision was intended to be a statement of the existing law rather than a substituted enactment. He, however, guarded himself by saying that he was, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of a Code and that, for example, if a provision be of doubtful import, such resort would be perfectly legitimate, or again, if in an enactment words be found which have previously acquired a technical meaning or been used in a sense other than their ordinary one, the same interpretation might well be put upon them in the new enactment, and that he gave these merely as illustrations, not as exhausting the category.

This rule of interpretation was followed in *Robinson* v. *Canadian Pacific Railway Company*(1) in regard to the construction of a section in the Civil Code of Lower Canada and recently in an Indian case in *Norendra Nath Sircar* v. *Kamalbasini Dasi*(2) in construing section 111 of the Indian Succession Act, which section was incorporated in the Hindu Wills Act. In the last-mentioned case it was held that a Statute intended to embody in a Code a particular branch of the law must be construed according to the natural meaning of the language used and not on the presumption that it was intended to leave the existing law unaltered.

The principle of interpretation affirmed in these cases in each of which the question turned upon the construction of a section in a statutory Code does not in the least militate against the long established rule of construction that in regard to the construction of any particular Act, recourse may and ought to be had to other Acts of similar scope on similar subjects (vide *Colquhoun* v. *Brooks*(3)) and that Acts which are *in pari materia* "are to be taken together as forming one system" and though made at different times or even expired and not referring to each other, they shall be taken as "interpreting and enforcing each other."

Instead of trying to interpret section 341 of Madras Act I of 1884, "by roaming over a vast number of authorities in order to discover by a minute and critical examination" what the case law in England is as to the exemption of the Crown from the payment of tolls, poor-rates and other taxes imposed by Statutes—a course deprecated by Lords Herschell and Macnaghten in the cases above referred to,—it will certainly be much safer to interpret the section with reference to the course of Legislation in India and the Acts already referred to in *pari materia* with Madras Act I of 1884.

The conclusions, therefore, I come to are, that—

(i) the canon of interpretation of Statutes that the prerogative or rights of the Crown cannot be taken away except by express words or necessary implication, is as applicable to the Statutes passed by the Indian Legislature as to Parliamentary and Colonial Statutes; and this is really concluded by the authority of the Privy Council in more appeals than one from the Colonies;

(ii) when in an Indian Act the Crown is not expressly included and the question is whether it is bound by necessary implication the course of Indian Legislation and Acts *in pari materia* with the Act in

[1] (1892) A. C., 481 at p. 487. [2] L.R., 23 I.A., 18 at p. 26; I.L.R., 23 Calc., 563.
[3] L.R., 14 App. Cas., 473 at p. 511.

Digitized by Google

question will have an important bearing upon the construction of the Act;

[iii] notwithstanding that in several Indian enactments the Crown has been specially exempted, the above rule of interpretation will nevertheless hold good in construing the provisions of an enactment from the operation of which the Crown is not expressly exempted, when a question is raised as to whether such provisions take away a right, or prerogative of the Crown;

[iv] the said rule, based like other cognate rules of construction upon the maxim "*generalia specialibus non derogant*" is not really a prerogative of the Crown, though such rule as well as the rule relating to the construction of Crown-grants are dealt with in treatises under the head of "prerogatives of the Crown" and also loosely referred to as such in some English decisions;

[v] the English law as to the exemption of the Crown and Crown property from payment of tolls, poor-rates and other taxes, local or imperial, imposed by Statutes rests partly upon historical reasons and principally upon judicial decisions which do not proceed upon a course of reasoning or principle which will be binding on Indian Courts;

[vi] exemption from payment of tolls, rates and taxes is not in reality a prerogative of the Crown, but depends solely upon the right construction to be put upon the Crown-grant or the Statute in question;

[vii] since the passing of the Indian Councils Act, 1861, not only the Viceregal Council but also the Provincial Councils can, without obtaining the previous sanction of the Crown, make laws affecting the prerogotives of the Crown, when such prerogatives have no relation to any of the matters specially exempted from their respective legislative jurisdictions;

(viii) even if the imposition of a duty or tax upon Crown property be regarded as affecting the prerogative of the Crown, it is competent for the Provincial Legislatures to impose such duty or tax, which will be payable out of the current public revenue, measures affecting which or imposing charges whereon, are specially contemplated by section 38 of the Indian Councils Act, as being within the competence even of Provincial Legislatures;

(ix) according to the uniform course of Indian legislation, Statutes imposing duties or taxes bind Government as much as its subjects, unless the very nature of the duty or tax is such as to be inapplicable to Government, and whenever it is the intention of the Legislature to exempt Government from any duty or tax which in its nature is not inapplicable to Government, the Government is specially exempted, and this is specially so in regard to taxes imposed by the Legislature for the benefit of local authorities, and in particular, Municipalities;

(x) timber brought into the City of Madras, by or on behalf of Government, is liable to the duty prescribed by section 341 of Act (Madras) I of 1884.

The revision petition therefore fails and ought to be dismissed.

Digitized by Google

1901 *October* 28. **I. L. R. 25 Mad. 525.**

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

KING-EMPEROR *v.* BALU KUPPAYYAN.*

Stamp Act—Act II of 1899, s. 33—Se zure of documents under search-warrant—Document that "comes" before a Magistrate.

Complaint having been made against a person for having committed offences under sections 64 (*c*) and 68 (*c*) of the Stamp Act of 1899, the Magistrate issued a search warrant, under which certain documents were seized and impounded under section 33 (2) of the Act. On its being contended that his action in impounding them was illegal, because the documents did not come before him in the performance of his functions within the meaning of section 33 [1]:

Held, that the word "comes" is sufficiently wide to include the production of documents under a search-warrant.

CASE referred to the High Court under section 438 of the Criminal Procedure Code. B was convicted by a first-class Magistrate of an offence under section 68 (*c*) of the Indian Stamp Act of 1899. On appeal, the conviction was reversed by the sessions judge who delivered the following judgment:—"The appellant has been convicted of practising or being concerned in a device to defraud the Government of its stamp revenue, and sentenced under section 68 (*c*) of Act II of 1899 to pay a fine of Rs. 200. It is to be observed that under section 68 (*c*) of Act II of 1899 it is provided that the device is 'not specially provided for by this Act'—words which the Deputy Magistate has overlooked. The history of case is as follows:—The appellant is one of four stake-holders in a chit fund or association. Towards the end of November 1898, *i.e.*, more than seven months before Act II of 1899 came into force, the Collector of Madura received from one Balasundaram Pillai (fifth prosecution witness), a subscriber to the fund, a petition stating that appellant was taking security bonds from prize-winners on paper stamped with a one-anna adhesive stamp and requesting that appellant might be prosecuted. This petition was referred to the Deputy Collector, Madura Division, for enquiry and disposal. The Deputy Collector promptly referred it to the Tahsildar for inquiry and report. The Tahsildar sent a notice to appellant to appear and produce the register of printed bonds to be executed by prize-winners. The appellant objected that the revenue authorities had no power to require him to produce the register. Thereupon the Tahsildar reported the matter to the Deputy Collector who directed the Tahsildar to issue a summons to appellant under Madras Act III of 1869 to produce the documents required. The Tahsildar issued a summons, but appellant appeared without producing the register and objected that he could not be legally required to produce the register. The matter was reported to the Deputy Collector, who then summoned appellant to produce the documents. Appellant appeared and represented through a pleader that he was not legally bound to produce the register, as revenue officers are not empowered to issue summons in matters in which they are not authorized to hold inquiry. The Deputy Collector evidently considered the objection a valid one, for he reported the matter to the Collector in his letter of 26th August 1899 (exhibit E). In this letter he remarked:—'There appears to be no provision in the Stamp Act II of 1899 authorizing revenue officers to hold an inquiry in matters affecting stamp revenue. It, therefore, appears that a revenue officer has no power to compel the production of the documents in question.' He suggested, however, that the Collector should sanction the prosecution of appellant for an offence under section 67 [*c*] of Act II of 1899. Thereupon the Collector sanctioned the prosecution of appellant for offences under sections 64 (*c*) and 68 (*c*) of Act II of 1899. Complaint was made to the Deputy Magistrate, who subse-

* Criminal Revision Case No. 342 of 1901.

Digitized by Google

quently issued search-warrants and had a number of duly stamped and insufficiently stamped documents seized. The appellant has apparently been convicted, because up to 24th January 1899—on which date Act II of 1899 was not in force—he had received 829 bonds, each being executed on a one-anna receipt stamp whereas the proper duty on all the bonds amounts to about Rs. 887. If the receipt of each bond is an offence under section 68 (*c*) of Act II of 1899, then appellant has been tried and convicted of 829 offences in one trial. Now the 8-9 insufficiently stamped documents are on their face bonds, and they cannot, therefore, be regarded as a contrivance or device (*Queen-Empress* v. *Chinna Pavuchi*(1)). Moreover, the persons who execute insufficiently stamped documents can be called upon to pay the deficient stamp duty and a penalty or they can be prosecuted for an offence, section 61 of Act I of 1879 or section 62 of Act II of 1899. Thus the so-called 'device' in which appellant was concerned is specially provided for by the Indian Stamp Act. The conviction is, therefore, reversed and the sentence set aside. The fine, if levied, must be refunded." The Collector having refused to cancel what his subordinates had done, B applied to the Sessions Court under section 517 of the Code of Criminal Procedure for an order directing the return to him of the documents taken from his possession. With regard to this, the letter of reference gave the following particulars:—"The Deputy Magistrate has impounded the 829 insufficiently stamped bonds and forwarded them to the Deputy Collector of Madura Division under section 38 of Act II of 1899 It appears to me that he was not justified in doing so, and I trust that the Collector will see his way to cancel all that has been done." . . . . "On that date [12th August 1901] the Public Prosecutor appeared on behalf of the Collector and contended that this Court had no jurisdiction as the Deputy Magistrate had not passed any order under section 517 of the Criminal Procedure Code. It is true that, in his judgment in Calendar Case N. 9 of 1899, the Deputy Magistrate has made no reference to section 517 of the Criminal Procedure Code, and that the order in paragraph 12 of his judgment, impounding the 829 documents and directing that they be forwarded to the Deputy Collector of Madura Division, purports to have been made under sections 33 and 38 of act II of 1899; but I am doubtful whether a Criminal Court can, when an enquiry or trial has been concluded, make any order for the disposal of any property or document produced before it or in its custody, except under section 517 of the Criminal Procedure Code. Section 33 of Act II of 1899 does not require a Magistrate to impound any instrument coming before him in the course of a trial, so that the Deputy Magistrate was not bound to impound the 829 documents. I submit that his order impounding the documents was really passed under section 517 of the Criminal Procedure Code, which says that 'the Court may make such order as it thinks fit,' but as that section is not referred to in the order I hold on the authority of *In re Anant Ramchandra Lotlikar*[2] that I cannot review the order." The Sessions Judge then referred the case to the High Court for orders.

Sivasami Ayyar for the accused.

The Public Prosecutor (Mr. *E. B. Powell*) for the Crown.

JUDGMENT.—The documents in question are, as we understand the case, in the legal custody of the Collector, having been sent to him under section 38 (2) of the Stamp Act. The Collector will have to return them to the Deputy Magistrate under section 40 (3) of the same Act. When they have been so returned the Deputy Magistrate may dispose of them under section 517, Cri-

(1) I. L. R., 23 Mad., 151. (2) I.L.R., 10 Bom., 197.

Digitized by Google

minal Procedure Code, and we have no doubt that he will do so without any unnecessary delay.

We have no authority to order the return of the documents to the party at this stage unless the action of the Deputy Magistrate in impounding them under section 33 *(2)(a)* of the Stamp Act was illegal. It is argued that the action of the Deputy Magistrate was illegal, because the documents did not come before him in the performance of his functions within the meaning of section 33 *(1)*, but we are unable to accept this contention. The word "comes" is sufficiently wide to include the production of documents under a search-warrant issued by the Magistrate.

1901 *November* 25. **I. L. R. 25 Mad. 534.**

Before Mr. Justice Benson and Mr. Justice Moore.

KING-EMPEROR *v.* KRISHNAYYA.*

Criminal Procedure Code—Act V of 1898, s. 421—Summary dismissal of appeal—Judgment.

A Court, when dismissing an appeal summarily under section 421 of the Code of Criminal Procedure, is not bound to write a Judgment in conformity with the provisions of section 367.

JUDGMENTS in two criminal appeals referred to the High Court under section 438 of the Code of Criminal Procedure as not being such as are required by section 367 of that Code. The judgments were in the following terms:—"After perusing the judgment and petition of appeal, I see no reason for interfering with the decision of the lower Court and reject the appeal summarily under section 421, Code of Criminal Procedure." The Acting Sessions Judge referred the judgments to the High Court.

The Parties were not represented.

JUDGMENT.—The Sessions Judge will be informed that there is nothing in the Code of Criminal Procedure which requires a Court, when dismissing an appeal summarily under section 421 of that Code to write a judgment in conformity with the provisions of section 367. This has been so decided by all the High Courts, by this Court in *Proceedings of the Madras High Court, dated 18th April* 1883[1], and by the other High Courts in the cases of *Rash Behari Das* v. *Balgopal Singh*[2], *Queen-Empress* v. *Warubai*[3] and *Queen-Empress* v. *Nannhu*[4].

In the last-mentioned case the Full Bench decided that it was advisable for the Court to state its reasons in view of the possibility of a petition for revision.

There is nothing in Rule No. 7 of the rules printed at pages 167 to 175, Criminal Rules of Practice, 1896, in conflict with the above decisions. The meaning of that rule is that, in all cases other than those dealt with under section 421, Criminal Procedure Code, the reasons for the decision should be given. The rule as originally passed required such reasons only in cases where the judgment appealed against was modified or reversed, but it was pointed out that this was opposed to section 367 of the Code and the rule was then amended in its present form.

---

* Criminal Revision Case No. 406 of 1901.

(1) Weir's Crl. Rul., p. 1009.
(2) I. L. R., 21 Calc. 92.
(3) I.L.R., 20 Bom., 549.
(4) I.L.R., 17 All., 241.

Digitized by Google

1901 *November* 22. **I. L. R. 24 Mad. 546.**

Before Mr. Justice Benson and Mr. Justice Moore.

KING-EMPEROR *v.* ALAGARISAMI PATHAN AND ANOTHER (ACCUSED).*

Criminal Procedure Code—Act V of 1898, s. 202—Failure to "record reasons" for postponing issue of process and inquiring into case—Irregularity.

By section 202 of the Criminal Procedure Code, if a Magistrate is not satisfied as to the truth of an offence he may, when the complainant has been examined, "record his reasons, and may then postpone the issue of process" and inquire into the case :

Held, that the failure on the part of a Magistrate to record his reasons is at most an irregularity, and unless it in fact occasions a failure of justice is not a ground for setting aside his order.

PETITION to revise an order of a Sessions Court. The order was as follows:—"This is an application to set aside the order, dated 25th May 1901, of the Second-class Magistrate of Madura Town, dismissing petitioner's complaint. The complaint was presented on 10th April 1901, and on that day, complainant was examined on oath as required by Criminal Procedure Code, section 200. Thereupon the Sub-Magistrate passed the following order:—'Section 406, Indian Penal Code, preliminary inquiry. Notice to first accused.' On the 22nd April some inquiry was made and the Magistrate ordered certain summons to be issued. On the 25 May he dismissed the complaint and, three days later, recorded the following extraordinary order:—'I distrusted the truth of the complaint as there was a case of assault preferred by one of the accused pending against the complainant. I resolved, therefore, to make a preliminary inquiry under section 202, Criminal Procedure Code. The reason should have been recorded before the preliminary enquiry began. As it was not done then I do it now and utilize the information got in the enquiry made already, so that it may not be said that the reason not having been recorded the dimissal under Criminal Procedure Code, section 202, is not valid.' Section 202 of the Criminal Procedure, Code authorises a Magistrate of the first or second class, if he is not satisfied as to the truth of a complaint to postpone the issue of process against the accused and to enquire into the case only if he has recorded his reasons for distrusting the truth of the complaint. The words 'may then postpone the issue of process, &c.,' show that unless and until reasons are recorded the issue of process may not be postponed and no local inquiry may be made. An inquiry made without reasons for distrusting the truth of complaint is illegal, and manifestly it cannot be made legal by the Magistrate making certain remarks after he has dismissed the complaint. The preliminary inquiry made by the Magistrate was illegal, for he issued process to one of the accused. In my opinion section 537 (*a*) of the Criminal Procedure Code does not apply to this case, for the inquiry made by the Magistrate was not an inquiry under the Criminal Procedure Code, but an inquiry distinctly prohibited by the Criminal Procedure Code. If the Magistrate had recorded his reasons for distrusting the truth of the complaint and then made an inquiry, any, error, omission or irregularity in the inquiry would have been saved by Criminal Procedure Code, section 537 (*a*); but here the inquiry is illegal *ab initio*. If a Magistrate, not being empowered by law in this behalf, tries an offender or decides an appeal, his proceedings are void. In the present case the Magistrate made an inquiry which he was not empowered to make, and he was manifestly not acting in good faith. It appears to me that his

* Criminal Revision Case No. 337 of 1901.

Digitized by Google

proceedings are void. If I am wrong in this view, it is certain that the Magistrate has acted on documentary evidence, which should not have been admitted as the documents had not been proved. For these reasons I set aside the Sub-Magistrate's order and direct the present Sub-Magistrate to make further inquiry into the complaint." The case was heard by a Sub-Magistrate who held it to be a false case and dismissed it under section 203 of the Code of Criminal Procedure.

The accused preferred this criminal revision petition to the High Court against the order of the Sessions Judge.

T. Rangachariar for the accused.

The Public Prosecutor (Mr. *E. B. Powell*) for the Crown,

JUDGMENT.—This Court has, in its order in the case of *Venkatesalu Naidu* v. *Durvasa Rangayyan* (1) pointed out to the learned Sessions Judge that his reading of section 202, Criminal Procedure Code, is incorrect. The Magistrate had jurisdiction to act under section 202 and his failure to record his reasons was at most an irregularity, and unless it in fact, occasioned a failure of justice it could be no ground for setting aside his order. The Sessions Judge does not suggest that the order was wrong on the merits and we see no reason to hold that it was so.

We set aside the order of the Sessions Judge, dated 5th September 1901.

1901 *September* 10. **I. L. R. 25 Mad. 624.**

Before Mr. Justice Benson and Mr. Justice Boddam.

KING-EMPEROR *v.* AYYA ANNASAMY AIYAR AND NINE OTHERS ACCUSED. §

Indian Penal Code—Act XLV of 1860, s. 143—Unlawful assembly—Defence by accused persons of property in their possession.

Paddy belonging to a society, to which the first accused belonged, was stored in a granary in a street. It was found as a fact that this paddy had been in the possession of the first accused for some time prior to 5th November 1899, and was in his possession on that date. Complainant, on 5th November 1899, attempted, as treasurer of the society to forcibly take possession of the paddy with his servants, whereupon all the accused resisted him, and maintained the possession of the first accused, some blows being struck. On a charge being preferred against the accused for rioting :

Held, that no offence had been committed.

CHARGE of rioting and theft against eighteen persons belonging to the village of Sulamangalam, Tanjore. The First-class Sub-Divisional Magistrate, before whom the accused were tried, discharged seven at an early stage of the case. The other eleven were convicted. The main facts of the case appear from the following judgment of the Sessions Judge at Tanjore, to whom the first accused, who was fined Rs. 100, preferred an appeal :—"The theft is said to have been committed in respect of some paddy belonging to the Mahajana Sabha of the village to which the appellant belongs, and the rioting is said to have been committed when the complainant, who says he is the treasurer of the sabha, attempted to take possession of the paddy on 5th November 1899. The paddy was stored in the granary in the village street, and the Magistrate finds that the appellant, a member of the sabha, was in possession of it for some time before 5th November. There can be no doubt that this finding is correct. The evidence shows very clearly that, for some time before 5th November and

§ Criminal Revision Case No. 168 of 1901.

[1] Criminal Revision case no 263 of 1901. [unreported.]

Digitized by Google

on that date, the appellant was in possession and that he appointed two of his men to watch the paddy; one of his watchmen was at the place when the complainant went there and tried to take possession of the paddy. The ninth witness for the prosecution, one of the men who accompanied the complainant, says; 'Govindan (one of the two watchmen employed by the appellant) was at the receptacle when we went there. Govindan objected, but we did not listen to him. There was a big row between complainant and Govindan, hearing the noise of which, the other accused came.' The complainant, in spite of Govindan's remonstrances, climbed on to the top of the granary and opened it in order to take out the paddy. The appellant and others then arrived at the scene and the complainant was pulled down, and it is said that he received two blows. This, according to the evidence, is all that happened, and it appears to me that no offence was committed. The appellant, I consider, did no more than maintain his own possession, and use such force as was necessary to maintain it, and to resist the complainant's attempt to deprive him of that possession. He did not commit or abet the commission of theft or rioting. The finding and sentence of the Magistrate are reversed and the appellant is acquitted. The fine will be refunded." The complainant had, previously to the occurrence, sent a written notice to the first accused, in which he acknowledged that first accused was in possession of the paddy, and warned him that he would be held responsible for any damage that it might suffer. The Sabha had authorized the complainant to endeavour to remove the paddy peaceably, and directed him to resort to a Civil Court if he met with any resistance.

The remaining ten accused (who had been sentenced to pay fines of Rs. 25 and under) preferred this criminal revision petition against their conviction.

Mr. *D. Chamier*, for petitioners, contended that the conviction was wrong, as the accused had only defended their possession. The person, who had attempted to "enforce a right or supposed right," was the complainant, who, as treasurer to the Sabha, endeavoured to take possession of the paddy which was in the possession of the first accused. Complainant, in his letter to first accused, acknowledged the possession of the latter, and the Magistrate found it as a fact. Complainant had attempted to take the paddy and the accused had prevented him, that is, they had defended their possession. This was not an offence under section 143, sub-section 4 of the Indian Penal Code. The offence defined in that section was the enforcement of a right, or the taking possession of property, by means of criminal force. A construction of the section as including a defence of possesion of property or of a right would be inconsistent with the right of private defence of property which is permitted in section 97 of the same code. He referred to High Court Ruling, 10th August 1869(1), and to *Shunker Singh* v. *Burmah Mahto* (2). The conviction for theft could not be supported, as the evidence did not show conclusively that any paddy had been in fact removed by the accused, and even if it was removed, there was no criminal intent, the object of removal being to protect their possession of it.

The Public Prosecutor (Mr. *E. B. Powell*), in support of the conviction, dealt with the facts and contended that the accused had been properly convicted.

JUDGMENT.—The First-class Sub-Divisional Magistrate found that the petitioners all acted in accordance with the directions of the first accused. He found that, before and at the time of the alleged offences, the first accused was in possession of the receptacle containing the paddy contributions and had appointed his own watchmen, two of whom are amongst the petitioners, and that the

(1) 4 M.H.C.R., App. 65. (2) 23 W.R., (C.R.), 25.

Digitized by Google

complainant had sent a notice to the first accused, whereby he acknowledged the first accused's possession and stated that he would be held responsible for all damage. The Sabha only authorized the complainant to endeavour to remove the paddy peaceably and if he met with any resistance directed him to resort to a Civil Court. The complainant endeavoured to take possession of the paddy forcibly with his servants and the acts complained of were done by the first accused and the petitioners in resisting this attempt to take possession and in maintaining the possession of the first accused.

In the circumstances no offence was committed and the petitioners and the first accused should have been acquitted.

We set aside the convictions and acquit and discharge all the petitioners. The fines, if paid, will be refunded.

1901 *August* 7, *October* 18. **I. L. R. 25 Mad. 627.**

Before Mr. Justice Davies and Mr. Justice Moore.

KING-EMPEROR (APPELLANT), *v.* ALEXANDER ALLAN (ACCUSED), RESPONDENT.§

Madras District Municipalities Act—Act IV of 1884, s. 63 (3)—Madras District Municipalities Amendment Act—Act III of 1897, s. 49—"Lands used solely for agricultural purposes"—Liability to tax.

By sub-section (3) of section 63 of the Madras District Municipalities Act. 1884, as amended by the Madras District Municipalities Amendment Act, 1897, lands used "solely for agricultural purposes" are exempted from the enhanced rates of taxation that may be imposed in certain cases under that sub-section :

Held, that lands on which potatoes, grain, vegetables, &c., are grown, as well as pasture lands, are used "solely for agricultural purposes" within the meaning of the sub-section.

APPEAL by the Public Prosecutor under section 417 of the Code of Criminal Procedure against an order of acquittal. The case had come before a Bench of Magistrates on a previous occasion when defendant was acquitted. An appeal was then preferred against that acquittal, when the High Court set aside the order of acquittal and remanded the case for trial, as there were questions which the Bench had left undecided (*Queen-Empress* v. *Allan*(1)).

The facts, which are more fully set out in the report of the previous case, were that the defendant objected to a demand made by the Ootacamund Municipality for land, water and drainage tax for the years 1897-98 and 1898-99, amounting to about Rs. 335 on lands which were admittedly not appurtenant to any building or attached thereto for any purpose, but which were held by defendant within municipal limits. The chief ground of objection was that the lands were used solely for agricultural purposes, and were consequently exempt from taxation by reason of the proviso to clause 3 of section 63 of the Madras District Municipalities Act of 1884 (Madras Act IV of 1884), as amended by the Madras District Municipalities Amendment Act of 1897 (Madras Act III of 1897). A statement containing a description of the lands was made by the Municipal overseer and filed as exhibit D, the correctness of which was not traversed by the defendant. In this, certain lands, over 44 acres in extent, were described as "waste." These were said by the defendant to be under grass a statement which the prosecution did not deny. After considering the mean-

§ Criminal appeal from an order of acquittal passed in Summary Case No. 848 of 1900.

(1) I. L. R. 24 Mad. 195.

Digitized by Google

ing and application of the term "agricultural purposes" the Bench found that 44.56 acres were let for cultivation, of which 35.05 were in actual cultivation, chiefly with potatoes and korali, a species of grain, one acre only was being used for growing market vegetables, and 9·51 acres were waste. They also found that four fields Nos. 117, 118, 119 and 120, aggregating 44.07 acres were "given for cattle grazing to Mrs. Reynolds." A majority held that the 44·56 acres let for cultivation as well as the 44·07 acres let for pasturage were lands used solely for agricultural purposes and were not liable to taxation. They accordingly acquitted the defendant under section 245 of the Code of Criminal Procedure.

Against that order of acquittal the Public Prosecutor preferred this appeal.

The Public Prosecutor for appellant.

Mr. *W. Barton* for respondent.

JUDGMENT.—This is an appeal preferred on behalf of Government from a judgment of the Bench of Magistrates in Ootacamund acquitting the defendant Mr. Allan who had been prosecuted by the Municipality under section 103 of the Madras Municipalities Act (IV of 1884 as amended by Act III of 1897).

The only question which has arisen for decision at the hearing of this appeal is as to whether all or any portion of the lands owned by Mr. Allan, the details as to which are given in exhibit D, should be held to be lands used solely for agricultural purposes and as such exempted from the enhanced rates of taxation that may be imposed in certain cases under section 63, sub-section 3 of the Madras Municipalities Act.

The expression "agricultural" is not defined in the Act. The only decisions of this Court to which our attention has been drawn in which an attempt has been made to define the word "agricultural" are that of *Kunhayen Haji* v. *Mayan*(1), where it was held that a lease of a coffee garden or a lease of certain coffee plants in a garden, for as to this the judgment is not very clear, is not an agricultural lease within the meaning of section 117 of the Transfer of Property Act and the judgment in Civil Revision Petition No. 337 of 1900 (*Murugesa Chetti* v. *Chinnathambi Goundan*(2)) in which it has been decided that a lease of land for betel cultivation should be held to be an agricultural lease in so far as that section is concerned.

On referring to the Agricultural Rates Act (59 and 60 Vict., cap. 16) passed in 1896 for the purpose of exempting the occupiers of agricultural lands in England from paying as high rates on such lands as those levied on buildings and other hereditaments we observe (section 9) that "agricultural land" is there defined as follows:—The expression "agricultural land" means any land used as arable, meadow, or pasture ground only, cottage gardens exceeding one-quarter of an acre, market gardens, nursery grounds, orchards, or allotments, but does not include land occupied together with a house as a park, gardens other than as aforesaid pleasure grounds or any land kept or preserved mainly or exclusively for purposes of sport or recreation or land used as a race course.

We also find that in the Oxford English Dictionary edited by Dr. J. A. H. Murray, which is admitted to be the standard authority in such matters, agriculture is defined as follows:—"The science and art of cultivating the soil, including the allied pursuits of gathering in the crops and rearing livestock, tillage husbandry, farming (in the widest sense)." We also note that it is there pointed out that the restriction of the word agriculture to tillage, as in the following quotation, is rare. The lands were not fields for agriculture but

(1) I.L.R., 17 Mad., 98. (2) I.L.R., 24 Mad., 421.

Digitized by Google

pastures for cattle. We believe that we cannot do better than follow these definitions in attempting to decide what, for the purposes of sub-section 3 of section 63 of the Municipalities Act, are or are not lands used solely for agricultural purposes. Referring again to exhibit D, we have no hesitation in holding that land on which potatoes, grain, vegetables, &c., are grown are lands used solely for agricultural purposes. We do not consider that any distinction can be drawn between large and small plots of lands on which roots or grain are cultivated. All such land must be held to be land used solely for agricultural purposes. We have next to consider the lands over 40 acres in extent entered in exhibit D as "waste." Mr. Barton, on behalf of Mr. Allan, has urged before us that these so-called waste lands are pasture lands and as such should be held to be lands used solely for agricultural purposes. Turning again to the definition of the word "agricultural" which we have accepted we find that agricultural lands include lands set apart as "pasture ground only" and also lands used for "rearing livestock." If, therefore, it could be shown that these so-called waste lands were in reality pasture grounds or lands used for rearing livestock, we should certainly decide that they were lands used solely for agricultural purposes. We cannot, however, hold on the evidence on the record that it has been shown that they are so used. All that we can find in the papers sent up bearing on the question as to how these lands are used is the following statement of the defendant Mr. Allan "Nos. 117, 118, 119 and 120 are in the occupation of Mrs. Reynolds; defendant receives no rent. Mrs. Reynolds pay the Government quit-rent; he uses it for grazing." If this is all the evidence that is forthcoming as to how the lands are used, we should most certainly hold that they are not pasture grounds "or lands used for rearing livestock." It is, however, urged by Mr. Barton that attention was not clearly drawn to this question when the case was before the Magistrates and that if opportunity be given to his client he will be able to put forward fuller and clearer evidence as to how this waste land is really used. As it is most inadvisable that we should decide this question, which is one of some general importance, in a case in which all the evidence available as to the manner in which the lands are used is not on the record, we, under section 428 of the Criminal Procedure Code, send back the case to the Bench of Magistrates and direct them to take such further evidence as may be put forward by the Municipality and Mr. Allan as to the purposes for which the land shown in exhibit D as waste is used, the fullest details possible being given, and to submit the same for the consideration of this Court.

The evidence of two witnesses, called for the defence, was taken by the Magistrates. This showed that the lands in question were used as pasture land.

The case again came before the same Bench, when the Court, after hearing the arguments of the same counsel, passed the following

JUDGMENT.—The further evidence shows clearly that the 44 acres odd regarding which we had some doubt are pasture lands and the learned Public Prosecutor does not dispute the fact. That being so it follows from the views we have already expressed that the land is used solely for agricultural purposes and is therefore exempt from taxation.

The appeal is therefore dismissed.

Digitized by Google

1901 *December* 18. **I. L. R. 25 Mad. 659.**

Before Sir. Arnold White, Chief Justice, and Mr. Justice Benson.

SANGILIA PILLAI, PETITIONER, *v.* THE DISTRICT MAGISTRATE OF TRICHINOPOLY, COUNTER-PETITIONER.§

Criminal Procedure Code—Act V of 1898, s. 476—" Judicial Proceeding "— Records of case called for by District Magistrate in his executive capacity.

Though an order passed after records have been called for, for any of the purposes specified in section 435 of the Code of Criminal Procedure, may be a " Judicial proceeding " for the purposes of section 476 (as to which the Court gave no ruling), where a District Magistrate called for such records in his executive capacity to see whether an application for an enquiry into the conduct of a police constable should be granted, and passed an order thereon, sanctioning his prosecution.

Held, that there was no judicial proceeding within the meaning of section 476 and that the order must be set aside.

PETITION to revise an order sanctioning the prosecution of petitioner (a head constable) on a charge of giving false evidence under section 193, Indian Penal Code. The order was passed by the District Magistrate of Trichinopoly on 28th August 1901, in a proceeding in which it was recited that the following documents had been read :—A petition ; records of an enquiry held by the District Superintendent of Police : and a reference to the Public Prosecutor and his reply. The order was in the following terms :—" ORDER.—From the records [in certain calendar cases on the file of the Town Sub-Magistrate in which four persons charged with having committed burglaries were discharged] and from the Public Prosecutor's letter [expressing his opinion, in reply to a reference to him on the point that proceedings against petitioner under section 193, Indian Penal Code, would stand] it appears that there is sufficient evidence to institute proceedings against Sangili (head constable) for an offence under section 193, Indian Penal Code. In these circumstances the District Magistrate sanctions the prosecution of Sangili before the Head-quarters Deputy Magistrate." Petitioner applied for revocation of the sanction to the Session Judge, who held that if the order in question was to be taken as one passed under section 195, the Sessions Court would be bound to cancel it, inasmuch as the District Magistrate had no authority to grant any sanction in the matter, since he was not the ' ordinary appellate authority,' and as the provision in the order as to the Court before which the charge was to be tried was beyond the scope of such a sanction. But he thought, from the form of the order and the material on which it had been passed, that the District Magistrate had passed it under section 476 of the Code of Criminal Procedure, the proceeding having been passed by the Magistrate *suo motu* after an enquiry held by him through others. He agreed that the grant of sanction under section 476 would be illegal, as the offence charged had not been committed before the District Magistrate or brought to his notice in the course of judicial proceedings ;but held that the Sessions Court was not competent to consider that question. He dismissed the petition on the ground that no appeal lay to the Sessions Court.

Petitioner filed petitions in the High Court against the order of the District Magistrate of 28th August 1901 and that of the Sessions Judge.

T. Rangachariar for petitioner.

The *Public Prosecutor* for the Crown.

JUDGMENT.—The Public Prosecutor has conceded that the order of the District Magistrate, dated 28th August 1901, cannot be upheld as an order for

§ Criminal Revision Petitions Nos. 279 and 280 of 1901,

Digitized by Google

sanction to prosecute such as is required by section 195 (1) (*b*) of the Code of Criminal procedure inasmuch as the District Magistrate is not the Court to which the Sub-Magistrate is subordinate within the meaning of section 195(7), Criminal Procedure Code. He has contended, however, that the order is valid as an order made under the powers conferred by section 476. Assuming the order was intended to be made under section 476, its validity depends on whether the alleged offence was brought to the notice of the District Magistrate in the course of a judicial proceeding. The public Prosecutor has argued that the District Magistrate must be assumed to have called for the records under the powers conferred by section 435, and that an order made on consideration of the records called for under that section is a judicial proceeding for the purposes of section 476. It is not necessary for us to consider the general question whether an order made after the records have been called for is a judicial proceeding for the purpose of section 476. It may be that an order made after the records have been called for for any of the purposes specified in section 435 would be a judicial proceeding for the purposes of section 476. In the present case, however, it seems to us clear from the terms of the petition on which the order of 28th August 1901 was made and from the endorsement of the Sub-Magistrate submitting the records that the order of that date was not made after the records had been called for for any of the purposes mentioned in section 435. The order calling for the records seems to have been made by the District Magistrate in his executive capacity for the purpose of enabling him to ascertain whether the petitioner's prayer for an enquiry into the conduct of the Police should be granted. In our judgment the present case does not come within the terms of section 435 and we think there was no judicial proceeding for the purposes of section 476.

The Public Prosecutor has further contended that it was competent for the Deputy Magistrate to take cognizance of the offence under section 190 and that the order of 28th August 1901, which purports to grant sanction, was unnecessary and may therefore be treated as a nullity. We feel no doubt that the offence alleged to have been committed is an offence in relation to a proceeding in a Court within the meaning of section 195 (*b*) of the Code of Criminal Procedure. Sanction is therefore necessary.

The order of the District Magistrate, dated 28th August 1901, must be set aside.

1901 *January* 18. **I. L. R. 25 Mad. 667.**

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

KING-EMPEROR *v.* THAMMANA REDDI AND TWO OTHERS, ACCUSED.*

Criminal Procedure Code—Act V of 1898, *s.* 250—Frivolous or vexatious accusations—Case instituted on "information given to a Magistrate"—Information to a Village Magistrate—Discharge of accused—Order awarding compensation—Validity.

A Village Magistrate is not a Magistrate within the meaning of section 250 of the Code of Criminal Procedure; and where a case has been instituted in consequence of a complaint

* Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code by C. R. Mounsey, District Magistrate of Coimbatore, in his letter, dated 13th November 1900.

Digitized by Google

made to a village Magistrate, who sent a report to the police, who submitted a charge sheet, the person who complained to the Village Magistrate cannot be ordered, under section 250, to pay compensation to the accused if the latter are discharged.

CASE referred for orders of the High Court. The facts appear from the letter of reference, which was as follows :—

"Section 250 of the Code of Criminal Procedure directs the award of compensation for frivolous or vexatious accusations in any case instituted by complaint as defined in the Criminal Procedure Code or upon 'information given to a Police officer or to a Magistrate.' In Criminal Case No. 117 of 1900 on the file of the Taluk Second-class Magistrate of Bhavani, a case of house-breaking and theft in a building (sections 454 and 380, Indian Penal Code) the accused were discharged under section 233, Criminal Procedure Code, and the prosecution witness No. 2 was ordered by the Taluk Magistrate (second class) to pay compensation of Rs. 40 to each of the accused. The complaint in this case was originally made to the Village Magistrate, who sent a report to the police. The police investigated the case and submitted a charge sheet to the Taluk Magistrate. The Taluk Magistrate was of opinion that the case was instituted upon information given to a Magistrate—the Magistrate in this case is a Village Magistrate or in other words head of a village. Under section 1 of the Criminal Procedure Code nothing contained in that Code in the absence of any specific provision to the contrary shall apply to heads of villages in the Presidency of Fort St. George. I am of opinion that the information in this case wase not given to a Magistrate, as the word Magistrate is used in section 250, Criminal Procedure Code, and that the award of compensation is not authorized by the Code. The case seems really to have taken up owing to a Police officer making a report. the judgment of the Taluk Second-class Magistrate contained the following paragraphs 21 and 22 :—'I discharge the accused under section 233, Criminal Procedure Code. I called on prosecution witness No. 2 who informed the Village Magistrate about the alleged house-breaking and theft and on whose information all proceedings have been taken to show cause why he should not be ordered to pay compensation to the accused. He repeats that his complaint is true. I have written in great detail the reasons for disbelieving the complaint. The accused were arrested by the police on 9th October 1899, and produced before this Court and were let out on bail on 11th October 1899. They have been thus subjected to considerable humiliation. I have considered over the matter of awarding compensation and believe such patently vexatious charges should be put down. Taking all the circumstances into consideration, I direct that prosecution witness No. 2 do pay to each of the accused Rs. 40 under section 250, Criminal Procedure Code.'"

Mr. *W. Barton*, for the Public Prosecutor, for the Crown.

Mr. *C. Krishnan* for the accused.

JUDGMENT.—We think that the view of the District Magistrate is correct. We set aside so much of the Second-class Magistrate's order as was made under section 250, Criminal Procedure Code, and direct that the amount, if any, levied as compensation be refunded.

Digitized by Google

1901. *February* 14. **I. L. R. 25 Mad. 671.**

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

JOHN MARTIN SEQUEIRA (COUNTER-PETITIONER), PETITIONER, *v.* LUJA BAI (PETITIONER), RESPONDENT.§

riminal Procedure Code—Act V of 1898, s. 195 (4)—Sanction to prosecute.

Clause (4) of section 195 of the Code of Criminal Procedure applies only to cases in hich, at the time of granting sanction to prosecute, the offender is uncertain or unknown. here there is no doubt as to whom the prosecution is to be directed against, the offender hould be named.

PPLICATION under section 195, clause (4), of the Code of Criminal Procedure or sanction to prosecute petitioner for forgery.

The District Judge made the following order :—"It is not denied now hat the words in the application for probate and in the vakalat, 'this cross is he signature of Luja Bai' were written by the counter-petitioner, though it is ot admitted that they were. There is nothing at present on record to show hat the counter-petitioner wrote those words but there is strong reason for hinking that the alleged marks were forgeries, and under section 195 [4], Criminal Procedure Code, I sanction the prosecution of the person who committed he forgeries for an offence punishable under section 465 of the Indian Penal Code."

Against this order, petitioner preferred this criminal revision petition.

Ayya Ayyar for petitioner.

K. Narayana Rao for respondent.

The Public Prosecutor [Mr. *E. B. Powell*] for the Crown.

JUDGMENT.—As the petitioner was not "a party to the proceeding in the Court" in the case in which the alleged forged will was produced, no sanction for his prosecution was required. Therefore the Judge was not competent to entertain the application for sanction. Even if he had been, he should have named the person against whom the prosecution was to be directed, as there was no doubt about who that person was. Clause [4] of section 195 of the Code of Criminal Procedure obviously applies only to cases where, at the time of granting sanction, the offender is uncertain or unknown.

The sanction in this case must therefore be revoked.

1902. *January* 28. **I. L. R. 25 Mad. 726.**

Before Mr. Justice Davies and Mr. Justice Bhashyam Ayyangar.

KING-EMPEROR *v.* C. SRINIVASAN (PETITIONER), ACCUSED.†

ndian Penal Code—Act XLV of 1860, ss. 417, 511, 468—Attempting to cheat and forgery—Application to University for duplicate certificate by person not entitled—Offence.

S. held a Matriculation certificate which had been issued to him by a University. C. had failed to pass the Matriculation Examination. The Registrar of the University received a letter purporting to be signed by S., stating that his certificate had been lost and requesting that a duplicate might be issued. Enclosed with the letter was what purported to be a certificate by the head-master of a local school, corroborating the statement as to the loss and supporting

§ Criminal Miscellaneous Petition No. 144 of 1900.

† Criminal Revision Petition No. 438 of 1901.

Digitized by Google

the application for the issue of a duplicate. This document had not, in fact, been written by the head-master, and S. had not in fact lost his Matriculation certificate. C. was charged with cheating and forgery to commit cheating. The Deputy Magistrate found, on the evidence, that the writer of the application for a duplicate certificate was the accused, and convicted and sentenced the accused on both charges. The Sessions Judge, on appeal; altered the offences to those of attempting to cheat and forgery to commit cheating and reduced the sentence. Subject to these modifications he dismissed the appeal. On a revision petition being filed in the High Court :

Held, that the charge of cheating must fail, inasmuch as there was no proof that the deception practised by the accused on the Registrar of the University had caused harm or damage to him or to the University which he represented. Nor was it shown that the accused, in applying for the duplicate certificate, had any intention of causing wrongful gain to himself or wrongful loss to the University, to whom he had paid a fee greater than the cost price of the certificate. The charge of forgery also failed, for, assuming that accused had fabricated the head-master's certificate it was not shown that he had done so fraudulently or dishonestly and with intent to cause damage or injury to the public or to any one. The question before the court was not as to his intended use of the certificate subsequently. Even if he had such an intention this mere preparation did not amount to an attempt to commit an offence within the meaning of section 511 of the Indian Penal Code.

CHARGES of cheating and forgery to commit cheating under sections 420 and 468, Indian Penal Code. In 1900, one S. Srinivasan went up for the Matriculation Examination held by the University of Madras, and passed. Accused, whose name was C. Srinivasan, went up for the same examination and failed. Subsequently the Registrar received the following letter :—

" MAYAVARAM 27—2—1901.

TO THE REGISTRAR OF THE UNIVERSITY OF MADRAS. Most Respected Sir, I was a candidate for the Matriculaton Examination held in December 1899 and I passed in it and I was placed in the first class (Supplement to *Fort St. George Gazette*, April 3, 1900, first class 24th rank, 1st page in the list of passed candidates. Register No. 3140]. On 2nd February when my house was plundered by thieves I lost my Matriculation certificate together with certain records [bonds] worth Rs. 500. Therefore, I am now in want of a certificate. Hitherto I have produced a certificate [identification] from the head of the institution where I received my instruction. I am a poor boy and I have to enter into some department. Therefore I humbly beg of you to be kind enough to send my certificate. I beg to remain, Sir, Yours obediently,

S. STREENIVASAN,
c/of Krishna Reddi, Near Sayergate,
Napier's Road, Kanganakuppam
[via.] Cuddalore."

This letter enclosed the following certificate:—

" MAYAVARAM, 27—2—1901.

MUNICIPAL HIGH SCHOOL, MAYAVARAM. This is to certify that S. Sreenivasan was a student of this institution and passed the Matriculation Examination held in December 1899 in the first class. I hear from his guardian that, when his house was plundered on the 2nd February, he lost his Matriculation certificate with some other records. His conduct is very satisfactory. His request may be granted. S. NARAYANASAMI."

This was filed as B-2.

The person whose signature this certificate purported to bear was the head-master of the school at Mayavaram. The Registrar of the University, in reply to the application, informed the writer that a duplicate certificate would be issued on payment of Rs. 3, that being the fee chargeable. This sum was paid to the

Digitized by Google

local treasury and a receipt for the amount was forwarded to the Registrar, who then issued the duplicate certificate. Instead, however, of sending it direct to the applicant, he addressed it to the head-master of the school at Mayavaram, together with the certificate purporting to be signed by that person. It was then discovered that the supposed certificate had not in fact been written or signed by the head-master, and it was also ascertained that S. Sreenivasan, the successful candidate had not, in fact, lost his certificate. This was reported to the Registrar, who then caused a letter to be sent by registered post to the address given by the applicant, and at the same time gave notice to the authorities in that locality, as the result of which, a police constable in plain clothes was sent to watch who should take the registered letter. Accused took it, and was subsequently arrested and charged. For the defence, it was not denied that the supposed certificate was not what it purported to be, or that some one had attempted to obtain a duplicate certificate from the Registrar of the University; but the accused denied that he had done so and endeavoured to show that when the registered letter was offered to him he had said that it could not be for him His case was that it had been forced on him by the post peon and the disguised constable. The Deputy Magistrate found that the application to the Registrar had been written by the accused, found him guilty of the offences charged, and sentenced him to two years' rigorous imprisonment. The Sessions Judge, on appeal, altered the offences to those of attempting to cheat, under sections 417 and 511, Indian Penal Code, and forgery to commit cheating, under section 468, and reduced the sentence to one year's rigorous imprisonment. Subject to those modifications he dismissed the appeal.

The accused preferred this Criminal Revision Petition.

Mr. *John Adam* and *T. Rangaramanuja Chariar* for petitioner.

The Public Prosecutor in support of the conviction.

JUDGMENT.—The charge of cheating must fail inasmuch as there is no proof that the deception practised by the petitioner on the Registrar of the Madras University caused harm or damage to him or to the University which he represents. If the real S. Streenivasan had practised a similar deception for obtaining a duplicate certificate it could not be argued that he would be guilty of cheating unless damage or harm was caused to the person deceived.

There is also nothing to show that the petitioner acted dishonestly in obtaining the duplicate certificate, that is, that he had any intention of causing wrongful gain to himself or wrongful loss to the University. On the other hand he paid three Rupees in cash for the certificate which certainly seems to be greatly in excess of its cost price. Then as to the charge of forgery,—assuming that the petitioner fabricated the document B-2, there is no evidence, for the reasons already stated, that he did so fraudulently or dishonestly and with intent to cause damage or injury to the public or to any one. The question before us is not whether he intended to use the certificate subsequently in order to obtain some temporal advantage by pretending that he had passed the Matriculation Examination. Had he had such intention this mere preparation towards such object would not amount to an attempt to commit an offence within the meaning of section 511 of the Penal Code.

We must therefore reverse the conviction, acquit the prisoner, and direct that he be set at liberty.

Digitized by Google

1902 *January*, 28. **I. L. R. 25 Mad. 729.**

Before Mr. Justice Davies and Mr. Justice, Bhashyam Ayyangar.

KING-EMPEROR *v.* GOPALASAMY AND SEVEN OTHERS, ACCUSED.*

Indian Penal Code—Act XLV of 1860, s. 424—Dishonest removal of property to avoid distraint—Distraint for arrears of rent under the Rent Recovery Act—Absence of presumption in favour of its legality—Onus of proof on prosecution to prove legality—Conviction in absence of such proof—Illegality.

Where a distraint is made under the Rent Recovery Act for arrears of rent, there is no presumption that it is legally made, and if persons are charged with having dishonestly removed property to avoid it, the prosecution must prove that it was a legal distraint. In the absence of such proof, persons who have resisted the distraint or have removed their property to avoid it, cannot be convicted of an offence, inasmuch as they had a right of private defence of their property unless the distraint was legal.

CHARGES of rioting, resisting the taking of property by the lawful authority of a public servant, and voluntarily causing hurt, under sections 147, 183, and 323, Indian Penal Code. The petitioners were convicted of rioting and dishonestly removing property, under sections 147 and 424, and sentenced (some of them) to pay fines and (some of them) to suffer imprisonment. The case for the prosecution was that fourth accused had made default in payment of rent in respect of fasli 1310, and that a demand had been served on him by the manager of the Maruthanthanallur estate, of which he was a tenant. It was alleged that the manager had gone to the house of this accused accompanied by seven or eight persons, and demanded payment of the arrears. Fourth accused said that he would pay the amount in ten days. Some cattle and a cart were thereupon distrained, but the accused drove them away. They were accordingly charged, and convicted as above. An appeal was preferred to the Joint Magistrate, who said:—" In this Court, almost the whole ground of appeal is that the distraint proceedings were illegal. This was not put forward in the lower Court until after the charge was framed, and the lower Court, rightly or wrongly, refused to allow questions on the point. It is certainly an objection to this defence that it is only put forward as a last resort." He discussed the evidence and dismissed the appeal.

Petitioners preferred this Criminal Revision petition.

C. Sankaran Nair for petitioner.

JUDGMENT.—The distraint having been made under the Rent Recovery Act, there is no presumption that it was a legal distraint. It therefore lay on the prosecution to prove the distraint was legal, and especially so when its legality was challenged by the accused before the convicting magistrate. In the absence of such proof, the petitioners were guilty of no offence under either section 147 or 424 of the Penal Code inasmuch as they had a right of private defence of their property unless the distraint was legal. We must express our surprise at the Sub-divisional Magistrate in appeal thinking it unnecessary to consider the question which was the chief ground of the appeal to him, viz, whether the Sub-Magistrate was right or wrong in declining to enquire into the legality of the distraint.

We reverse the convictions of all the petitioners and acquit them, and direct the refund of the fines inflicted if they have been paid.

* Criminal Revision Petition No. 431 of 1901.

Digitized by Google

VOL. XXVI.

1902 *February* 10, 26. **I. L. R. 26 Mad. 1.**

Before Mr. Justice Davies and Mr. Justice Benson.

EMPEROR, APPELLANT, *v.* EDWARD WILLIAM SMITHER (FIRST ACCUSED), RESPONDENT.*

Criminal Procedure Code—Act V of 1898, ss. 423 (2), 537—Trial by jury—Mis-direction—Verdict and order of acquittal—Appeal against acquittal—Jurisdiction of High Court to consider the evidence—Evidence of accomplices.

In a charge against an Inspector of Salt and Abkâri of extortion and bribery, in a Court of Session, the first witness for the prosecution deposed that when he complained to the accused of delays which were taking place in weighing salt, the accused told him he ought to make the customary present of Rs. 100 or Rs. 50, according to the amount of salt to be weighed. The witness stated that he had refused to pay the bribe at that time, but that on the following day, when the accused stated that the weighing would only be properly proceeded with if the present were made, he consented, and the accused agreed to send his peon (who was charged with abetment) for the money. According to the witness, the peon came to his shop and was paid Rs. 50 by his accountant by his order and in his presence, and in the presence of two other persons who were in the employment of the witness. The prosecution evidence, if true, only showed that these two other persons had witnessed the transaction without taking any part in it. The accountant and the other two persons were called and gave evidence as second, third and fourth witnesses respectively, for the prosecution. Some entries in account books were relied on in support of the oral evidence of the witnesses, but they were challenged by the accused as false entries, and they were, in fact, discredited by the High Court. The writer of them was called as the fifth prosecution witness, and they had been made after the alleged transaction was over. The Sessions Judge, in his charge to the jury warned them against accepting the evidence of accomplices without corroboration in material particulars. He said that the first and second witnesses were certainly accomplices, and that the third, fourth and fifth witnesses had put themselves practically in the same position as accomplices and that their evidence also required corroboration before the jury could act on it. The jury returned a verdict of not guilty, and the Sessions Judge acquitted the accused. Upon an appeal being preferred by the Public Prosecutor against the acquittal, on the ground of misdirection:

Held, that as regards the first and second witnesses, the charge was accurate; but that the description of the third, fourth and fifth witnesses was a misdirection.

Held further, that it was not obligatory on the High Court, in such circumstances, to order further enquiry or a retrial and that the High Court could consider the evidence and if, after so doing, it formed the opinion that the evidence could not, in any proper view of the case, support a conviction, it would not alter or reverse the order of acquittal.

Queen-Empress v. *Magan Lal* (I.L.R., 14 Bom., 115), approved. *Elahee Buksh's Case*, [5 Suth. W. R., (Cr.), 80], followed. *Wafadar Khan* v. *Queen-Empress*, (I.L.R., 21 Calc., 955), and *Ali Fakir* v. *Queen-Empress*, [I.L.R., 25 Calc., 230), commented on.

CHARGE of extortion and abetment of bribery. The charge against first accused, Edward W. Smither, was that on or about 1st December 1898, at Tuticorin, he being a public servant, to wit, Inspector in the Salt and Abkâri Department, Tuticorin Circle, did accept or obtain from one Shanmugam Pillai, of Tuticorin, a sum of Rs. 50, a gratification other than legal remuneration, as a motive for forbearing to show, in the exercise of his official functions, disfavour to the said Shanmugam Pillai, and thereby committed an offence punishable under section 161 of the Indian Penal Code: also that he did intentionally on 30th November 1898 put the said Pillai in fear of injury to him and thereby dishonestly induced him to pay first accused Rs. 50, an offence punishable under section 384 of the Indian Penal Code; also that on or about

* Appeal No. 106 of 1902.

Digitized by Google

4th November and 14th December 1898, he attempted to commit the said offences and thereby committed an offence punishable under sections 511 and 161 of the Indian Penal Code. The charge against second accused Senthinayagam Pillai, was that he being a peon under first accused, and being thus a public servant, abetted these offences by receiving the said sum of Rs. 50 from the said Pillai and by giving it to first accused, an offence punishable under sections 161, 384 and 109 of the Indian Penal Code.

The accused pleaded not guilty, and the case came before the Sessions Judge at Tinnevelly, and a jury.

The following statement of the case is taken from the judgment of Mr. Justice Benson:—

"One Shanmugam Pillai [first prosecution witness] was engaged in the export of salt to Penang, and had to get 26,000 bags of salt weighed out from the Tuticorin factories which were in charge of Inspector Smither at the end of November and early in December 1898. He complained one morning to Smither of delays in the weighment of the salt and Smither told him that he ought to pay the customary present of Rs. 100 for a large, or Rs. 50 for a small, ship-load. Shanmugam at first refused to pay the bribe, but next day consented on Smither again telling him that weighment 'would be properly made only if rupees were paid.' Smither then agreed to send his peon for the money. The second accused came to Shanmugam's shop the same evening (1st December 1898) at 8 P. M., and received Rs. 50 from Chellam Pillai (second prosecution witness) by order of Shanmugam, and in his presence, and in that of the third and fourth prosecution witnesses, who were, respectively, a servant and a tailor in the employ of Shanmugam. Smither next day told Shanmugam that he had received the money. After that the salt was weighed out in much larger quantities. In support of the oral evidence of the witnesses to the above effect the prosecution especially relied on the day-book and ledger (exhibits A and B) kept by Shanmugam. The day-book is written on cadjan leaves, and contains an entry in Chellam Pillai's handwriting under date 1st December 1898, of a payment of Rs. 50 'to Inspector in the matter of export to Penang.' The ledger is a bound book, and it contains an entry under the same date of a payment of Rs. 50 'on account of P.S.A.A.' In the same space as the letters 'P.S.A.A.' and either under or over them is the word 'Inspector.' The letters 'PS.A.A.' denote the firm of the first prosecution witness, Shanmugam. According to the case for the prosecution the word 'Inspector' was written originally by Shanmugam's son-in-law (fifth prosecution witness) when he wrote up the ledger from the day-book, in which it will be remembered the word 'Inspector' is found, and that Shanmugam on looking over the ledger a few days afterwards noticed the word 'Inspector' and thought it unwise to leave so compromising an entry in the book, and made his son-in-law alter it to 'P.S A.A.' (which would give no information as to the purpose for which the money was paid), but that by oversight a corresponding correction was not made in the day-book. The contention of the accused is that originally there was a blank space (as we find in the same book eight days later, where 'P.S.A.A.' is written in pencil in the blank space) or else that the original entry was 'P.S.A.A.', and that 'Inspector' was written when the present case was concocted by Shanmugam and his witnesses, at the instigation of one Venkatesa Iyer, a dismissed salt officer, who had been badly reported on by Smither and owed him a grudge in consequence, and who, as manager of a firm in partnership with Shanmugam, had opportunities of influencing him. It is admitted by the prosecution that Venkatesa Iyer has been acting as a

Digitized by Google

detective for the Salt Department, and has been assisting it in the present, and in other cases, and was the first person to make charges against Smither so long ago as June last. The accused contend that the day-book, being written on cadjan leaves, could easily be tampered with, and suggest that the original entry was 'P.S.A.A.', as in the ledger, and that when the latter was altered a new leaf was substituted in the cadjan account showing the payment to the 'Inspector'. The accused strongly rely on the improbability of Shanmugam making the correction in the ledger in order to hide the bribe, without making a corresponding correction in the day-book, which is the more important account, and where it would only be necessary to substitute a new leaf in order to avoid all possible suspicion, and also on the fact that the alteration in the ledger is utterly ineffectual to conceal the bribe, since the word 'Inspector' is still plainly visible. The prosecution points out that the accounts came into the possession of the Salt Department not voluntarily on a complaint by Shanmugam, but when they were seized by order of the Magistrate along with the accounts of several other salt merchants, and contends that the circumstances negative conspiracy and concoction. On the other hand, the accused point to the fact that the accounts were in the hands of the salt officers for several days before they were handed to the Magistrate, and that they might have been tampered with, then or previously."

In the course of his charge to the jury, the Sessions Judge made the following remarks:—

"7. The law is quite clear that though it is perfectly legal for you to act on the uncorroborated evidence of accomplices, it is the duty of the Judge to warn you that, as a matter of common experience, it is unsafe to accept such evidence unless it is corroborated in material particulars. Accomplices have various motives for giving false evidence; and it is common experience that it is not safe to accept their evidence unless it is corroborated. The first witness, Shanmugam Pillai, is admitted by the Public Prosecutor to be an accomplice. It seems to me that Chellam Pillai is also an accomplice, for he admits that he counted the money and that he made an entry in the day-book as regards the payment; and, according to the evidence of at least one witness, he actually paid the money to the second accused. The other witnesses are not technically accomplices, for, an accomplice may be defined as a person who is liable to a criminal charge in respect of the transaction about which he gives evidence; but various rulings have laid down that 'witnesses who admit that they were cognizant of a crime, that they made no attempt to prevent it and that they did not disclose its commission are not necessarily accomplices, but their evidence should be treated with suspicion and only relied on to the same extent as that of accomplices'. (Mayne, page 979 of 'Criminal Law of India, 2nd edition,' and cases there cited.) The third, fourth and fifth witnesses were admittedly present at the time of payment and for nearly 2½ years they never told anybody what had happened.

"8. In this case, as in most similar cases, a charge of extortion is made, because witnesses think it takes away their guilt if they say they paid under compulsion. This view of the matter is a mistake. If Mr. Smither had a revolver in his hand and threatened to shoot first prosecution witness dead on the spot unless he paid the money, that would be a justification for the witness to pay the money, and his payment would not be a punishable offence (section 94, Indian Penal Code). It is no doubt true that bribery is not a serious offence in the eyes of natives, but 'one cannot help suspecting that men so pliable as to be willing to bribe may be induced to tell lies under some other motive or

Digitized by Google

pressure.' It is a matter of experience that 'the two offences often go together (*Queen-Empress* v. *Magan Lal* (1)). Of course bribe-givers have a strong motive to give false evidence. They hope, by pleasing those who conduct the prosecution, to avoid the consequences of their action and to escape punishment. 'No exception can be made in favour of bribers because they are not people of good character and because, if such exception were allowed, men of previously good character would be exposed to charges of receiving bribes without sufficient protection' [same case, page 138]. So that, the first and second witnesses are certainly accomplices, and the third, fourth and fifth witnesses have put themselves in the same position, practically, as accomplices, and their evidence requires corroboration before you can act upon it."

The jury returned a verdict of not guilty, and both of the accused were acquitted.

Against that order of acquittal the Public Prosecutor preferred this appeal, on the ground that the Judge had misdirected the jury on points of law and that the verdict was erroneous owing to that misdirection.

The Advocate-General [Hon. Mr. *J. P. Wallis*] and the Public Prosecutor in support of the appeal.

Mr. *Robert Grant* for the accused.

DAVIES, J.—The principal objection taken to the Sessions Judge's charge to the jury is his having treated the first prosecution witness as an accomplice requiring corroboration in regard to the charge of extortion under section 384, Indian Penal Code, as well as in regard to the charge of abetting bribery under section $\frac{161}{109}$, Indian Penal Code. But the Sessions Judge had very good authority for his direction in the ruling in the case referred to by him [*Queen-Empress* v. *Magan Lal* and *Moti Lal* (2)]. There three learned Judges of the Bombay High Court unanimously held, to quote the head-note in the report of that case, which is accurate, that "the limits of the application of the doctrine of necessity as an excuse for an act otherwise criminal are those prescribed in section 94 of the Indian Penal Code. Therefore, witnesses who in order to avoid pecuniary injury or personal molestation had offered or given bribes to a public servant were abettors of the offence of taking an illegal gratification, and their evidence should be treated as that of accomplices." In that case the inducement to bribe was said to have been a fear that the officials concerned would unfairly get the assessment of the villagers raised or put them to expense in erecting boundary marks, and it was held that that pressure, supposing it existed, was not the kind of compulsion which the law allows to be an excuse for the offence of abetting the acceptance by a public servant of an illegal gratification. In the case before us the fear which the first prosecution witness says induced him to give the bribe was that without it he would not get due deliveries of the salt he was purchasing from Government inasmuch as the first accused had told him that his weighments would only be done properly if rupees were paid. Following the decision of the learned Judges of the Bombay High Court, this, if true, was not such a threat as would excuse the first prosecution witness from the offence he was committing in giving a bribe to a public servant. If the law allowed the bribers to escape criminal liability when they bribed a public servant by complaining that they were put in fear of some pecuniary injury that would be, as Mr. Justice Jardine observes, "tantamount to encouraging the corruption as the corrupt Judge or officer would then be

(1) I. L. R., 14 Bom., 115 at pp. 136, 137. (2) I. L. R., 14 Bom. 115.

Digitized by Google

able by politic use of threats to give an indemnity to all who paid him money." So it was held in *Reg* v. *Parshram Keshav* (1) that receipts of bribes by public servants differ from extortions by private persons, and ought to be tried under section 161 rather than under section 383 of the Indian Penal Code. Though in the present case the charge of extortion as well as of bribery was laid against the accused, the first prosecution witness was nevertheless, under the ruling of the Bombay High Court, with which I entirely concur, an accomplice and required corroboration as the Sessions Judge ruled.

The second objection to the Judge's charge to the jury is in his telling them that second prosecution witness, Sellam, Pillai, who speaks to actually having paid the bribe to the second accused, was certainly an accomplice; and that the third and fourth prosecution witnesses, Narayana Pillai and Vyravan Maistri, who speak to having witnessed the payment of the bribe and the fifth prosecution witness, Ambalavan Pillai, who speaks to altering the original entry in the ledger in regard to the person to whom the Rs. 50 was paid, were practically accomplices, and therefore also required corroboration. In my opinion the Judge was right in treating the second witness, who actually paid the bribe, albeit under the orders of his master, the first prosecution witness, as also an accomplice, because the witness says he knew it was a bribe, but I think the Judge was wrong in treating the other three witnesses as practically accomplices. The third and fourth prosecution witnesses took no part in the transaction but merely witnessed it and the fifth prosecution witness merely cooked the account after the transaction was over. The Judge might well have told the jury that they were tainted witnesses, or at all events not independent witnesses as they are all dependents of the first prosecution witness, and their evidence should therefore be received with caution.

The other objection taken to the Judge's charge to the jury is that he ought to have laid stress upon this fact or that fact as supporting the case of the prosecution, but there is no fault whatever to be found in the Judge in this respect, for a fuller or fairer charge upon the facts could not have been delivered.

Coming back to the one error which the Judge has committed, the question is whether that misdirection has "in fact" occasioned a failure of justice, in which case only have we authority to interfere either on appeal or in revision [section 537 (*d*), Criminal Procedure Code] Now, it is impossible for us to decide whether there has been a failure of justice in fact without looking to see what the facts are. Again, this is an appeal by Government from an acquittal by a verdict of jury, and under section 423, clause 2 of the Code of Criminal Procedure, we cannot alter or reverse a verdict of the jury unless we are of opinion that such "verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury as to the law laid down by him." If, on that ground, we are to alter or reverse the verdict of acquittal by the jury our powers under the same section [423 (A)] are to "reverse such order and direct that further enquiry be made or that the accused be retried or committed for trial as the case may be or find him guilty and pass sentence on him according to law." Now, in order to determine if the verdict is erroneous, and, if so, which of these powers we should exercise, it is absolutely necessary for us to go into the facts. On these two grounds I am clearly of opinion that we are bound to consider the evidence in the case before passing orders in it, and if we "are of opinion that the evidence could not, in any

(1) 7 Bom. H. C. R., 61, C. C.

Digitized by Google

proper view of the case, support a conviction it will be worse than useless to send the case back for a new trial" (per Sir BARNES PEACOCK, C.J., in the case of *Elahee Baksh* (1)).

On going through the evidence, then, as we have done, I have no hesitation in agreeing with the rider to the jury's verdict, namely, that the evidence for the prosecution is unreliable. The evidence against the first accused Smither is that of the first prosecution witness alone. That evidence is that Smither asked for or hinted that he wanted a bribe, that Rs. 50 was subsequently paid to Smither's peon, the second accused, and that Smither admitted the next day that he had received the Rs. 50. This is not only the evidence of an accomplice, but it is evidence that was procured under pressure from Smither's superior officers. It was only forced from the first prosecution witness 5 or 6 days after he had been expelled from the salt pans on the suspicion that he had been giving bribes, and it is significant that after his evidence against Smither was given the first prosecution witness was again allowed access to the salt pans. There is absolutely no corroboration of the story. The entry in the first prosecution witness' ledger account which is put in as corroborative evidence bears on its own face its worthlessness, for it is one entry cancelled by another, and neither may be true. A similar entry of Rs. 50 made a few days afterwards in the same book of what is said to have been a bribe is left blank as to the person to whom it was paid; and the probability therefore is there was a blank in that respect in this case also. There was ample opportunity for the prosecution, in whose hands this acconnt book with others was most improperly left for two or three days after it was seized from the complainant's shop, to have filled up the blank and concocted the entry as it now stands, and it was an opportunity that the chief person assisting the prosecution all along—in other words the detective in the case, one Venkatesa Iyer,—would gladly have seized as he is arch enemy of Mr. Smither. If, however, the word Inspector was originally written in the book at the time, as the prosecution allege, the entry according to the evidence as now given was a false entry, because the money was paid to the second accused, the Inspector's peon, and not to the first accused, the Inspector himself. There is, therefore, no case against Mr. Smither and the verdict of acquittal in his case must be upheld.

As regards the second accused the evidence as I have just stated is that he was the man who actually received the bribe. But he is not himself charged with the substantive offence but only with the abetment thereof, the prosecution having chosen to treat him as a go-between on behalf of the first accused. There is no evidence whatever except that of the first prosecution witness that the second accused was such go-between, and as he denies it, there is no case against him.

The acquittal in his case must therefore also be upheld.

The appeal petition is accordingly dismissed and with it the case in revision also goes.

BENSON, J.—In this case the first accused, E. W. Smither, is an Inspector in the Salt Department : second accused was his peon.

They were tried by a jury, the first for bribery and extortion [sections 161 and 384, Indian Penal Code], and the second for abetment of the same, and were acquitted.

(1) 5 Suth. W.R., [Cr.], 80 p. 89.

Digitized by Google

Against that acquittal the Public Prosecutor, on behalf of Government, now appeals, on the ground that the Sessions Judge misdirected the jury on points of law, and that the verdict was erroneous owing to such misdirection. The case for the prosecution may be briefly stated as follows: [His Lordship's statement of the case has already been set out.]

Such being the main facts and contentions on both sides, we have to see whether there is any misdirection in the Sessions Judge's charge to the jury. The law as to how far the prosecution witnesses are accomplices and how far their evidence requires corroboration and can be acted on by the jury, is laid down in paragraphs 7 and 8 of his charge to the jury in these words: [His Lordship referred to the portion of the charge already set out.]

Now, I think that the learned Sessions Judge laid down the law with substantial accuracy in the first sentence of paragraph 7, though in order to be quite accurate he ought to have added the words "as a general rule" after the word "unsafe," for there are special circumstances in which it would not be unsafe to accept the evidence of an accomplice even when uncorroborated. But I think that he was not correct in law in going on to say that "the third, fourth and fifth witnesses have put themselves practically in the same position as accomplices and their evidence requires corroboration before you can act on it," nor was he right in quoting to the jury as a correct statement of the law the passage to the same effect from Mr. Mayne's 'Criminal Law of India.' Two cases, *Queen* v. *Chandalinee* (1) and *Ishan Chandra* v. *Queen-Empress* (2) are referred to by Mr. Mayne in support of the proposition.

The former was a case of murder. One of the witenesses, Shasti, said she was present in the house at the time and witnessed the alleged murder. She was related to the accused, and said nothing about the murder for four months. In regard to her the Court observed: "The statement of this witness, Shasti, is, in fact, an admission that she was cognizant of the crime which she took no means to prevent or disclose and her evidence must be considered as no better than that of an accomplice." That was a dictum in regard to a particular witness, and it by no means justifies a general proposition that every witness, in all classes of cases, who acts as Shasti did, must be treated as practically an accomplice. The case of *Ishan Chandra* v. *Queen-Empress* (2) has still less application to the present case. The remarks of the Judges in these cases must be read in reference to the particular facts then under discussion, and, when so read they do not at all support the broad proposition laid down. When the principles, or rules of law, on any matter have been laid down in general terms by the Legislature, a Judge will, in most cases, be wise to refer to the exact terms of the law, and then instruct the jury with regard to its application to the facts before them, instead of adopting as principles passages from text-books (however eminent the writer may be) which briefly refer to what is laid down (or is supposed to be laid down) in reported cases or even to passages from the judgments of reported cases themselves, which may mislead by not being correctly understood in relation to the facts of the particular case, or possibly even by not containing an accurate exposition of the law. Now the law as to the evidence of accomplices is laid down in sections 133 and 114 of the Indian Evidence Act.

Section 133 enacts that "An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

---

[1] 24 Suth. W. R., [Cr], 55. (2) I.L.R., 21 Calc., 328.

Digitized by Google

Section 114 says that "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case," and as illustrations it adds that "the Court may presume (*b*) that an accomplice is unworthy of credit unless he is corroborated in material particulars. But the Court shall have regard to such facts as the following in considering whether such maxims do or do not apply to the particular case before it.

As to illustration (*b*) "A, a person of the highest character is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself.

As to illustration (*b*) "A crime is committed by several persons. A, B and C three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D and the accounts corroborate each other in such a manner as to render previous concert highly improbable."

There is nothing in the law, as laid down in these sections, to justify the broad proposition quoted by the Judge that the evidence of witnesses, who admit that they were cognizant of a crime, that they made no attempt to prevent it and that they did not disclose its commission should "only be relied on to the same extent as that of accomplices." The degree of credit to be attached to the evidence of such witnesses depends on all the facts and circumstances of the particular case. For instance, if a busy man sees a person strike another a trifling blow in the street, and if the witness proceeds on his way without interfering or calling for the Police, and is summoned next day to give evidence as to what he saw, can it be supposed for a moment that he is to be regarded as "practically an accomplice" and that his evidence is to be treated with suspicion, because, though cognizant of the assault, he made no attempt to prevent it and gave no information to the authorities. There would, in such a case, be no obligation on the witness to interfere or to give information to the Police. He might have thought the person assailed well able to take care of himself, or he might have thought the assault unimportant compared with his own important business. On the other hand, if a Policeman should see a thief pick a lady's pocket in the street and not interfere or report the matter for months, and should then give evidence of it, without explaining his inaction, the Court will be right in treating his evidence with suspicion, not on the ground that he must necessarily have been an accomplice, but on the principle which is the foundation of the rule as to the credit to be usually attached to accomplices, and which is laid down in section 114 of the Evidence Act, viz., that the Court might presume his evidence to be untrue because he did not act in accordance with the common course of human conduct and his public duty in relation to the facts of the particular case. In the present case there are, no doubt, good reasons for not placing much reliance on the evidence of the third, fourth and fifth witnesses, but they were in no sense accomplices, and it only leads to confusion of thought to treat them as "practically accomplices" and then apply a mechanical rule as to their credibility, instead of judging of their credibility by a careful consideration of all the particular facts of the case affecting it. Natives do not generally regard bribery as a very serious offence. There was no legal obligation on the witnesses to give information of it, and all our experience of natives of that class leads us to conclude that

Digitized by Google

they would be unlikely to do so unless actuated by enmity or the desire for gain. On the other hand, the events happened nearly three years before the witnesses gave their evidence; it is not likely that a transaction of the kind would take place in the presence of so many persons, and these witnesses are all subject to the influence of the first witness, and are of such a position in life as not to entitle them to any special degree of credibility; and there are the inconsistencies in their evidence to which the Judge has drawn attention in paragraph 9 of his charge. For these reasons the Judge might well have advised the jury to treat their evidence with caution. Exception is also taken by the learned Advocate-General to the Sessions Judge's reference to section 94 of the Indian Penal Code, and to his omission to leave it to the jury to say whether on the evidence the case was one of extortion or bribery. I do not think it necessary to go into these questions, because as regards the third, fourth and fifth witnesses I think there was a clear misdirection. It is obviously one of such a character as may have led to a failure of justice; and it is necessary to decide as to the procedure to be adopted when such a misdirection is established.

It is contended for the accused that we must now weigh the truth of the evidence against the accused, and that we may then convict or acquit the accused according to the view we take of the evidence, or may, if we see fit, direct a retrial. On the other hand, the learned Advocate-General contends that an important misdirection having been established, we are bound to order a new trial and have no power to assume the functions of a jury, and decide as to whether the evidence, when rightly considered does or does not establish the guilt of the accused. The law on the subject must be gathered from the Criminal Procedure Code. Section 417 gives Government the right to appeal against an acquittal, and section 418 declares that such an appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only. Then section 423 gives the Court power to reverse the order of acquittal and direct further enquiry, or a retrial, or to find the accused guilty and pass sentence on him, but adds "nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

Then section 537 enacts that "subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of (*d*) any misdirection in any charge to a jury, unless such misdirection has, in fact, occasioned a failure of justice."

Now, reading these sections together, and construing the words in their plain, ordinary sense, the contention of the accused seems to be justified. Section 418 says that an appeal against an acquittal by a jury shall lie, that is, shall be based and supported, on a matter of law only. If an erroneous verdict on a matter of fact is alleged that will not support such an appeal; but if there is an error in law the appeal will lie. That is, I think, all that section 418 means. It does not, I think, prohibit the Court, in a case where an appeal lies on a question of law, from deciding questions of fact which other sections of the Code require the Court to decide in order to do justice in the case. Section 423, clause (1), requires the Court to then peruse the record, and hear the parties, and lays down what are the ordinary powers of the Court in dealing with appeals against acquittals generally, but clause (2) restricts the power of the Court to reverse or alter the verdict of the jury "unless it is of

Digitized by Google

opinion that such verdict is erroneous owing to a misdirection by the Judge." The manifest implication in these words seems to be that if the verdict is erroneous owing to a misdirection, the verdict may be reversed or altered. Clause (2) contains no provision as to what the Court is to do, or has power to do, when it reverses or alters the verdict of a jury. To ascertain that it is necessary to revert to clause (1) of the section, and in it no distinction is made between the powers of a Court in a case tried by a jury and in any other case. The inference seems to be that as soon as the verdict of the jury is reversed, the Court has the same power to deal with the case that it has to deal with a case triable by assessors as soon as the order of acquittal by the Judge is set aside; that is, the Court may order a retrial, or may find the accused guilty and pass sentence on him according to law.

It is to be observed that clause 2 of section 423 speaks of the power to "reverse or alter" the verdict. "Reverse" evidently means "to set aside," to "make null," but it is difficult to see what further action the word "alter" is intended to indicate unless it be the substitution of a finding of "guilty" for "not guilty" or *vice versâ*. The only verdict a jury can give is one of "guilty" or "not guilty." That verdict may be "reversed," *i.e.*, set aside, or it may be "altered," *i.e.*, another finding may be substituted for that of the jury. As already observed, if the verdict is "reversed" the Court may, as an alternative, take the action indicated in clause (*a*) of the section and order further enquiry or a retrial instead of itself "altering" the finding.

In many cases, no doubt, the Court would prefer to take this course, but I cannot hold that it is obligatory on the Court to do so whatever may be its view as to the weight to be attached to the evidence.

To do so would be an intolerable hardship on an accused person in a case where the Court was satisfied of his innocence, and that the acquittal was, in fact, right, or that the conviction (in the case of an appeal against a conviction) was not justified by the evidence. Section 537 expressly enacts that "no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of any misdirection in any charge to a jury unless such misdirection has, in fact, occasioned a failure of justice." The words "in fact" were introduced into the Code in 1898, apparently in order to emphasise the duty of the Court to go into the merits before interfering in consequence of a misdirection or other error, but I think the duty existed just the same before those words were added.

We cannot say that there has, in fact, been a failure of justice without considering the credibility of the evidence, and I think it would be unreasonable, and contrary to the express direction of section 537, to hold that once a misdirection, even though it be an important one—is established we are bound mechanically to order a retrial, even though in our judgment the evidence for the prosecution is untrustworthy.

If it is said that the Court, not having an opportunity of observing the demeanour of the witness, is at a disadvantage in weighing the evidence, that is true, but it is the same in all cases where an Appellate Court deals with the facts, and is no worse in a case triable by a jury than in one triable by a Judge with assessors.

If it is said that in weighing the truth of the evidence we are assuming the functions of the jury, the answer is that this is a duty so frequently cast on Judges of High Courts in India that no adverse argument can be drawn from it.

Digitized by Google

Trial by jury is a comparatively recent innovation in India, and even now comparatively few offences are so tried, and the classes of cases to be so tried may be varied from time to time by order of Government. A jury in the mofussil of this part of India consists of only five men, and the verdict of a bare majority ordinarily prevails.

In section 307 the Legislature expressly imposes on the High Court the duty of itself trying jury cases. There is therefore nothing opposed to the fundamental principles of the law in a Judge of this Court trying on the written record and without examining witnesses questions of fact even in a case ordinarily triable by a jury. The only question in each case is whether or not the Legislature has imposed on the Court such duty.

In the present case I think that it has imposed this duty and that we ought not to order a retrial unless we are satisfied that the misdirection has, in fact, occasioned a failure of justice [section 537] and that the verdict is erroneous [section 423 (2)]. In this view of the law of India I am supported by the high authority of Sir Barnes Peacock, C.J., and the Full Bench of the Calcutta High Court in the case of *Elahee Buksh* (1). In that case the appeal was against a conviction, but the reasoning of the learned Chief Justice appears to apply even more strongly in the case of an appeal against an acquittal. He says: "It would tend to defeat, and not to promote, justice, if a verdict of guilty were set aside, and a new trial granted, for a defective summing up with reference to the weight of evidence in a case in which the High Court would, upon the evidence given on the trial, have affirmed a conviction, if, instead of a trial by jury, the trial had been before a Judge and assessors. In determining whether the verdict ought to be set aside and a new trial granted for a defective summing up of the evidence it appears to me that the question to be considered is not whether upon a proper summing up of the whole evidence, a jury might possibly give a different verdict, but whether the legitimate effect of the evidence would require a different verdict. If the evidence is such that the High Court would have affirmed the conviction if the trial had been before a Judge and assessors, I think that they ought not to set aside a verdict of guilty found by a jury merely because the Judge has not, in summing up, given proper caution or advice to the jury as to the weight which they might properly give to the evidence. If the verdict is set aside for such a cause upon the ground that the error of the Judge has caused a failure of justice and that the prisoner has been prejudiced, thereby, it may be necessary in some cases to grant a new trial. But if the Court is satisfied that a failure of justice has been caused, and that the evidence is wholly insufficient to support any conviction against the prisoner, and would upon the same evidence have reversed a conviction if the case had been tried without the intervention of a jury, there is no necessity, and I think it would be improper, to grant a new trial. In such a case, the Court, having set aside the verdict, may order the prisoner to be discharged," and again "the case should be returned to the Division Bench with an expression of the opinion of the Full Bench . . . . that the verdict and conviction ought not to be set aside if the Court be of opinion that the verdict was warranted by the evidence, and that upon that evidence they would have upheld the conviction on appeal if the trial had been by the Judge with the aid of assessors instead of by jury."

These views were accepted by the Full Bench, Jackson, J., adding "In regard to the proposed rule that we should not interfere in case of misdirec-

(1) 5 Suth. W. R., [Cr.], 80.

Digitized by Google

tion where the facts are such that if the trial had been held before a Judge and assessors, we should have affirmed the sentence, I have only one misgiving. It is not always safe,—I might say it is rarely safe—for an Appellate Court, with papers before it, to put itelf in the place of the Court below which has heard the witnesses; and it might be that, in affirming the conviction on the faith of some unnoticed circumstance of corroboration found in the evidence, we might be using that which the Judge and Jury would not have relied upon. But this perhaps only suggests caution in the application of the rule, rather than an objection to the rule itself."

The view of the law taken by the Full Bench in the case of *Elahee Buksh* (1) is, I think, that embodied in the present Code of Criminal Procedure, and I am unable to adopt the contrary view taken by a Division Bench of that Court in the cases reported in *Wafadar Khan* v. *Queen-Empress* (2) and *Ali Fakir* v. *Queen-Empress* [3]. I may add that the dicta cited in the former case from the judgment of the Privy Council in the case of *Makin* v. *Attorney-General for N. S. Wales* (4) had reference to the law in a country where the history and essential characteristics of the law of trial by jury are very different from what they are in India.

The question, then, is whether in the present case we are satisfied that the verdict is erroneous in the sense indicated by Sir Barnes Peacock. Are we of opinion that the acquittal was not warranted by the evidence or would we uphold the acquittal on appeal if the trial had been by the Judge with assessors instead of by a jury? I must answer this last question in the affirmative. I have already indicated that there are good reasons for not attaching weight to the evidence of the third, fourth and fifth witnesses. Even if their evidence and the evidence of the second witness is true, it only establishes the payment of Rs. 50 to the second accused. It does not implicate the first accused. His guilt must rest on the evidence of the first witness, Shanmugam. The alleged demand for money and the admission of its receipt by the first accused, rest solely on the uncorroborated evidence of Shanmugam, and the terms of his prior statement to the Deputy Commissioner indicate that the first accused never, in fact, made any admission of the receipt of the money. The entries in the accounts I regard as fraught with suspicion, and as damaging rather than assisting, the prosecution. It is unlikely that if Shanmugam took the precaution of altering the entry in the ledger, he would have failed to alter the day-book; especially as it could be done so easily and effectually by rewriting one-half of a cadjan, and it is incredible that if he thought it necessary to obliterate the word "Inspector" in the ledger, he would have done it in such a way as to still leave it perfectly legible. It is impossible on the evidence to say that Venkatesa Iyer, or other enemies of the accused, had no opportunity of making such an alteration after the books were seized. If that entry is a forgery, as I strongly suspect that it is, it becomes impossible to reley on the evidence of Shanmugam or the other witnesses who are his dependents.

The inference sought to be drawn from the increase of salt weighed out after the first December is not, by itself, important, as it may easily have been due to other causes altogether. There is no independent evidence to show that Shanmugam was at the time pressing to be allowed larger deliveries.

I would refuse to set aside the verdict of the jury, and would dismiss the appeal.

(1) 5 Suth. W.R., [Cr.], 86.
(2) I.L.R., 21 Calc., 955.
(3) I.L.R., 25 Calc., 230.
(4) L.R., [1894], A.C., 57.

Digitized by Google

1902 *February*, 28. **I. L. R. 26 Mad. 38.**

Before Mr. Justice Benson and Mr. Justice Moor.

THANDRAYA MUDALY (ACCUSED No. 1), APPELLANT, *v.* EMPEROR, RESPONDENT.*

Evidence Act—I of 1872, s. 24—Confession caused by promise—Village Magistrate Person in authority—Appeal from conviction by Jury—Misdirection.

Two days after a dacoity had been committed in a certain village, T. went to the Village Magistrate of that village, who was enquiring into the dacoity and requested him to report that T. had not been concerned in the dacoity. The Village Magistrate replied that there was already a hue and cry against T., but that if T. spoke the truth he would consult the Head constable and arrange that T. should be taken as a witness. T. at first denied all knowledge of the dacoity, but ultimately made a confession. T. was charged, with others, with having committed the dacoity, and this confession was deposed to by the Village Magistrate. The Sessions Judge, in his charge to the Jury, made no reference to the relevancy or otherwise of the confession under section 24 of the Evidence Act, and he said that if the confession was true it was enough to warrant the conviction of the accused. The Jury returned a verdict of guilty, and the accused was sentenced. On an appeal being preferred on the ground of misdirection.

Held, that the Village Magistrate was a person in authority within the meaning of sec. 24 of the Evidence Act, and that as the arrangement promised by him before the confession was made was obviously intended to be one that would save the accused from prosecution if he would confess, the confession was irrelevant under that section. *Also*, that the misdirection was a material and important one, likely to lead to an erroneous verdict, and that a new trial must take place.

CHARGE of dacoity, under section 395 of the Indian Penal Code, against thirteen persons. The tenth witness for the prosecution, the Village Magistrate of Kalavai (where the dacoity was alleged to have been committed) deposed that on the second day after the dacoity the first accused had come and asked him to write a report to the effect that first accused had not been concerned in the dacoity. The witness replied that there was a hue and cry against the first accused, and that the report should have been written on the preceding day, and he added: "If you speak the truth we would consult the Head constable and arrange." The witness added that first accused then, after considering a little while, made the following confession:—"I, some jogies and others, together committed the dacoity and I should be saved anyhow." The first accused then informed the witness where the stolen property was. No objection was taken to the admissibility of this evidence, with reference to section 24 of the Evidence Act. The eleventh prosecution witness deposed that first accused first denied all knowledge of the dacoity and then the Monigar said: "If you speak the truth, you might be taken as a witness." The Sessions Judge, in his charge to the Jury, made no reference to the relevancy or otherwise of the evidence, with regard to section 24 of the Evidence Act, and he said, with reference to the case against first accused: "If the confession is true, it is enough to warrant the conviction of the accused." The Jury found the first and six other accused guilty, and the Judge, agreeing with that finding, sentenced them to imprisonment.

First accused preferred this appeal, on the ground of misdirection.

Mr. *J. G. Smith* and *T. Venkatasubbier* and *Narayana Sastri* for appellant.

The Public Prosecutor in support of the conviction.

---

* Appeal No. 36 of 1902.

Digitized by Google

JUDGMENT.—On behalf of the first accused, it is urged that there is a misdirection in the Judge's charge to the Jury, and we think that this is so. The tenth witness is the Monigar-Magistrate of the village of Kalavai. He says that on the 26th, that is on the second day after the dacoity, the first accused came and asked him to write a report saying that he (first accused) was not concerned in it; to which the witness replied, " it should have been written yesterday; there is a hue and cry against you : if you speak the truth we would consult the Head constable and arrange, " and the witness adds that first accused then, after considering a little, made the following confession— " I, some jogies and some others together committed the dacoity and I should be saved anyhow, " and then proceeded to say where the stolen property was. Now, this witness, no doubt, says that when he spoke of arranging with the Head constable, he only meant to arrange to have a report written, but we do not think that this is true. We have no doubt that he meant to make some arrangement to save the first accused from prosecution if he would confess. This is made clear from the evidence of the eleventh prosecution witness. His account is that the first accused denied all knowledge of the dacoity, and then the Monigar (tenth witness) said: " If you speak the truth you might be taken as a witness."

Now, we think that, in these circumstances the confession of the first accused was irrelevant under section 24 of the Indian Evidence Act, inasmuch as it was caused by an inducement or promise having reference to the charge against him and proceeding from a person in authority, viz., the Monigar, and sufficient to give the accused grounds which would appear to him reasonable for supposing that by making it he would gain an advantage in regard to the proceedings by being taken as a witness instead of an accused person. There can, we think, be no doubt that the Monigar who was acting as such in regard to the inquiry into the dacoity was a " person in authority " within the meaning of the section and in the circumstances the Judge ought not to have allowed evidence of the confession to be recorded, or, if it was inadvertently recorded he ought to have told the jury that the confession was irrelevant and should not be considered by them. It is true no objection was taken by the accused or his pleader to the confession under section 24 of the Evidence Act, but that does not render it any the more relevant or admissible. The Judge, in paragraphs 17 and 18 of his charge, dealt with another objection to the confession but made no reference to its irrelevancy under section 24 of the Evidence Act and told the Jury that if the confession was true it was enough to warrant the conviction of the accused. We think that the misdirection was a material and important misdirection likely to lead to an erroneous verdict. We do not wish to say more on the merits as we think the case is one peculiarly fit for a jury to decide and we wish not to embarrass them by any expression of opinion on other parts of the evidence. We may add that what we have said as to the irrelevancy of the confession under section 24 does not apply to any statement of the accused relating to the discovery of any fact which is relevant under section 27 of the Evidence Act.

With these remarks we set aside the Conviction of the first accused and direct that he be retried according to law.

Digitized by Google

1902, *February* 25. I. L. R. 26 Mad. 41.

Before Sir Charles Arnold White, Mr. Justice Benson and Mr. Justice Moore.

ALAGIRISAMY NAIDU (ACCUSED), PETITIONER, *v.* BALAKRISHNASAMI MUDALIAR (COMPLAINANT), RESPONDENT*

Criminal Procedure Code—Act V of 1898, ss. 435, 437—Petition by complainant for retrial of accused after discharge—No notice to accused—Order by Sessions Judge directing further enquiry—Revision petition to High Court—Jurisdiction—Necessity for notice before order passed to prejudice of accused.

A person charged with having committed criminal breach of trust was discharged, whereupon the complainant petitioned the Sessions Judge, under section 435 of the Code of Criminal Procedure, to direct a retrial of the case. Notice of the application was not given to the accused. The Sessions Judge, acting under section 437, ordered a further enquiry to be made. On a criminal revision petition being preferred by the accused in the High Court against that order,

Held, that it was competent to the High Court to revise the order; and that, without laying down a general rule that the omission to give notice of such an application renders an order under the section bad, the order must be set aside as it had not been shown that in this case there was any difficulty in giving notice, or that there was any reason why the general rule should not be followed that an order should not be made to a man's prejudice without giving him an opportunity for being heard.

CHARGE of criminal breach of trust by an agent under section 409 of the Indian Penal Code. Accused was discharged by the Head-quarter Deputy Magistrate, whereupon the complainant presented a petition to the Sessions Judge, under section 435 of the Code of Criminal Procedure, asking him to call for the records of the lower Court and direct a retrial of the case under section 437 of the Code. Numerous grounds were set forth in the petition. Notice of the application was not given to the accused. The Sessions Judge, after perusing the petition and records and hearing counsel for the complainant, passed the following order :—" It seems to me that the finding is inconsistent with the statements of fact in paragraph 6 of the judgment. I, therefore, under section 437, direct the District Magistrate to make further enquiry by himself or any Magistrate subordinate to him except the Magistrate whose judgment is now dealt with in revision."

Against that order the accused preferred this criminal revision petition.

T. V. Seshagiri Ayyar for petitioner.

Mr. *J. G. Smith* for complainant.

JUDGMENT.—It cannot be said that the order of the Sessions Judge made, under section 437 of the Code of Criminal Procedure, is an illegal order since it does not in any way contravene the provisions of the section. But it may be said it was an improper order by reason of the fact that it was made without notice to the accused so as to give him an opportunity of showing cause why an order to his prejudice should not be made, and it is clearly competent to us to revise it.

We do not want to lay it down as a general proposition that the omission to give notice in itself renders an order under the section bad. In the case now before us, however, there is nothing to show that there was any difficulty in connection with giving notice, or that there is any reason why the general rule that an order should not be made to a man's prejudice without giving him an opportunity of being heard, should not be followed.

We set aside the order, and direct the Sessions Judge to re-hear the petition after giving notice to the accused.

* Criminal Revision Petition No. 519 of 1901.

Digitized by Google

1902. *February* 24. I. L. R. 26 Mad. 43.

Before Sir Charles Arnold White, Chief Justice, Mr. Justice Benson and Mr. Justice Moore.

H. K. BEAUCHAMP (ACCUSED No. 1), APPELLANT, *v.* G. M. J. MOORE (COMPLAINANT), RESPONDENT.*

Indian Penal Code—Act XLV of 1860, section 500—Defamation—Criminal Procedure Code—Act V of 1898, section 198—Person aggrieved—Defamation of subordinate officers of Municipality—Complaint by President—Maintainability.

A newspaper published articles which, for the purposes of the point of law to be determined, were assumed to be defamatory. These related to the conduct of certain subordinate officers of the Madras Municipal Commission. A complaint was lodged by the President of the Commission in respect of the alleged defamation, it being contended on behalf of the complainant that, inasmuch as by the Madras Municipal Act, the President is responsible for the efficient discharge of their duties by his subordinate officers, his conduct and administration had been impugned by the articles :

Held, that assuming for the purposes of the question under consideration that the statements complained of were defamatory of the subordinate officers of the Municipal Health Department, they were not defamatory of the complainant; and that the complainant was not a "person aggrieved" within the meaning of section 198 of the Code of Criminal Procedure.

CHARGE of defamation. The matter complained of was contained in certain letters which were published in the *Madras Mail*, and which were thus set out in the charge :—

" That on Friday night (meaning the night of Friday, August 23, 1901) there were three attacks in two native houses in Chaintadripet in Singana Chetty Street. In one of the houses both the cases proved fatal . . . . There was one more attack in that very house and a Eurasian resident reported the case to the Police who in turn brought the Sanitary Overseer to the houses but strange to say absolutely nothing was done in the way of disinfection, cleaning the cloths, etc. Naturally the contagion spread to the neighbouring Eurasian houses, and the Medical attendant at once reported the cases to the Health Officer but would you believe it, that only at 10 o'clock at night did the same Overseer come to disinfect the houses . . . . It was pointed out to the Health Officer that the people had locked up the cloths of the patients in an adjoining house, and the cloths were found locked up. But beyond ordering the peons or the Overseer to see them burned nothing was done to destroy them. The corpse was allowed to be kept till at 7 last night . . . . it was removed. When death occurs in a respectable Eurasian house the Municipal Health department insist on the body being removed at once, but the body of the woman was allowed to remain for one full day. This is not all. There was one death in the Barracks and there are one or two cases of " diarrhœa " there. But the Municipality has done nothing to disinfect the house, and there are not fewer than a dozen families in the Barracks. There are not fewer than three cases to-day, but of course we see not a single peon anywhere. These are facts which speak for themselves. I have now to appeal from Dr. Mathews to Colonel Moore to adopt more rigorous measures to put an end to the scourge . . . . now carrying off men like sheep." Further that on the 5th day of September 1901 at Madras aforesaid in another number of the same paper the *Madras Mail* the said defamatory and untrue imputations and matter or portions thereof were repeated and confirmed in the following words, that is to say, " with reference to the above I have to state that the best evidence of the facts furnished by me is the above letter itself so

* Appeal No. 864 of 1901.

Digitized by Google

far as the disinfection of the native house in Singanna Chetty Street is concerned. Let me again restate my facts of the case . . . . On Friday the 23rd ultimo there were three attacks in two native houses in Singanna Chetty Street, in Chintadripet. It is also absolutely true that the Sanitary Overseer of the division visited the house on Saturday morning, but nothing was done as to disinfection till 10 P. M. on Saturday night. As to the removal of the corpse there is nothing in what I said to imply that I accused the Health Department of not carrying out the law in the matter. What I meant and what my words clearly indicate was that the Eurasians, the better class, were amenable to moral persuasions in this respect and removed their corpses without much delay. With regard to the disinfection of the cloths of the deceased, I regret to have to add . . . . I have evidence to show they were not disinfected in the presence of the Acting Health officer, but only on his instructions . . . . after he left the spot."

The Acting Chief Presidency Magistrate, finding the defendants guilty of of the offence of defamation, sentenced first defendant to pay a fine of Rs. 205 so that an appeal might be preferred, if desired, and second defendant to a nominal fine of 8 annas.

First defendant preferred this appeal.

The Advocate-General (Hon Mr. *J. P. Wallis*), for appellant, raised the preliminary point that the complainant had not been defamed, and was not a person aggrieved, within the meaning of section 198 of the Code of Criminal Procedure. Even assuming that the matter complained of was in fact defamatory, it could only be defamatory of the officials whose conduct formed the subject of comment, and not of the complainant, whose personal conduct had in no way been impugned by the articles.

Hon. Mr. *Eardley Norton*, for complainant [called on to reply on the preliminary point], contended that inasmuch as by the terms of section 34 of the Madras Municipal Act, the President of the Municipality was responsible for the efficient discharge of duty by the subordinate officers of the Municipal Health Department, his conduct had been impugned. He referred to *Riding* v. *Smith* [1].

JUDGMENT.—This is an appeal from a conviction of the Editor of the *Madras Mail* on a charge of defamation.

The complainant is the President of the Madras Municipality. The charge alleges that the defendant published certain untrue and defamatory statements concerning the Acting Health officer of the Municipality and the subordinate officers of the Municipal Health Department for whose efficient working the complainant is directly responsible, intending thereby, or knowing, or having reason to believe, the publication of such untrue and defamatory imputations would injure the reputation of the complainant.

The charge then proceeds to set out the alleged untrue and defamatory imputations. They are as follows:—[This portion of the charge has already been set out.]

The question we have to determine, before it becomes necessary to go into the evidence, is this;—assuming the statements of which the complainant complains are untrue and assuming for the purposes of the question now before us those statements are defamatory of the Acting Health officer and of the

(1) L. R., Ex. D., 91 ; 45 L. J., Ex., 281.

Digitized by Google

subordinate officers of the Municipal Health Department, are the statements, in law, defamatory of the complainant ?

None of the statements contains any express allegation that the complainant has been negligent in the discharge of his public duties. In our judgment the statements set out in the charge are not of such a nature as to suggest that the complainant has been guilty of negligence in the discharge of his public duties. The statements complained of are in the main allegations of specific acts of negligence by the Acting Health officer and the subordinate officers of the Health Department. It seems to us that none of the statements are capable of being construed as containing any imputation against the complainant.

Besides the specific allegations there are two statements which may be described as general; one is : " When death occurs in a respectable Eurasian house, the Municipal Health Department insist on the body being removed at once, but the body of the woman (the woman being a native) was allowed to remain for one full day."

It was contended on behalf of the prosecution that these words are defamatory inasmuch as they suggest that the Health Department are in the habit of bringing more pressure to bear in connection with the removal of corpses when the corpse is that of an Eurasian than when it is that of a native. It seems difficult to extract any defamatory meaning from this statement;, but assuming as, for the purposes of the question of law, we do assume, that these words are defamatory of the Health officer, it seems clear to us that they are incapable of bearing an interpretation which makes them defamatory of the complainant. The other general statement is : " There are not fewer than three cases to-day, but of course we see not a single peon anywhere." It is very difficult to see that these words involve any imputation on the complainant, but if there is any imputation it is of so remote and slight a character that we have no hesitation in holding that the imputation was not made with the intention of harming the reputation of the complainant or with the knowledge that it would do so.

This is clear from the concluding words of the letter complained of,—" I have now to appeal from Dr. Mathews to Colonel Moore to adopt more rigorous measures." This clearly indicates that the writer believed that the fault lay with the Health officer and his subordinates, and that it was only necessary to bring the matter to the notice of the complainant in order to have more rigorous measures adopted. These words suggest confidence in the complainant rather than any negligence or inefficiency on his part.

In our judgment the complainant is not a person aggrieved by the defamation of his subordinate officers (if they were defamed) within the meaning of those words as used in section 198 of the Code of Criminal Procedure. The statements set forth in the charge which are relied upon by the complainant as constituting the alleged defamation are, in our judgment, clearly not defamatory of the complainant.

The conviction is bad and must be set aside. The fine if levied must be refunded.

Digitized by Google

1902 *February*, 19. **I. L. R. 26 Mad. 49.**

Before Sir Charles Arnold White, Chief Justice.

BATAKALA POTTIAVADU AND ANOTHER, PETITIONERS.*

Code of Criminal Procedure—Act V of 1898, s. 552—Order for restoration of possession of immoveable property—Conviction of accused on charge of criminal trespass—No finding of use of criminal force—Legality of order for restoration.

Certain persons were convicted of having committed criminal trespass on a piece of land, under section 447 of the Indian Penal Code. There was no finding that they had used criminal force, or that the complainant had been dispossessed of the land by such force. An order was subsequently made, which purported to be under section 522 of the Code of Criminal Procedure, directing the accused to restore possession of the land. On a revision petition being preferred against this order:

Held, That as there was no finding that criminal force had in fact been used, or that complainant had been dispossessed of the land by it, and as criminal force was not an ingredient of the offence for which the accused had been convicted, the order was made without jurisdiction.

ORDER for restoration of immoveable property, under section 522 of the Code of Criminal Procedure. Petitioners had been convicted, by the second-class Magistrate of Tekkali, on a charge of criminal trespass, under section 447 of the Indian Penal Code. The case for the prosecution was that these petitioners, with others (who were charged with them but acquitted) had unlawfully entered upon land which was in the possession of the complainant and ploughed it up. Complainant stated that the land had been delivered to him by the Court amin a month before the accused trespassed on it. The accused stated that the land in dispute had been in their possession, and they denied the alleged delivery to the complainant by the Court amin. The Magistrate inflicted nominal fines. An order was subsequently made, which purported to be under section 522 of the Code of Criminal Procedure, by which the accused were to restore possession of the land. A revision petition was presented to the Sessions Judge, who rejected it on the ground that no substantial injustice had been done, though the order was irregular inasmuch as no criminal force had been used in the course of the trespass. Petitioners now filed this criminal revision against the order of the second-class Magistrate.

V. Ramesam for petitioners.

JUDGMENT.—In this case the petitioners were convicted of an offence under section 447 of the Indian Penal Code (criminal trespass), and an order was subsequently made which purported to be under section 522 of the Code of Criminal Procedure. The question is, was this order under section 522 a legal order or is it bad as having been made without jurisdiction ? The conditions precedent that must exist before an order can be made under section 522 are (1) some person must have been convicted of an offence " attended by criminal force and (2) some person must have been dispossessed of immoveable property by such force."

It is clear that the use of the criminal force is not a necessary ingredient of an offence under section 447 of the Indian Penal Code. The Calcutta High Court have held that an offence attended by criminal force "means an offence of which criminal force is an ingredient (*Ram Chandra Boral* v. *Jityandria*(1)). I am inclined to think that this is too narrow a construction to place on the very general words " attended by criminal force." In the present case, however, there is no finding by the Court which convicted the petitioners that any

* Criminal Revision Petition No. 489 of 1901. (1) I.L.R., 25 Calc., 434.

Digitized by Google

criminal force was in fact used by the petitioners or that the complainant was dispossessed of the land by such force. This being so, and criminal force not being an ingredient of the offence for which the petitioners were convicted, I think the order which purported to be made under section 522 of the Code of of Criminal Procedure was made without jurisdiction and must be set aside. I order that petitioners be restored to possession.

1902 *August* 26, 29. *September* 9, 17. **I. L. R. 26 Mad. 55.**

Before Mr. Justice Benson (on reference from Mr. Justice Bhasyyam Ayyangar and Mr. Justice Moore).

IN THE MATTER OF PALAGAN §

Indian Penal Code—Act XLV of 1860, s. 193—Charge of giving false evidence—Contradictory statements by witness before same Magistrate in the course of one and the same trial, on two different days—Conviction—Legality.

On 18th January 1900, the accused deposed before a Magistrate that he had seen P. and others gambling in a certain place. The deposition was read over to the accused, and acknowledged by him to be correct. On 1st February, he was cross-examined in the same case, before the same Magistrate, and he then deposed that he did not know P and had never seen him gambing. He was charged and convicted under section 193 of the Penal Code of having intentionally given false evidence, in that he made two contradictory statements, one of which he either knew or believed to be false or did not believe to be true. On the question being raised, on revision, whether the conviction was legal, or whether it was illegal, by reason of the fact that the contradictory statements were made before the same Magistrate and in the course of one and the same trial:

Held, *Per* BENSON, J. (to whom the case was referred).—That the conviction was legal.

Per MOORE, J.—As no rule can be laid down to the effect that the contradictory statements must have been made at different inquiries or trials, (to render a person liable to conviction) the conviction could not be held to be illegal and should, consequently, not be interfered with in revision.

Per BHASHYAM AYYANGAR, J.—The conviction was bad in law. No statement made by a witness in a deposition can be regarded as a completed statement until the deposition is finished, and corrected if necessary ; for till then, every statement is liable to be retracted, corrected, varied or qualified, and until his *viva voce* examination is finished neither the whole nor any portion of his deposition becomes evidence. The whole deposition must be read and construed as one, and if a later statement in it is contradictory to or at variance with a prior statement, the statement made by the witness must be taken to be the earlier statement as subsequently modified, or the subsequent statement itself, if it intentionally contradicts and thus retracts the earlier,

Habibullah v. *Queen-Empress*, (I. L. R., 10 Calc., 937), considered.

CHARGE of having intentionally given false evidence, V. Ponnusami and others were charged before the third-class Magistrate at Sendamangalam, with gambling. The second witness for the prosecution was the present accused Palani Palagan. On 18th January 1900, after he had been solemnly affirmed, he made the following statement in the course of his examination-in-chief:—" At about 9 A. M. on 16th January 1900, Vania Ponnusami, Palli Ramaswamy, Kavarai Rangan and Andi Bodi were gambling, keeping with them money and stones under the ichi tree, by the side of Yettikulamroad. . . . As soon as the gamblers saw [the constable] they left the stones and money and ran away. . . ." At the end of the deposition, which bore the witness' mark, the usual statement was made and signed by the Magistrate that the evidence had been taken down by him and read over to the witness and acknowledged by him to

§ Criminal Revision Case No. 177 of 1902.

Digitized by Google

be correct. On 1st February 1900 the same witness was cross-examined, after having again been solemnly affirmed. In the course of his cross-examination he said :—" I do not know this Ponnusami. I have not seen him. I know the Police Constable . . , . I have never seen Ponnusami gambling . . . ." Palani Palagan was charged under section 193 of the Indian Penal Code with having given false evidence in a judicial proceeding. The Magistrate who recorded the statements deposed that accused had stated what was recorded, and that both depositions had been read to him, and that he had admitted the correctness of them both and had touched the pen when the mark was added. The Deputy Magistrate, who tried the present case considered that the record of evidence showed that accused had been tampered with in the interval between examination-in-chief and cross-examination. Accused admitted that he had made the later statement, but he denied having made the earlier one. The Deputy Magistrate found accused guilty and sentenced him to a short term of imprisonment in consideration of the time that had elapsed. The accused appealed, without success, to the Sessions Judge.

The records were called for by the High Court.

The case first came on for hearing before Bhashyam Ayyangar and Moore, JJ.

The Acting Public Prosecutor appeared in support of the conviction.

Their Lordships delivered the following judgments :—

BHASHYAM AYYANGAR, J.—In my opinion a witness who has intentionally made contradictory statements in one and the same deposition cannot be charged in the alternative and convicted under section 193, Indian Penal Code, by reason of his having made such statements one or other of which must, if the two are construed as independent and separate statements, be false. No statement made by a witness in a deposition can be regarded as a completed statement until the deposition is finished and corrected if necessary; for till then, every statement is liable to be retracted, corrected, varied or qualified and until his examination *viva voce* is finished, neither the whole nor any portion of his deposition becomes evidence. If a later statement in the deposition be contradictory to or at variance with a prior statement, the whole deposition must be read and construed as one, and the statement made by the witness must be taken to be the earlier statement as subsequently modified or the subsequent statement itself if it intentionally contradicts and thus retracts the earlier, and the statement so modified or the later statement intentionally retracting the earlier is the statement or evidence made or given by him, and if that be proved to be false he can of course be convicted of perjury or giving false evidence on that count. Suppose the deponent instead of giving evidence *viva voce* as allowed to give evidence by swearing to an affidavit which is given in evidence, can he be indicted and convicted of giving false evidence by reason merely of the affidavit containing two contradictory statements one or the other of which must be false to the knowledge of the deponent ? They cannot be regarded as two independent separate statements which are cotradictory to each other and the witness cannot be convicted on the footing that he intentionally made two contradictory statements one or other of which must be false to his knowledge, any more than a plaintiff or defendant can be indicted and convicted in the alternative for verifying a plaint or written statement containing contradictory or inconsistent statements, one or other of which must be false. The fact that in the present case there was an interval of about a week between the close

Digitized by Google

of the examination-in-chief—in which the earlier statement was made—and the commencement of the cross-examination—in which the later statement was made contradicting the earlier—cannot affect the question, and if, as appears to be the case, the two instalments of the deposition have been separately signed, even that can make no difference any more than the construction of a document will depend upon whether the document is signed once for all at the end or each sheet thereof is signed separately.

The question arising in this case was considered and decided under Act X of 1882, in *Habibullah* v. *Queen-Empress* (1). In that case Tottenham, J., and Wilson, J., to the latter of whom the case was referred as third Judge under section 429, Criminal Procedure Code, held that the conviction was legal; Norris, J, having dissented from the view of Tottenham, J., holding that a witness cannot be convicted by reason of having intentionally made contradictory statements in one and the same deposition. I concur with the dissenting Judge, Norris, J., in his opinion. I am also inclined to think that the Legislature in enacting illustration (*b*) to section 236 of Act V of 1898—which illustration did not exist in Act X of 1882—was aware of the above decision of the Calcutta High Court and adopted the view of Norris, J. This seems to be also the view on which the decisions of this Court in Criminal Miscellaneous Petitions Nos. 25 and 23 of 1902 proceed, the sanction in the former case having been upheld on the ground that the contradictory statements were made not in one and the same deposition, but in different depositions made on different occasions and in different proceedings though in one and the same case. In my opinion, therefore, the conviction of the accused in the present case in the alternative ought to be set aside on the ground that it is bad in law and the accused acquitted and set at liberty

I am glad to be able to come to this conclusion as a pure question of law, for I feel convinced that as a matter of policy the contrary doctrine, that a witness can be indicted and convicted of giving false evidence by reason merely that one or other of two contradictory statements intentionally made in one and the same deposition must be false, will have a most unwholesome and deterrent effect upon witnesses, by compelling them to adhere to statements which they have originally made in the course of their examination—however incautiously or inaccurately they might have been made—and unwary and comparatively ignorant witnesses may be made, in the hands of cross-examining counsel who are allowed full latitude in 'leading' a witness in cross-examination, to commit themselves to hopeless contradictions of what they have stated in the examination-in-chief. During the course of examination, a witness often discovers that previous statements made by him are incorrect, either owing to forgetfulness or confusion or because the question was misunderstood, and he should be at perfect freedom to retract or qualify such statements until the deposition is finished and read out. No doubt it will be said that in such cases he will not be prosecuted for having made contradictory statements and I dare say it will be so when the matter rests in the discretion of experienced Magistrates and Judges. But, as a general rule it is but natural that a witness would rather adhere to his original statement than expose himself to the risk of the party against whom he gives evidence obtaining sanction to prosecute him for having made contradictory statements though in one and the same deposition.

The doctrine that a witness can be convicted of perjury simply on the

(1) I.L.R., 10 Calc., 937.

Digitized by Google

ground that one or other of two contradictory statements intentionally made by him must be false, without proving which of them is false, is one that has long been exploded in English law (*R.* v *Harris* (1), *Reg.* v. *Wheatland* (2); *Reg.* v. *Jackson* (3), *Queen-Empress* v. *Ghulet* (4), *Palany Chetty* (5)); and in India it rests upon the decision of the majority in two Full Bench cases (*Queen* v. *Musst. Zamiran* (6), and *Queen* v. *Mahomed Hoomayoon Shaw* [7]), which has been dissented from by eminent Judges who took part in those cases and by others in *Queen-Empress* v. *Mugapa Bin Ningappan* (8), and the Legislature itself has given sanction to such doctrine, not directly by any substantive enactment, but only indirectly, by illustration *(b)* to section 236 of the Criminal Procedure Code of 1898. In *Habibullah* v. *Queen-Empress* [9] already referred to, Wilson, J. [who concurred with Tottenham, J.] in adverting to the above two Full Bench decisions of the Calcutta High Court, stated as follows:—" I think I am bound to accept this view of the law though if it were not framed [sic ' concluded '] by authority, it is not a view that I should myself have taken."

Apart from the reasons already given by me for holding that the doctrine cannot logically or on legal principles apply to a case in which the so-called contradictory statements are contained in and form parts of one and the same deposition, I am not prepared to extend the doctrine beyond the authority of the Full Bench decisions and illustration *(b)* to section 236 of Act V of 1898 and the forms of alternative charges appended to that Act and the former Codes of Criminal Procedure, in all of which the contradictory statements referred to are in different depositions—each of which became complete in itself—and was made by the witness on different occasions and in different proceedings.

MOORE, J.—Palani Palagan when examined before a Magistrate on the 18th January 1900 deposed that he saw one Ponnuswami and others gambling in a certain place. After he had given his deposition it was read over to him and acknowledged by him to be correct. On the 1st February he was cross-examined in the same case before the same Magistrate and he then deposed that he did not know Ponnuswami and had never seen him gambling. Palani Palagan has been convicted on an alternative charge of giving false evidence under section 193, Indian Penal Code. There is no finding by the Deputy Magistrate as to which of the contradictory statements is false. A question has been raised as to whether the conviction can be upheld inasmuch as the two statements were made in the same trial although on different days and not in two separate and distinct enquiries. The only reported decision that I can find in which this question, as to whether it is absolutely necessary that the contradictory statements should have been made in different inquiries or trials, has been discussed is that of *Habibullah* v. *Queen-Empress*(9), and as I agree with the view taken by the majority of the Judges (Wilson and Tottenham, JJ,) who heard that case to the effect that no such rule can be laid down I am not prepared to hold that the conviction of Palani Palagan is illegal and I would therefore decline to interfere in revision.

In consequence of the difference of opinion the case was referred to and again came on for hearing before Benson, J., under sections 429 and 439 (1) of the Code of Criminal Procedure who delivered the following:—

(1) 5 B. and Ald., 926. (2) 8 C. and P., 238. (3) 1 Lewis C. C., 270.
(4) I.L.R., 7 All., 44. (5) 4 M.H.C.R., 51 at p. 52. (6) B.L.R.F.B., 521.
(7) 13 B. L. R., 324 (8) I. L.R., 18 Bom., 377. (9) I. L. R., 10 Calc., 937.

Digitized by Google

JUDGMENT.—The facts of the case are not in dispute. They are briefly as follows:—The accused when examined on solemn affirmation before the Magistrate on the 18th January 1900 deposed that he saw one Pannuswami and others gambling in a certain place. The deposition was read over to the witness and acknowledged by him to be correct. A fortnight afterwards he was cross-examined in the same case, before the same Magistrate, and he then deposed that he did not know Ponnuswami, and had never seen him gambling. He was convicted of having intentionally given false evidence, an offence punishable under section 193, Indian Penal code, in that he made two contradictory statements one of which he either knew or believed to be false or did not believe to be true. The question for decision is whether the conviction is legal, or whether it is illegal by reason of the fact that the contradictory statements were made before the same Magistrate and in the course of one and the same trial.

In my judgment the conviction is legal. It is unnecessary to consider what would be the law of England in such a case, inasmuch as the Indian Legislature has deliberately departed from the English law of perjury in more than one particular, and has defined the offence and laid down the procedure to be followed by the Indian Courts in dealing with it. It is admitted on all hands that under section 236, Code of Criminal Procedure, a witness who intentionally makes two contradictory statements in two separate trials, or in an inquiry before a Magistrate and in the trial of the same offence before a Sessions Judge, may be tried on a charge which alleges that one or other of the statements was known by the witness to be false, though without alleging which was, in fact, false. The only question for decision is whether a witness may be similarly charged when the contradictory statements have been made, as in this case, before the same Court and in the same trial. I can find nothing in the law, or in the history of the law, or in the principles on which it is founded to justify the distinction suggested. The law which sanctions the framing of an alternative charge in such a case is section 236, Code of Criminal Procedure, and its terms are perfectly general. They are: "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences." There are two illustrations added to the section as examples of how its terms may be applied. The second of these illustrations is as follows:—"*A* states on oath before the Magistrate that he saw *B* hit *C* with a club. Before the Sessions Court *A* states on oath that *B* never hit *C*. *A* may be charged in the alternative and convicted of intentionally giving false evidence although it cannot be proved which of these contradictory statements was false." This illustration, no doubt, deals only with a case of a witness making contradictory statements before the Committing Magistrate and the Sessions Judge, but it is obvious that the general scope of the provisions of a section cannot be cut down by the terms of an illustration, and the same is true of the forms in the schedule attached to the Code. As observed by Scotland, C.J., and Collett, J., in reference to this same question "the statements of particular offences given in the forms are obviously given only as examples (*Ramanuja Chariyar* v. *Venkatavaradhaiyangar* (1))." There is no suggestion that a charge in the alternative would not be warranted by the section if the two contradictory statements were made in

[1] 4 M. C. R., 51 at p. 54.

Digitized by Google

two separate trials, though the illustration does not cover such a case. So far as the terms of the law are concerned, I find nothing to indicate that a conviction such as we are dealing with is illegal : nor do I find anything to that effect in the history of the law, or in the principles on which the law is based. The history of this part of the criminal law has been set forth with admirable fulness by Duthoit, J., in *Queen-Empress* v. *Chulet*(1). The learned Judge there showed that the *ratio decidendi* of the leading English case, *R.* v. *Harris*(2) was inapplicable in India and that the rule of English law there laid down was never adopted in India. In fact it was almost at once dissented from by express Legislation. Madras Regulation 3 of 1826, which was enacted soon after *R.* v. *Harris*(2) was decided settled the law in Madras and provided that "if a witness shall wilfully and deliberately give two contradictory depositions on oath . . . . such witness shall be liable to be committed for trial before the Court of Circuit for wilful and corrupt perjury ; provided that the contradiction between the two depositions be direct and positive, and that upon the whole circumstances of the case, there be strong grounds to presume the corrupt intention of the witness." In Bengal and the North-Western provinces the law was laid down in 1831 "where there exists a contradiction in the evidence of a witness before one or more Courts, and the difference be such that the two statements can in no way be reconciled with each other, for instance, if a witness depose that he saw *A* kill *B* mentioning the time and place in which the murder was committed and afterwards in the same Court or some other, shall state that he did not witness the transaction this is a direct retraction of his evidence," and he is liable to be convicted (Constructions S. D. A. and N. A., ed. 1839, Vol. II, p. 19).

In 1847 the Indian Law Commissioners, in dealing with this question, stated : "We are strongly of opinion that whoever in any stage of a judicial proceeding, been bound by an oath or by a sanction tantamount to an oath, to state the truth, gives a statement touching any point material to the result of such proceeding which directly and positively contradicts a statement touching the same point, given by him on oath, or under a sanction tantamount to an oath, in any stage of a judicial proceeding, at another time "should (failing any satisfactory explanation of the contradiction to negative the inference of a corrupt intention) be liable to punishment. Under such circumstances, it is morally certain that the party has given a false statement on one or other of the two occasions, though it may be impossible to show positively which of the contradictory statements is false. Both statements may perhaps be false, but one only can be true. It is possible, indeed, that the first statement may have been false, through an error or mistake, which has been corrected by subsequent information, and that the second contradicts the first because it contains the truth which had come to the knowledge of the party in the meantime. But when there is no such allegation nor any explanation of the contradiction to negative the inference that the party at one time or the other has been guilty of stating on oath (or as it may be) as true what he knew to be false in order to deceive a Court of justice, on a point material to the question to be decided by the Court, we think the law should be so framed that he should not be able to escape from the punishment he would well deserve." Now, the reasoning of the Law Commissioners, which, I take it, correctly explains the policy and principles on which the law is founded, is equally applicable whether the two statements

(1) I. L. R., 7 All., 44. (2) 5 B. and Ald., 926.

Digitized by Google

are made as in the case before us, at different times in one and the same trial, or at different stages (the inquiry and trial) of one judicial proceeding. The Indian Penal and Criminal Procedure Codes came into force on the 1st January 1862 and laid down the law applicable thenceforward throughout India. The Criminal Procedure Code was re-enacted in 1872 and again in 1882 and 1898, but in each enactment the law on this matter was substantially the same as it now is. The validity of a conviction on an alternative charge has been affirmed in reported cases under each of the Codes [referred to in detail in *Queen-Empress* v. *Ghulet*, already cited], but in only one of these has the exact question now before us been decided. That is the case of *Habibullah* v. *Queen-Empress* (1). In it the witness was under cross-examination on one day and under re-examination on the next day, and made two statements which were directly contradictory. His conviction on a charge in the alternative was upheld by a majority of the Judges,—Norris, J., dissenting. The learned Judge who dissented did not quote any authority for making a distinction in favour of the witness who makes contradictory statements at different stages of his examination by the same Court. He based his dissent on the supposed inexpediency of allowing a prosecution in such a case " as it would render it unsafe for a witness to correct the deposition." I do not think that much weight can be given to this argument, for precisely the same argument can be used, and I think with no less force, when the contradictory statements are made at the enquiry and at the trial respectively. Yet this latter is the case expressly given in illustration *(b)* to section 236 as within the scope of the section. It is just as desirable that a witness who has honestly made an incorrect statement at the enquiry before the Magistrate should be free to correct it at the trial before the Judge, as it is that a witness, who has honestly made an incorrect statement at one stage of his examination by the Magistrate should be free to correct it at a later stage of his examination by the same Magistrate, and in my judgment it is no less desirable that a witness who has dishonestly and intentionally made a false statement should not be allowed to escape with impunity in the one case more than in the other. If a witness is honest he has nothing to fear. He cannot be prosecuted without the sanction of the Court before which he deposed [or some Court to which it is subordinate] after such enquiry as the nature of the case demands, and no Court would give sanction unless satisfied that the witness had deliberately and intentionally made the contradictory statements not merely to correct a *bona fide* error, but intending in one or the other instance to mislead the Court by stating what he knew to be false or did not believe to be true. The essence of the offence lies in the intention to give false evidence, and that intention may, I think, just as well exist where the contradiction is in various stages of the same deposition as where it is in different stages of the same proceedings. In both cases every possible presumption should be made in favour of a reconciliation of the two statements and every means should be taken to ascertain the true intention of the witness, but when that intention is shown to be deliberately dishonest, I can see no principle on which the witness should be protected from punishment in the one case more than in the other. To consider whether the false statement was made in the course of one deposition or in the course of two separate depositions seems to be irrelevant, and calculated to obscure the real question. The offence is defined in the Indian Penal Code, and consists in intentionally making a false statement. The Criminal Procedure Code does not create or define the offence. It rather

(1) I. L. R., 10 Calc., 937.

Digitized by Google

relates to the mode in which it may legitimately be proved that the offence has been committed. It says, in effect, you may prove that a false statement has been made by showing that two contradictory statements have been made one or other of which must necessarily be false, and it is not necessary for you to show which of the two is, in fact, the false one. This mode of proof is just as applicable in the case of contradictory statements made at different stages of a witness' examination by a Magistrate, as in the case of cantradictory statements made by the same witness at the enquiry by a Magistrate and at the trial by the Judge. It often happens that a witness is not cross-examined at all at the enquiry by the Magistrate, the cross-examination being reserved until the witness has been examined in the Sessions Court. In what essential does such a case differ from that now before us ? In both cases it is merely a question of words as to whether the statement in eross-examination is to be regarded as a separate deposition or as a continuation of the original deposition. The evil to be guarded against seems to be precisely the same in both cases, and ought to be equally liable to the sanction of punishment.

In the case before us the witness deposed in examination-in-chief that he saw Ponnuswami committing an offence and stated the exact time and place and other particulars. The deposition, after it was recorded, was read over to the witness and acknowledeged to be correct. When cross-examined a fortnight afterwards the witness denied that he knew Ponnuswami or had ever seen him commit the offence. He did not plead that his former statement was made under any misapprehension. He made no attempt to reconcile the two statements or to explain them in any way consistent with an honest intention on his own part. He simply denied having made the former statement attributed to him. It would, I think, be difficult to find a more flagrant case of intentional giving of false evidence, and it would, in my judgment, have a most unfortunate effect on the morality of witnesses and the administration of justice if a witness, however corrupt, who behaves in this way, cannot be punished. In the words of Sir Barnes Peacock, used with reference to two contradictory statements made before the Magistrate and the Sessions Judge in one and the same case: " It is clear that unless the law is very defective, or we are to trifle with the administration of justice, the witness ought to be punished. It appears to me that the law is not deficient, and that the case is provided for by the Code of Criminal Procedure whether it be read according to the strict letter or according to its spirit." (*R.* v. *Zumeerun* (1)).

I must hold that the conviction in the present case was legal and that there is no ground for our interference as a Court of Revision.

1902 *September* 17, 19, 29. **I. L. R. 26 Mad. 98.**

CRIMINAL APPELLATE—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Benson and Mr. Justice Moore.

ERANHOLI ATHAN (ACCUSED), PETITIONER *v.* KING-EMPEROR, RESPONDENT. *

Criminal Procedure Code—Act V of 1898, ss. 439, 476—" Jurisdiction of High Court to interfere when a Court has taken action under s. 476 of the Criminal Procedure Code."

* Criminal Revision Petition No. 146 of 1902. [1] 6 Suth, W. R. [Cr.] 65.

Digitized by Google

Where a Court has taken action under section 476 of the Code of Criminal Procedure, the High Court, as a Court of Revision, has no power to interfere, under section 439.

The reasons for the decision in *Queen-Empress* v. *Srinivasulu Naidu*, (I.L.R., 21 Mad, 124), are not applicable to the amended Code.

(Note: This case is Fol: 8 C. W. N. 73. Ref: 26 All. 249; 1904 All. W. N. 15; 29 Mad. 100.)

QUESTION referred to a Full Bench ;—" Whether the High Court, as a Court of Revision, has power, under section 439 of the Code of Criminal Procedure, 1898, to interfere when a Court has taken action under section 476 of the Code of Criminal Procedure."

Three Moplahs were charged in the Court of the Special Assistant Magistrate of Malabar with having kidnapped a boy in order to convert him. Petitioner was called as a witness for the prosecution. After hearing his evidence and giving him an opportunity to make a statement, the Special Assistant Magistrate (for reasons which are not material to the question considered by the Full Bench) passed an order under section 476 of the Code of Criminal Procedure forwarding the records to the Head Assistant Magistrate at Palghat for enquiry, in the meanwhile releasing the petitioner on bail.

Against that order, petitioner preferred this criminal revision petition.

The case first came on for hearing before Sir. Arnold White, Chief Justice, and Mr. Justice Moore, who made the order of reference to a Full Bench which has already been set out.

The case came on in due course before a Full Bench constituted as above.

Dr. *Swaminadhan* for petitioner.—The High Court has jurisdiction to interfere. Assuming, in the first instance, that *Queen-Empress* v. *Srinivasulu Naidu* (1), which was decided under the Code of 1882, was rightly decided, no such change has been made in the Code of 1898 as would deprive the High Court of the revisional powers which it was held to possess in that case. The only change in the new Code is the introduction of the words " as if upon complaint made and recorded under section 200." These were introduced to meet the requirements of section 190, under which there are only three ways in which a Magistrate can take cognizance of a case. By the amendment, the Magistrate is to treat the proceeding under section 476 as if it were a complaint, and in this way the requirements of section 190 are satisfied. The use of the words " as if " show that a proceeding under section 476 is not really a complaint. Magistrates always had power, under section 195 [*b*], to lay complaints like ordinary complaints so that if a proceeding under section 476 is a mere complaint, the amendment of 1898 is unnecessary. Such a proceeding is, consequently, an order, and, as such, is subject to the revisional powers of the High, Court. Moreover, section 435 [3] expressly exempts certain orders from the revisional powers of the High Court but does not refer to proceedings under section 476. The maxim " expressio unius est exclusio alterius " should be held to apply. If the Legislature intended to effect such an important innovation as the curtailment of the revisional powers of the High Court it would not have expressed its intention in so uncertain a manner. Moreover [if the proceedings of the Legislature could be looked to for guidance], the draft bill contained an express exemption of proceedings under section 476 from revision, but the clause was not incorporated

[1] I.L.R., 21 Mad., 124.

Digitized by Google

in the Act as passed. The obvious intention was to retain jurisdiction to check the proceedings of Magistrates. Lastly, if called upon, I am prepared to argue that the decision in *Queen-Empress* v *Srinivasulu Naidu* [1] was correctly decided.

The Acting Public Prosecutor [Hon. Mr. *C. Sankaran Nair*] contended that, under the section as amended, the High Court had no power to interfere, as a Court of Revision, with the Magistrate's order By section 190 of the Code of Criminal Procedure there are only three ways in which a Magistrate is empowered to take cognizance of an offence, namely, on complaint, on a police report, or on information received. To enable the Magistrate to take cognizance of a case sent to him by a Court under section 276, the proceeding must come within the meaning of one of these three; and so the Legislature provided that such a proceeding is to be treated as a complaint. That means that it is a complaint, and, being a complaint, it is not an order, and not being an order the High Court has no power to revise it.

Dr. *Swaminadhan* in reply.

JUDGMENT.—In the case of *Queen-Empress* v. *Srinivasulu Naidu* [1], it was held by a Full Bench of this Court that a High Court as a Court of Revision has power under section 439 to revoke an order under section 476 of the Code of Criminal Procedure. This decision was based upon the ground that where action is taken under section 476 [1] such action is not to be regarded merely as the lodging of a complaint by a public servant, but is to be treated as a proceeding which is tantamount to an order of a Court. In the Code of 1898 the Legislature introduced in sub-section [2] of the section, after the words " such Magistrate should thereupon proceed according to law," the words " and as if upon complaint made and recorded under section 200."

It seems to us that, by the introduction of these words, the Legislature intended to make it clear that when action is taken under sub-section [1] such action is not to be regarded as an order but as the lodging of a complaint. Consequently the reasons for the decision in *Queen-Empress* v. *Srinivasulu Naidu* [1] are not applicable to the amended section

We think the answer to the question which has been referred to us ought to be in the negative.

On the case again coming on before the Division Bench, the petition was dismissed.

1902. *May 28.* **I. L. R. 26 Mad. 116.**

Before Mr. Justice Bhashyam Ayyangar

IN RE PAREE KUNHAMMED AND ANOTHER, PETITIONERS.*

Criminal procedure Code—Act V of 1898, s. 195—Petition to revoke sanction.

A person whose prosecution had been sanctioned by a Sub-Magistrate petitioned the Special Assistant Magistrate for its revocation. The Special Assistant Magistrate declined to interfere' on the ground that as the Sub-Magistrate had had judicial evidence before him and had also held the necessary enquiry before granting sanction, the necessary conditions had been fulfilled and it was not for him at that stage, to usurp the functions of a court trying the petitioner for the offence:

---

[1] I.L.R., 21 Mad., 124. * Criminal Revision Petition No. 244 of 1902.

Digitized by Google

Held, that it is the duty of the authority giving sanction or upholding it, under section 195, to go into the merits of the application for sanction, with reference to the evidence before it, which is relied on as justifying the according of sanction. Unless there is sufficient *prima facie* evidence and a reasonable probability of conviction, the Court giving the sanction or upholding it will not be properly exercising the discretion vested in it by law.

PETITION to revise an order declining to interfere with sanction to prosecute the petitioners. An order had been passed by the Sub-Magistrate of Tiruvangadi, sanctioning the prosecution of the petitioners for the abetment of giving false evidence, under section 193 of the Indian Penal Code. Against that order, petitioners appealed to the Special Assistant Magistrate of Malabar, who passed the following order :—" The Sub-Magistrate had judicial evidence before him and also held the necessary enquiry before granting sanction. These necessary conditions having been fulfilled it is not for me, at this stage, to usurp the functions of a Court trying petitioners for the offences, their prosecution for which has been sanctioned. I decline to interfere."

Petitioners presented this criminal petition.

Dr. *S. Swaminadha* for petitioners.

JUDGMENT.—The Special Assistant Magistrate of Malabar, in disposing of the appeal petition presented to him under section 195 (6), Criminal Procedure Code, for revocation of the sanction given by the Sub-Magistrate of Tiravangadi for the prosecution of the petitioners for the abetment of offences under sections 211 and 193, Indian Penal Code, summarily dismissed the petition on the ground that " the Sub-Magistrate had judicial evidence before him and also held the necessary enquiry before granting sanction," and such necessary conditions having been fulfilled " it was not for him at this stage to usurp the functions of a Court trying the petitioners for the offences." The Special Assistant Magistrate is entirely mistaken as to his functions and responsibility in dealing with a petition presented to him under section 195 which is really in the nature of an appeal against the order of one of his Subordinate Magistrates giving sanction to prosecute the petitioners. He is quite right in saying that in dealing with the petition of appeal before him he ought not to usurp the functions of the Court which will have to try the petitioners if the sanction be upheld and they are brought to trial. That Court will have to try the petitioners upon the evidence which may be adduced at that trial and either convict or acquit them with reference to such evidence. But the authority giving the sanction or upholding the sanction given under section 195 must go into the merits of the application for sanction with reference to the evidence before such authority which is relied upon as justifying the according of sanction. The object of section 195 is to protect parties resorting to Courts and witnesses against vexatious or frivolous prosecutions for their resorting to Courts and giving evidence therein and such protection is afforded by prescribing the necessity of a preliminary sanction by the Court before which the offence is alleged to have been committed before a prosecution is launched and by giving a right of appeal to the Court to which the Court giving sanction is subordinate. Unless there is sufficient *prima facie* evidence and a reasonable probability of conviction the Court giving the sanction or upholding it will not be properly exercising the discretion vested in it by law and the safeguard provided by law against vexatious or frivolous prosecutions of parties resorting to Court and of witnesses attending and giving evidence in Courts of Justice in discharge of a public duty imposed upon them by law will be rendered nugatory. The according of sanction or upholding the same when a sufficient *primâ facie* case is not made out will, in the majority of cases, simply lead to waste of public time

Digitized by Google

and subject the person against whom the sanction is given to serious annoyance and expense which he can in no way be compensated for even though he be honourably acquitted. And such prosecutions launched under the sanction of a Court of Justice are certainly not calculated to produce a wholesome effect upon the administration of justice or to improve the quality of evidence forthcoming in Courts of Justice.

In the present case sanction has been accorded to prosecute the petitioners for the abetment of a false charge preferred by one Pathumma who is being prosecuted for having preferred a false complaint (exhibit A) and for abetting her in giving false evidence. The order of the Sub-Magistrate giving sanction, which extends over eight pages, does not disclose the existence of any evidence as to the complaint made by Pathumma being really false and false to the knowledge of the petitioners. Several witnesses seem to have been examined simply to prove that the petitioners instigated Pathumma to prefer the complaint, but that is quite compatible with the complaint itself being well founded and true. Exhibit C, which was a petition presented by Pathumma herself shortly after she presented the complaint A, in which (C) she says that her complaint (A) is a false one and that she preferred such false complaint at the instigation of petitioners and some others, and the sworn statement taken from her in support of C, are no evidence against petitioners, not to say that the conduct of Pathumma as manifested by exhibit C and its contents and the compounding of the complaint (exhibit B) which was reported to be true by the Police is extremely suspicious. The complaint A was not dismissed by the Sub-Magistrate as false after holding any enquiry and the Sub-Magistrate does not point to any evidence as to petitioners having abetted Pathumma in giving false evidence if she gave any such evidence. It is strange that in the enquiry made by the Sub-Magistrate in connection with the application for sanction against the petitioners he should have examined on oath (*vide* section 5, Indian Oaths Act) as a Court witness Pathumma, who was then an accused person before the Special Assistant Magistrate in connection with the very matter of enquiry, namely, her having preferred a false complaint. Even assuming that the evidence thus elicited from her is not illegal it can hardly be used as evidence against the petitioners whom it is sought to bring to trial jointly with her and in view to which the proceedings against Pathumma have been stayed by the Special Assistant Magistrate. Exhibits D and E and F which, the Sub-Magistrate states, show that the first petitioner is by profession a law agent and mediator and interferes in many cases to earn something are perfectly irrelevant and inadmissible. The Sub-Magistrate also says that the first witness swears that the first petitioner is a proclaimed law tout and that he read recently the proclamation to that effect on the notice board of the Parappanangadi Munsif's Court. The authority giving sanction under section 195 should never be influenced in giving sanction by evidence which it ought to know will be altogether inadmissible against an accused person in a criminal trial. It would be an abuse of the power vested in Courts under section 196, Criminal Procedure Code, if sanction should be given or upheld on the principle that, though the conviction of the party complained against is a *mere possibility* and is by no means *probable* yet the giving of sanction would in itself operate as a punishment which, in the opinion of the authority giving or upholding the sanction, will be fully deserved by the person whose prosecution is sanctioned, for, he will have either to pay a substantial consideration to his adversary as an inducement to the latter quietly dropping the sanction and allowing it to die a natural death by effluxion of the period of six months

Digitized by Google

prescribed by law or to undergo the worry, hardship and expense of a criminal prosecution, though eventually he may be acquitted and acquitted honourably too. As this case comes before this Court not by way of appeal under section 195, but only as a Court of Revision under section 439, I pass no final order in the matter of sanction, but, under sections 439 and 423 [1(6)], I set aside the order of the Special Assistant Magistrate, dated 24th December 1901, in Criminal Appeal No. 119 of 1901, declining to revoke the sanction given by the Sub-Magistrate, and direct that the said appeal be restored to the file and disposed of according to law, with reference to the foregoing observations, by the Head Assistant Magistrate at Palghat, as I think it undesirable that the appeal should be heard and disposed of on the merits by the Special Assistant Magistrate before whom the case against Pathumma is pending and at whose suggestion, as appears from the Sub-Magistrate's order, application was made by the Police Inspector to the Sub-Magistrate for sanction to prosecute the petitioners for abetment of the false complaint preferred by Pathumma.

1902, *April* 28. **I. L. R. 26 Mad. 124.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

EMPEROR, APPELLANT *v.* RAVALU KESIGADU (ACCUSED), RESPONDENT*

Madras Abkari Act—I of 1886, s. 34—Power of officer in one Circle to arrest offenders in another.

An officer of the Salt and Abkari Department belonging to Circle A, received certain information and entered Circle B, and under section 34 of the Madras Abkari Act, arrested an offender in the latter circle. The Magistrate who, in due course, tried the offender, held that the officer's powers of arrest were restricted to his own circle, and acquitted the accused, though he believed the prosecution evidence as to an offence having been committed. Upon an appeal being preferred against the acquittal.

Held, that the order of acquittal was wrong and must be set aside: also, that the question whether the officer who effected the arrest was acting within or beyond his powers in making the arrest did not affect the question whether the accused was or was not guilty of the offence with which he was charged.

(Note:—This case is Ref. 7 C. W. 662; 31 Cal. 557.)

CHARGE, under section 55 of Act I of 1886, of being in possession of materials for illicit distillation. The charge was laid by the Salt and Abkari Inspector of the Kanuparti Circle. It appeared that the Assistant Inspector of the Pakala Circle received information at Kanigiri that illicit tapping and distillation was going on in the village of Mahammadapuram, situated in the Kanuparti Circle, and went there and arrested the accused, in the vicinity of a still, secreted in certain bushes. The accused was handed over to the police at the station at Gottagotta. The Second-class Magistrate, who ultimately tried the case, believed the prosecution evidence, but raised the question whether the Abkàri officers of the Pakala Circle had been empowered by the Abkàri Act I of 1886, or by any notification of Government, to enter a village in the Kanuparti Circle and detect a case there. He referred to the notification of 24th November 1899 published in the *Fort St. George Gazette* of 28th November 1899, and held that it restricted the limits of jurisdiction, at the date when the accused was arrested and that the proceedings of the officers of the Pakala Circle were unwarranted. He also remarked that the

* Criminal Appeal No. 146 of 1902.

Digitized by Google

restriction had since been removed by the more recent notification of 18th July 1901 (G. O., Revenue, No. 606). He acquitted the accused under section 245 of the Code of Criminal Procedure.

Against that order, the Public Prosecutor preferred this appeal.

The Public Prosecutor in support of the appeal.

JUDGMENT.—The Magistrate appears to have been of opinion that the evidence showed that the accused were guilty of an offence under section 55 of the Abkari Act. He however, acquitted them on the ground that the officer who arrested them was an officer who, under the terms of the notification of 24th November 1899, had only authority within the area of his circle and that when he arrested the accused he was acting outside that area. The notification in question did not, and could not, operate so as to limit the powers conferred upon officers by section 34 of the Act. The question whether the officer who effected the arrests was acting within or beyond his powers in making the arrest does not affect the question of whether the accused were guilty or not guilty of the offence with which they were charged.

The Magistrate had jurisdiction under section 190 of the Criminal Procedure Code to take cognizance of the offence.

We must set aside the acquittals and direct the retrial of the accused.

1902, *August* 11. **I. L. R. 26 Mad. 125.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

KRISHNASAMI PILLAI (SECOND ACCUSED), APPELLANT, *v.* EMPEROR, RESPONDENT*

Criminal Procedure Code—Act V of 1898, ss. 233, 235—Misjoinder of charges—Objection first taken on appeal—Same transaction.

A person was convicted on three charges, namely ;—(1) of abetting the falsification of a document (an account book), (2) of fraudulently destroying and secreting documents, and [3] abetting criminal breach of trust, no objection on the ground of misjoinder being taken before the Sessions Judge. The only manner in which the alleged falsification and destruction were connected was that the account book and the document were both in the custody of the accused, who thus had opportunity to falsify the one and to destroy the other. It was not suggested that the account book was falsified in order to conceal the fact that documents had been destroyed, or that documents had been destroyed in order to prevent the particular falsification from being detected:

Held, that the offences charged did not constitute one series of acts so connected together as to form the same transaction within the meaning of section 235 of the Code of Criminal Procedure. Also that the misjoinder could not be treated as an irregularity curable under section 537, and that the conviction must be set aside.

Subramania Ayyar v. *King-Emperor*, [I. L. R., 25 Mad., 61], followed.

CHARGES of (1) abetting the falsification of a document (under section 477-A of the Indian Penal Code) ; (2) fraudulently destroying a document and fraudulently secreting a document (under section 477); and (3) abetting criminal breach of trust (under sections 109 and 458). The accused (with another who was tried jointly with him) was tried by a Judge sitting with assessors, and convicted and sentenced to three years' rigorous imprisonment.

* Criminal Appeal No. 259 of 1902.

Digitized by Google

He now preferred this appeal.

Mr. *John Adam* for appellant,

The Acting Public Prosecutor in support of the conviction.

JUDGMENT.—In this case the Sessions Judge has convicted the second accused on three charges :

(1) A charge of abetting the falsification of a document,—an offence under section 477-A of the Indian Penal Code.

(2) A charge of the fraudulent destruction of a document and the fraudulent secretion of other documents,—offences under section 477.

(3) A charge of abetting criminal breach of trust,—an offence under sections 109 and 408.

These are distinct offences and the second accused having been tried at the same trial for the three distinct offences the conviction is bad as being in contravention of section 233 of the Code of Criminal Procedure, unless it appears that the alleged offences were committed by the same person in a series of acts so connected together as to form the same transaction within the meaning of section 235. It has been urged on behalf of the prosecution that because the different offences are alleged in the charge to have been committed at or about the same time and place and because the objection of misjoinder was not taken before the Sessions Judge, it is not open to us to say the conviction is bad. We entirely disagree with this contention. The fact that the charge alleges that the different offences were committed at or about the same time or place does not of course show that the case falls within the provisions of section 235.

The only sense in which the alleged falsification of the account book and the alleged fraudulent destruction and secretion of documents can be said to be " connected together " is that the fact of the first accused being left in charge of the account book and of the documents gave him an opportunity of defrauding the complainant by falsifying the account book and destroying the documents. It is not suggested that the account book was falsified in order to conceal the fact that documents had been destroyed or that documents had been destroyed in order to prevent the particular falsification from being detected.

We are of opinion that the offences charged do not constitute one series of acts so connected together as to form the same transaction. This misjoinder of charges cannot be treated as an irregularity which is curable under section 537 of the Criminal Procedure Code (*Subramania Ayyar* v. *King-Emperor*(1)).

We set aside the conviction and direct that the second accused be retried.

1902. September 9. **I. L. R. 26 Mad. 127.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Davies.

IN THE MATTER OF BYRAVALU NAIDU (COMPLAINANT).*

Criminal Procedure Code—Act V of 1898, ss. 250, 388 (2)—Compensation in respect of

* Case Referred No. 90 of 1902.

(1) I. L. R., 25 Mad., 61.

Digitized by Google

vexatious complaint—Sentence of imprisonment on non-production of sureties and on complainant's plea of inability to pay—Legality.

A Deputy Magistrate, having held that a complaint was vexatious, ordered the complainant to pay compensation under section 250 of the Code of Criminal Procedure. He recorded the following order :—" The complainant is unable to produce any sureties and pleads inability to pay the compensation. He is awarded 30 days' simple imprisonment. " No attempt was made to levy the amount of the compensation.

Held, that the order was invalid whether it were passed under section 250 [2] or section 388 [2] of the Code of Criminal Procedure. Where an order to pay compensation has been made under section 250, the Magistrate cannot make an order for imprisonment on the mere intimation by the person who is directed to pay the compensation that he is unable to do so. Under section 388 [2], the issue of a warrant for the levy by distress of the amount awarded as compensation is a condition precedent to the carrying out of the sentence of imprisonment.

ORDER to pay compensation. The Deputy Magistrate of Chittoor discharged the accused in a case on his file and, holding the complaint to be vexatious, ordered the complainant to pay Rs. 38 as compensation, under section 250 of the Code of Criminal Procedure. He passed the following order:—" The complainant is unable to produce any sureties and pleads inability to pay the Rs. 38 of the compensation. He is awarded 30 days' simple imprisonment." The case was referred to the High Court for orders, by the District Magistrate, who, while doubting the legality of the Deputy Magistrate's order, suggested that it had apparently been passed under section 388 (2) of the Code of Criminal Procedure. No attempt had been made to levy the sum in the manner provided by section 386 of the Code of Criminal Procedure. The District Magistrate suspended the execution of the sentence of imprisonment, and requested that the unexpired portion of the term should be set aside.

The Court passed the following Order :—

Sir ARNOLD WHITE, C.J.—The order of the Deputy Magistrate is in these terms : " The complainant is unable to produce any sureties and pleads inability to pay the Rs. 38 of the compensation. He is awarded 30 days' simple imprisonment." The question is, is this a legal order ?

The District Magistrate assumes that, in making this order, the Deputy Magistrate purported to act under the powers conferred by section 388 (2) of the Code of Criminal Procedure. I am not at all sure that, when he made the order, the Deputy Magistrate had in mind the provisions of section 388 (2). It is difficult to say what is meant by the words of the order " the complainant is unable to produce any sureties." These words do not appear to have been used with reference to the provisions of section 388, since the bond referred to in that section may be executed with or without sureties. Having regard to the terms of the order it seems to me that the Deputy Magistrate was under the impression that, under section 250 of the Code of Criminal Procedure, he could make an order for imprisonment on an intimation by the person directed to pay compensation that he was unable to pay. So far as section 250 is concerned it is clear that the Deputy Magistrate had no jurisdiction to make the order. The words of section 250 (2) are:—" Compensation of which a Magistrate has ordered payment under sub-section [1] shall be recoverable as if it were a fine : Provided that, if *it cannot be recovered*, the imprisonment to be awarded, " etc. See, too, the cases (*Ramjeevan Koormi* v. *Durgacharan Sadhu Khan* [1] and *Parsi Hajra* v. *Bandhi Dhanuk*. (2)).

(1) I. L. R., 21 Calc., 979. (2) I. L. R. 28 Calc. 251.

Digitized by Google

The question, however, remains,—can the order be upheld as an order under section 388 *(2)*? I think not. In my opinion the issue of a warrant for the levy by distress and sale of the amount awarded as compensation is in all cases a condition precedent to the carrying out of the sentence of imprisonment. It seems to me that section 388 *(2)* clearly contemplates the issue of a warrant, although it empowers the Court to pass sentence of imprisonment, although no attempt to execute the warrant has been made, if the person ordered to pay compensation on being required to execute a bond to appear on the day fixed for the return of the warrant, fails to execute the bond.

The object of section 388 (1) is to enable the Court to give time, not exceeding 15 days, to an offender who has been sentenced to pay a fine. If the fine is not paid within the time so given the Court may direct the sentence of imprisonment to be carried into execution at once. The object of section 388 (2) (which in terms applies to all orders for the payment of money whether by way of fine or compensation) on non-recovery of which imprisonment may be awarded, is to enable the Court to pass sentence of imprisonment without waiting for the return of the warrant, if the person ordered to make the payment fails to execute a bond to appear on the day appointed for the return.

The compensation which the Court is empowered to award under section 250 is not a fine but is in the nature of damages for malicious prosecution, although it is made recoverable in a summary manner as if it were a fine. The governing section is section 250, where the words " if it *connot be recovered*" are used, and if section 388 (2) can be construed, and grammatically it certainly can, as not inconsistent with these words, I think it ought to be so construed. In the circumstances of this case I do not think it necessary to order that any further action be taken.

On the facts I agree with the District Magistrate and I think the unexecuted term of the sentence may be set aside.

DAVIES, J.—I agree.

1902, *June* 25. **I. L. R. 26 Mad. 130.**

Before Mr. Justice Bhashyam Ayyangar.

RAGHUNATHA PANDARAM (FIRST ACCUSED), PETITIONER, *v.* EMPEROR, RESPONDENT. *

Criminal Procedure Code—Act V of 1898, s. 528—Order by Sub-Divisional Magistrate transferring case from one Sub-Magistrate to another—Order by District Magistrate cancelling that order and retransferring the case—Legality.

A District Magistrate has no power to cancel an order made by a Sub-Divisional Magistrate directing the transfer, under section 528 of the Criminal Procedure Code, of a case from the file of one Sub-Magistrate to that of another Sub-Magistrate, and to direct the re-transfer of the case to the file of the Sub-Magistrate from whom it was transferred.

PETITION. A petition was presented by the complainant in Calendar Case No. 78 of 1902, on the file of the Stationary Second-class Magistrate of Tirutturaippundi, to the District Magistrate of Tanjore, requesting that a case which had been transferred by the Sub-Divisional Magistrate of Mannargudi to the file of the Stationary Second-class Magistrate of Mannargudi might be transferred

* Criminal Revision No. 267 of 1902.

Digitized by Google

back to the file of the Tirutturaippundi Magistrate. Vakils were heard on behalf of the complainant and the accused, whereupon the District Magistrate made the order as prayed. It appeared that the accused had previously applied for a transfer of the case from the Tirutturaippundi Magistrate without success, but that a second application had been acceded to by the Sub-Divisional Magistrate of Mannargudi, on the ground as the District Magistrate stated in his order, that the Tirutturaippundi Magistrate had several heavy cases on his file The examination-in-chief of the witnesses for the prosecution had already been taken there. The District Magistrate, in his order said:—" The Divisional Magistrate acted, so far as his order shows, not on the counter-petitioner's allegations, which are in my opinion either trivial or vague, but on the departmental ground that the Tirutturaippundi Sub-Magistrate had a number of Mettupalayam cases on his file. As regards those cases, it is within my knowledge that two have already been disposed of. As regards convenience, there is nothing to be said in favour of Mannargudi. I consider transfer should not be granted without much better reason than has been shown, and direct that the case be tried by the Tirutturaippundi Sub-Magistrate, to whom the records should be sent." This order was dated 23rd May 1902.

The accused presented this Criminal Revision Petition against that order on the ground that the District Magistrate had no power to cancel the order of the Sub-Divisonal Magistrate transferring the case, and because, for reasons disclosed in an affidavit filed with the petition, a fair trial could not be had before the Tirutturaippundi Magistrate.

V. Visvanatha Sastri for petitioner.

Mr. *N. Subrahmaniem* for the Acting Public Prosecutor.

JUDGMENT.—This revision petition is presented against the proceedings of the Acting District Magistrate of Tanjore, dated 23rd May 1902, cancelling the order of the Sub-Divisional Magistrate of Mannargudi, dated 16th April 1902, which directed the transfer under section 528, Criminal Procedure Code, of Calendar Case No. 78 of 1902 on the file of the Tirutturaippundi Sub-Magistrate to the court of the Stationary Second Class Magistrate of Mannargudi, and directing its retransfer to the Tirutturaippundi Sub-Magistrate. The action of the District Magistrate in entertaining virtually an appeal against an order of the Sub-Divisional Magistrate passed under section 528 is clearly illegal. If the District Magistrate thought that the order of the Sub-Divisional Magistrate was not legal or proper it was competent to him to call for and examine the record of the Sub-Divisional Magistrate under section 435, Criminal Procedure Code, and report under section 438 for the orders of the High Court the result of such examination. In the matter of a transfer under section 528, Criminal Procedure Code, the District Magistrate and Sub-Divisional Magistrate have co-ordinate authority over Magistrates subordinate to the Sub-Divisional Magistrate and the order passed by the Sub-Divisional Magistrate cannot be appealed against to the District Magistrate. It may be that under section 528 a case once transferred from one Magistrate to another may be withdrawn from the latter by the District Magistrate or even by the Sub-Divisional Magistrate and he may enquire in to or try such case himself or refer it for enquiry or trial to some other competent Magistrate on a substantive application made that it is inexpedient that the Magistrate to whom it had been transferred or his successor in office should enquire into or try the case. But that is not the nature of the application made to the District Magistrate in the present case nor are the proceedings of

Digitized by Google

the District Magistrate of such nature either in form or in substance. He expressly says that the reasons which induced the Sub-Divisional Magistrate to transfer the case from the Tirutturaippundi Sub-Magistrate are in his opinion insufficient and that much better grounds than have been shown should have been established. And he therefore cancels the order of the Sub-Divisional Magistrate and directs the retransfer of the case to the Tirutturaippundi Sub-Magistrate himself. It is unnecessary to issue any notice to the complainant and thus unnecessarily prolong the proceedings and I accordingly set aside, under section 439 and section 423 (1) (*e*) Criminal Procedure Code, the order of the Acting District Magistrate, dated 23 May 1902, above referred to.

1902, *July* 22. **I. L. R. 26 Mad. 137.**

Before Mr. Justice Bhashyam Ayyangar.

V. SHANMUGAM CHETTY, PETITIONER, *v.* PENNAPPA MUDALY AND OTHERS, COUNTER-PETITIONERS*

Criminal Procedure Code—Act V of 1898, ss. 195, 435—Order by Sessions Judge staying proceedings pending reference to High Court for orders on proceeding relating to grant of sanction—Prosecution proceeding in Court outside jurisdiction of Sessions Judge—Legality.

Sanction was accorded by a Second-class Magistrate in the Sessions' Division of South Arcot, for the prosecution of A on various charges. A then applied to the Deputy Magistrate of Cuddalore (in the same Sessions Division) who confirmed the sanction. A charge was laid against A in the Court of a Second-class Magistrate in the Sessions Division of Chingleput. A, however, petitioned the Sessions Judge of South Arcot to revise the sanction and stay proceedings until his petition should be disposed of, and the Sessions Judge passed an order staying proceedings pending the disposal of the petition. On a criminal revision petition being presented to the High Court.

Held, that the order was *ultra vires*.

PETITION. Petitioner had laid a charge of cheating against counterpetitioner in the Court of the Second-class Magistrate of Pandarutti, which is situated in the Sessions Division of South Arcot. Counterpetitioner was acquitted, but the Magistrate, in his judgment, expressed the belief that a certain document which had been produced in the case was a forgery. Petitioner thereupon applied to the Magistrate for sanction to prosecute counter-petitioner for offences under sections 193, 467, 471 and 109 of the Indian Penal Code, and sanction was accorded. Counter-petitioner applied to the Deputy Magistrate of Cuddalore (also in the Sessions Division of South Arcot), who confirmed the sanction on 24th May 1902. On 1st July 1902, petitioner filed a complaint against counterpetitioner, in pursuance of the sanction, in the Court of the Second-class Magistrate of Madurantakam, which is situated in the Sessions Division of Chingleput. Counter-petitioner, on 7th July 1902, presented a criminal revision petition in the Court of the Sessions Judge of South Arcot, in which he complained of the manner in which the sanction had been confirmed by the Deputy Magistrate of Cuddalore and asked for revision and for a stay of proceedings pending the disposal of the petition. The Sessions Judge, on the same day, passed the following order :—" Proceedings (if any) should be stayed pending the disposal of the revision petition."

Against that order, petitioner presented this criminal revision petition.

T. Rangaramanuja Chariar for petitioner.

JUDGMENT.—It may be competent to the Sessions Judge of South Arcot,

---

* Criminal Revision Petition No. 282 of 1902.

Digitized by Google

under section 438 of the Code of Criminal Procedure, to report, for the orders of the High Court as a Court of Revision, the result of his examination of the record of the proceedings in relation to the according of sanction under section 195, Criminal Procedure Code, before the Deputy Magistrate of Cuddalore which is within the Sessions Division of South Arcot. He certainly cannot himself revise such proceedings and section 438 also distinctly provides in what way he may take action in favour of the accused, pending his recommendation to the High Court that a sentence be reversed or altered. In this case the prosecution, in pursuance of the sanction, was instituted before the Stationary SubMagistrate of Madurantakam which lies within the Sessions Division of Chingleput and the proceedings in connection with that prosecution are pending before him, but the Sessions Judge of South Arcot, after entertaining a petition under section 435 from the accused before the Madurantakam Sub-Magistrate, and on a motion made by him on the 7th July 1902, passed on the same day an order that proceedings (if any) should be stayed pending disposal of the Revision Petition. This order is clearly *ultra vires*, the Court of the Madurantakam Sub-Magistrate being outside the territorial jurisdiction of the Sessions Judge of South Arcot, even assuming that the Sessions Judge could stay proceedings before any Criminal Court in his own Sessions Division pending the disposal of any proceedings before him under section 435. I accordingly set it aside without prejudice to his disposing, according to law, of the petition presented to him by the accused under section 435 to move the High Court under section 438 to quash the sanction.

1902. *August 5.* **I. L. R. 26 Mad. 139.**

Before Mr. Justice Bhashyam Ayyangar.

IN RE CHENNANAGOUD AND ANOTHER, PETITIONERS.*

Criminal Procedure Code—Act V of 1898—ss. 435, 439—Jurisdiction of High Court under Criminal Procedure Code to revise order according sanction which has been granted by a Civil Court.

The High Court has no jurisdiction, under sections 435 and 439 of the Code of Criminal Procedure, to revise an order passed by any Court other than a Criminal Court under clause (*b*) or (*c*) of sub-section (1) of section 195 of the Code of Criminal Procedure, according sanction to institute a prosecution; or an order passed under sub-section (6) of section 195 revoking or refusing to revoke a sanction which has been given or granting a sanction which has been refused.

It may be open to the High Court, under section 622 of the Code of Civil Procedure, to revise such proceedings of a Civil Court, in cases which come within the terms of that section.

(Note : This case is Fol : 8. C. W. N. 73. Diss : 26 All. I.)

PETITION for sanction to prosecute counter-petitioners under sections 193, 196 and 465 of the Indian Penal Code. The petition was filed in the Court of the District Munsif of Bellary, in whose Court the first counter-petitioner had instituted a suit to recover a sum of money due on a bond executed by the father of the present petitioner. A decree was passed in favour of the first counterpetitioner. In execution of that decree a sale was held and a sale list was prepared, which petitioner contended was a false one. It was with reference to this sale-list that sanction was asked for. The District Munsif considered

* Criminal Revision Petitions Nos. 303 and 304 of 1902.

Digitized by Google

that a *primâ facie* case was made out and accorded sanction for their prosecution under sections 193 and 468 of the Indian Penal Code. The counter-petitioners then presented Criminal Revision Petitions in the District Court of Bellary, under section 195 of the Code of Criminal Procedure, praying the Court to revoke the sanction which the District Munsif had granted. The District Judge, treating the applications as having been made to him as Sessions Judge, upheld the finding that a *prima facie* case had been made out and dismissed the petitions.

Against that order, the counter-petitioners presented this Criminal Revision Petition to the High Court under sections 435 and 439 of the Code of Criminal Procedure.

T. Venkatasubba Ayyar and *Narayana Sastry* for petitioners in Criminal Revision case No. 305 and *K. Narayana Rau* for petitioners in Criminal Revision case No. 304.

JUDGMENT.—In my opinion the High Court cannot, under the provisions of sections 435 and 439, Criminal Procedure Code, revise an order passed by any Court other than a Criminal Court under clause (*b*) or (*c*) of sub-section (1) of section 195, Criminal Procedure Code, according sanction for the prosecution of any person who is alleged to have committed any of the offences therein referred to in relation to any proceeding in such Court, nor revise an order passed under sub-section (6) of section 195 revoking or refusing to revoke a sanction given or granting a sanction refused by such Court.

Sub-section (2) of section 195 defines the 'Court' referred to in clauses (*b*) and (*c*) of the same section to be a Civil, Revenue or Criminal Court. Sub-section (7) declares that the Court which under sub-section (*b*) may revoke or grant a sanction given or refused under clauses (*b*) and (*c*) of sub-section (1) is the Court to which appeals ordinarily lie from the Court so giving or refusing.

In the present case the sanction was given by the District Munsif and applications were made under sub-section (6) and (7) of section 195 to the District Judge to revoke such sanction. But the District Judge, treating them as applications made to him as a Sessions Judge, refused to revoke the sanction. Under sub-section (7) it is quite clear that the applications lay to him only as District Judge, for appeals from the District Munsif's Court lie only to the District Judge and not to the Sessions Judge, and he acted irregularly in dealing with them as a Sessions Judge. This, however, is only an irregularity which is not material and the order passed by him refusing to revoke the sanction given by the District Munsif must be treated as one passed by him as District Judge. As the District Judge did not in this case grant a sanction refused by the District Munsif, the High Court cannot act under sub-sections (6) and (7) and revoke a sanction given by the District Munsif, who is not, within the meaning of sub-section (7), subordinate to the High Court, which sanction the District Judge refused to revoke.

Under section 435, Criminal Procedure Code, the High Court can only call for and examine the record of any proceeding of a Criminal Court and, under section 439, it can only revise the proceedings of a Criminal Court, including of course, proceedings in a Criminal Court under section 195, and under that same section 439 it can also exercise the power of according original sanction in respect of an offence of the description referred to in clauses (*b*) and (*c*) of section 195 (1) committed in a Criminal Court, or of revoking or granting a sanction given or refused by a Criminal Court, though appeals

Digitized by Google

do not lie to the High Court from such Criminal Courts. The reference in section 439 to section 195 is thus given full effect to, without assuming that under sections 435 and 439 the High Court can also revise the proceedings of Civil and Revenue Courts acting under section 195. It is only under section 195 that a Revenue Court also gives or refuses sanction in respect of offences therein referred to and if a Revenue Court gives sanction under clause (*b*) or [*c*] and such sanction is under sub-section [6] revoked or refused to be revoked by a higher Revenue Court, say, the Board of Revenue, to which appeals lie from such Revenue Court, it is obvious that the High Court cannot under section 439, revise those proceedings. If that be so, it is difficult to see on what principle similar proceedings of a Civil Court can be revised by the High Court under section 439, Criminal Procedure Code. When a Civil or Revenue Court acts with the powers of a Criminal Court under section 478 and makes a commitment to a Court of Session, Section 215 authorizes the High Court to quash such commitment on a point of law.

It may be that, under section 622 of the Code of Civil Procedure the powers of revision under which are much narrower than those conferred by sections 435 and 439, Criminal Procedure Code, the High Court may, in a fit and proper case, revise the proceedings of a Civil Court under section 195, Criminal Procedure Code, whether it be the Court of First Instance or an Appellate Court. In the present case there are no grounds for revising under section 622, Code of Civil Procedure, the order of the District Judge refusing to revoke the sanction accorded by the District Munsif and there is therefore no object in treating this Criminal Revision Petition as a Civil Revision Petition presented under section 622, Civil Procedure Code, and allowing the same to be thus amended.

The Revision Petitions are therefore rejected.

1902 September 2. **I. L. R. 26 Mad. 188.**

Before Mr. Justice Davies and Mr. Justice Bhashyam Ayyanger.

ARUNUGA TEGUNDAN AND, ANOTHER PETITIONERS.*

Criminal Procedure Code—Act V of 1898, ss. 145, 526—Jurisdiction of High Court to transfer a case pending disposal under s. 145.

A case under section 145 of Criminal Procedure is a " criminal case, " and the High Court has jurisdiction to transfer it. both under section 526 of the Code of Criminal Procedure and article 29 of the Letters Patent.

Re Pandurang Govind Pujari, (I. L. R., 25 Bom., 179), not followed.

TRANSFER petition. A Deputy Magistrate took proceedings with reference to the possession of certain land, under section 145 of the Code of Criminal Procedure, and passed an order for the issue of notice calling upon petitioner to appear and file a written statement. This order had been preceded by numerous others relating to the same piece of land. Petitioner applied for a transfer to the District Magistrate, who, though he stayed proceedings for the time being and issued notice, and expressed disapproval of the Deputy Magistrate's proceedings, ultimately dismissed the application on the ground that the allegations of bias and prejudice were insufficient. Petitioner presented

---

Criminal Miscellaneous Petition No. 168 of 1902.

Digitized by Google

this petition for a transfer to the High Court, when the question whether the High Court has jurisdiction to transfer a case under section 145 of the Code of Criminal Procedure was considered.

A. S. Balasubramania Ayyar for petitioners.

Acting Public Prosecutor for Crown.

JUDGMENT.—We have on doubt of our power to transfer this case under both section 526 of the Code of Criminal Procedure and clause 29 of the Letters Patent. If a case under section 145 of the Code of Criminal Procedure is not a " criminal case " it is difficult to conceive what it is. With all respect we are unable to agree with the decision of the Bombay High Court in *Re Pandurang Govind Pujari.* (1). Upon the merits, we think, upon the facts stated by the Acting District Magistrate, that he ought to have made the transfer . . . .

* * * *

1902. September 1. **I. L. R. 26. Mad. 189.**

Before Mr. Justice Bhashyam Ayyangar.

PACHAI AMMAL (ACCUSED], PETITIONER. *

Criminal Procedure Code—Act V of 1898, s. 195—Prosecution sanctioned by competent authority—Trial by another Magistrate in pursuance of sanction—Competency of Court to question propriety of sanction.

Where sanction has been accorded under section 195 of the Criminal Procedure Code by a competent Court and a prosecution is instituted in pursuance thereof, it is not competent to the Court which is trying the case to question the propriety or legality of the sanction in respect of an offence of the kind mentioned in section 195, which is alleged to have been committed in any proceeding in the Court by which the sanction was granted.

PETITION to revise a conviction and sentence. Petitioner had preferred against one Chennam in January 1901 a charge of theft, and in February 1901 a charge of indecent assault. Both charges were ultimately thrown out as false, and application was made to the Tahsildar-Magistrate for sanction to prosecute her. This was accorded, and petitioner was accordingly charged with having made the two false charges. When the case was being tried by the Sub-Divisional Magistrate of Salem, objection was taken on behalf of the petitioner that the sanction had not been accorded by the Tahsildar-Magistrate who originally threw out the complaints as false, but by his successor ; also that sanction had been accorded without notice to the petitioner. The Sub-Divisional Magistrate overruled both objections, tried the case, and convicted the petitioner. On appeal, the Sessions Judge regarded the sanction as invalid, and considered that the Sub-Divisional Magistrate should not have accepted it, but held that the defect was cured by section 537 of the Criminal Procedure Code. He dismissed the appeal on the merits.

Petitioner now preferred this criminal revision petition.

Mr. *Nugent Grant* for petitioner.

JUDGMENT.—The Magistrate before whom a prosecution is instituted in pursuance of a sanction given under section 195 of the Criminal Procedure Code by a competent Court cannot question the propriety or legality of the

---

* Criminal Revision Case No. 373 of 1902.

(1) I. L. R. 25 Bom. 179.

Digitized by Google

sanction given by the Magistrate in respect of an offence of the kind mentioned in section 195, which is alleged to have been committed in any proceeding before his Court.

The petition is rejected.

1902. *April 7.* **I. L. R. 26 Mad 190.**

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

IN RE MUTHUKUDAM PILLAI (ACCUSED), PETITIONER.*

Criminal Procedure Code—Act V of 1898, s. 195—Sanction to prosecute—Computation of the period of six months—Starting point—Date of original sanction and not of appellate order.

The period six months during which sanction to prosecute remains in force under section 195 (6) of the Code of Criminal Procedure is to be computed from the date of the original order granting sanction and not from that of a final order of an Appellate Court declining to revoke it.

(Note : This case is Diss: 32 Cal. 379.)

CASE referred for orders. On 30th March 1901, the Stationary Second-class Magistrate of Periyakulam sanctioned the prosecution of one Muthukudam Pillai. An appeal was preferred against this order to the Joint Magistrate, at Dindigul, who, on 9th May 1901, confirmed the proceedings of the Stationary Magistrate. Muthukudam Pillai then filed a revision petition in the High Court against the orders granting and upholding sanction, which was dismissed on 1st October 1901. On 30th September 1901 complaint was filed, but the Sub-Magistrate declined to take further proceedings against the accused as the period of six months from the date of the original sanction expired on 29th September. The question referred to the High Court was whether the six months during which sanction remains in force under section 195 of the Code of Criminal Procedure should be computed from the date of the original order granting it or from that of the order of an Appellate Court declining to revoke it. The Court was requested to extend the time if necessary.

JUDGMENT.—The application is not opposed. We do not think that the period of six months can be reckoned from the date of the final order of the Appellate Court declining to revoke the sanction. The sanction will lapse at the expiration of six months from the date on which it was given. The fact that an appeal has been preferred against it is no impediment to the institution of criminal proceedings on the strength of the sanction, though as a general rule, it may be a reasonable ground for stay of proceedings by the Magistrate before whom the complaint has been preferred, pending the disposal of the appeal.

We resolve, in the circumstances now reported, to extend the time under section 195 (6), Criminal Procedure Code, to the 7th May next inclusive.

---

‡ Case referred, No. 17 of 1902, for the orders of the High Court, by A. G. Cardew, District Magistrate of Madura, in his letter, dated 1st February 1902, Reference No. 253 (Magisterial) of 1902.

Digitized by Google

1902 July 29. **I. L. R. 26 Mad. 191.**

Before Mr. Justice Bhashyam Ayyangar.

EMPEROR, APPELLANT, *v.* CHERATH CHOYI KUTTI (ACCUSED) RESPONDENT.*

Evidence Act—I of 1872, s. 155 (3)—Statements previously made by witnesses—Inadmissibility as substantive evidence.

Two persons made statements to the effect that C and another had robbed them and caused hurt while doing so. One statement was made to their employer, and the other to the Head Constable. C was subsequently charged and these two persons were called as witnesses for the prosecution, but they then denied that C was one of the men who had assaulted them. Their previous statements were filed, but neither the employer nor the Head Constable was called to depose to the terms of the statements which the witnesses were said to have made:

Held, that the former statements referred to, and which implicated the accused, could be used only under section 155 (3) of the Evidence Act for discrediting their evidence and not as substantive evidence against the accused.

(Note: This case is Ref: 8 C. W. N. 797.)

CHARGE of voluntarily causing hurt in committing robbery under section 394 of the Indian Penal Code. The accused was convicted and sentenced by the Special Assistant Magistrate of Malabar to nine months' rigorous imprisonment. That conviction was set aside by the Acting Sessions Judge, from whose judgment it appeared that (according to the case for the prosecution) two of the prosecution witnesses had, on the night of 5th may 1900, been assaulted by the accused and another, and had been forced to give up money that was in their possession. The other assailant had already been convicted of robbery. The two prosecution witnesses stated at the trial that the accused was not the man who assaulted them. It appeared, however, that shortly after the robbery they had complained of it to their employer, and mentioned the name of the accused. A record made by the Police Head Constable of the complaint of one of the witnesses was filed as exhibit A: and a letter from their employer setting out the complaint of the other was filed as exhibit B, and in both of these the accused was named. Neither the Head Constable nor the employer was called. The Acting Sessions Judge held that exhibit B ought not to have been placed on the record, and that if the witnesses complained to their employer, the latter should have deposed to the terms of their complaint. He acquitted the accused.

Against that order of acquittal the Public Prosecutor preferred this appeal.

The Public Prosecutor in support of the appeal.

JUDGMENT.—There is no legal evidence at all against the accused. The former statements made by the first and second prosecution witnesses which are evidenced by exhibits B and A implicating the accused can be used only under section 155 (3) of the Indian Evidence Act for discrediting their evidence given in this case, but in themselves they cannot be used as substantive evidence against the accused by converting and regarding the same as the evidence now given on oath by the first and second witnesses subject to cross-examination. The appeal is dismissed.

---

* Criminal Appeal No. 409 of 1902.

Digitized by Google

1902. *July* 21. I. L. R. 26 Mad. 193.

Before Mr. Justice Bhashyam Ayyangar.

VENKATESA AYYANGAR, PETITIONER.*

Criminal Procedure Code—Act V of 1898 s. 195—Grant of sanction to prosecute—Failure to decide that a primâ facie case has been made out—Legality of sanction.

Application was made to a Second-class Magistrate for sanction to prosecute a person on a charge of abetment of giving false evidence in a judicial proceeding. The Magistrate held an enquiry and examined three witnesses, and then refused to accord sanction. Application was then made to the Sub-Divisional Magistrate, who granted sanction. In doing so, he did not hold that a primâ facie case had been made out, or that there was a probability of securing a conviction. He expressed the view that it was essential that the truth of the matter should be threshed out and, for that reason, sanctioned the prosecution as that appeared to be the only course by which it could be decided whether or no the very serious offence charged had been committed.

Held, that this was no ground for granting sanction, or for setting aside the order of the Second-class Magistrate refusing sanction.

PETITION to revise an order according sanction to prosecute. Application was made to the Second-class Magistrate of Tiruvada-marudur for sanction to prosecute the petitioner on a charge of abetment of giving false evidence in a judicial proceeding. After holding an enquiry and examining three witnesses, the Magistrate refused to grant sanction. Application was then made to the Sub-Divisional Magistrate of Kumbakonam, who, by an order dated 4th April 1902, granted sanction. He said (after referring to the charge and to the proceedings before the Second-class Magistrate and to the arguments addressed to him) : " I consider it is essential that the truth of the matter should be threshed out and, for that reason, I sanction the prosecution of the counter-petitioner as this appears to be the only course by which it can be decided whether or no this very serious offence was committed."

Against that order, petitioner presented this Criminal Revision petition.

R. Sadagopachariar for petitioner.

JUDGMENT.—The petitioner is accused of abetment of giving false evidence in a judicial proceeding before the Second-class Magistrate of Tiruvadamarudur. An application was made to the Magistrate for sanction, under section 195 of the Criminal Procedure Code, to prosecute the petitioner. The Magistrate held an enquiry in connection with such application and after examining three witnesses refused to give sanction. Against this order of refusal an application was made, under section 195 of the Criminal Procedure Code, to the Sub-Divisional Magistrate of Kumbakonam to set aside the order refusing sanction and to grant sanction. This application was granted; application is now made by the petitioner to this Court, under section 439 of the Criminal Procedure Code, for revising the order of the Sub-Divisional Magistrate and revoking the sanction accorded by him. The Sub-Divisional Magistrate does not say that there is any *primâ facie* case made out against the petitioner, or that there is any probability of securing a conviction if he be prosecuted. He simply says that he "considers it essential that the truth of the matter should be threshed out and that for that reason " he " sanctions the prosecution of " the petitioner as this appears to be the only course by which it can be decided whether or no this very serious offence was committed. " This is clearly no ground what-

* Criminal Revision petition No. 141 of 1902.

Digitized by Google

ever for exercising the powers vested in Courts to grant sanction for prosecution (*vide* judgment in Criminal Revision Case No. 244 of 1902 (1)) and the Sub-Divisional Magistrate was not warranted in law in setting aside on such grounds the order of the Second-class Magistrate refusing to accord sanction and I accordingly set it aside and quash the sanction accorded by the Sub-Divisional Magistrate.

1902, *June* 18, *19* **I. L. R. 26 Mad. 243.**

Before Mr. Justice Benson. and Mr. Justice Bhashyam Ayyangar.

PATTIKADAN UMMARU, APPELLANT, *v.* EMPEROR, RESPONDENT. *

Criminal Procedure Code—Act V of 1898,—ss. 418, 539—Trial by jury for offence triable by jury—Verdict of acquittal—Opinion of jury of gilt in respect of offence not triable by jury—Conviction—Appeal on facts.

Two persons were charged, as first and second accused, before a Court of Session, with robbery (under section 392 of the Indian Penal Code) and first accused was also charged with having caused grievous hurt in the course of the robbery (under section 397). Both offences are triable, and the accused were, in fact, tried by a jury, who, by their verdict, acquitted both of the accused of the charges framed under the sections referred to, but found first accused guilty of voluntarily, causing grievous hurt—an offence which is triable, not by a jury but by assessors. The Sessions Judge acquitted both accused in respect of the charges under section 392 and section 397, but convicted first accused of having voluntarily caused grievous hurt, under section 325. Against that conviction first accused preferred this appeal when it was objected that inasmuch as the trial had been held before a jury, the appeal lay on matter of law only, and not on questions of fact.

Held, per BENSON, J., that the conviction of the first accused for causing grievous hurt was not one by a jury but by the Judge, who treated the finding of the jury in regard to the grievous hurt as the opinion of assessors. An appeal therefore lay on the facts, as in the case of *Muthusami Pillai* v. *Queen-Empress*, (Criminal Appeal No. 215 of 1895, unreported—see judgment in footnote hereto), and in *Empress v. Mohim Chunder Rai.* (I. L. R., 3 Calc., 765).

Per BHASHYAM AYYANGAR, J—That the effect of section 238 of the Criminal Procedure Code is to invest a jury trying an offence triable by a jury with authority to find, as an incident to such trial, that certain facts only are proved in the trial, which facts constitute a minor offence, and return a verdict of guilty of such offence though such minor offence be not triable by a jury. And that a Sessions Judge may thereupon record judgment convicting the accused of such minor offence although he is not charged with it and tried on such a charge by the Sessions Judge with the aid of the jurors as assessors. The jury having found first accused guilty of causing grievous hurt and the Judge having given judgment convicting him of the same, an appeal lay only on a point of law, as the accused had been convicted in a trial by jury

---

(1) *Vide* page 116 *supra.*

*Criminal Appeal No. 300 of 1902,

Criminal Appeal No. 215 *of* 1895 (*unreported*).—This case was heard by Sir Arthur Collions, C. J., and Parker, J., the judgment being delivered on 5th November 1895. The portion bearing on the question raised in the principal case is as follows:—

The first prisoner is the manager of the Jambukeswaram temple appointed by the Devastanam committee of Trichinopoly under Act XX of 1863. He has been convicted of breaking into the temple and stealing therefrom a large number of jewels under sections 457, 381 and 380 of the Indian Penal Code, and the prisoners 2 to 4 and 6 who assisted him, have been convicted under sections 457 and 380.

The first objection taken is that the convictions for house-breaking, theft by a servant, and theft, cannot be sustained since the temple was in the possession of the first prisoner as

Digitized by Google

APPEAL against a conviction, under section 325, Indian Penal Code, for voluntarily causing grievous hurt. The case is reported with reference to the question whether, in the circumstances of the conviction, the appeal lay on the evidence as to questions of fact, or whether, the case having been tried before a jury, the appeal lay, under section 418 of the Code of Criminal Procedure, only on a matter of law. The facts are set out in the head-note and in the judgments.

Mr. *C. Krishnan* for appellant.

The Acting Public Prosecutor in support of the conviction.

BENSON, J.—In this case the first and second accused were charged with robbery (section 392, Indian Penal Code) and the first accused was also charged with having caused grievous hurt in the course of the robbery (section 397, Indian Penal Code.)

These offences are triable by a jury, and, in the present case, were so tried. The jury found that the first accused had committed the offence of voluntarily causing grievous hurt (section 325, Indian Penal Code), but that the elements necessary to constitute the offence of robbery were not proved. They therefore acquitted both the accused on the charges framed under sec-

---

were also the jewels. To constitute the offences of house-breaking and of theft, it is necessary to prove that the property was in the possession of another.

The learned counsel argues that the Sessions Judge wrongly directed the jury in telling them that the temple was in the possession of the committee, and argues that if the facts alleged by the prosecution are true, the offence committed by the first prisoner would be criminal breach of trust—which is triable by assessors—and not theft. We think this contention must be allowed. The Devastanam committee appointed under Act XX of 1863 exercise the same powers of supervision that were formerly exercised by the Board of Revenue under Regulation VII of 1817, but the property of the temple is not vested in them nor do they represent the property. The person who represents the property is the trustee or manager, who is indeed appointed, and may, no doubt, be removed, by the committee for sufficient cause. But the trustee or manager is not in the position of a clerk or servant removable at the pleasure of the committee. He holds his office permanently though subject to removal for misconduct. It was held in I. L. R., 12 Mad., 366, that the members of a Devastanam committee were not entitled as against the trustee or manager to be put in possession of the property of the temple or to the receipt of its income. The right view appears to be that the deity is regarded as the owner of the temple property, and the trustee or the manager appointed by the committee is the agent of the deity subject to the committee's control. The first prisoner was therefore in possession of the temple and its jewels, and if he has made away with the property his offence is criminal breach of trust by an agent punishable under section 409 of the Indian Penal Code. The offence therefore should have been tried by the Sessions Judge with the aid of assessors. Section 536 of the Criminal Procedure Code provides that the trial shall not on that ground only be invalid, and the next point we have to consider is whether on appeal we should treat the case as having been tried by a jury or by assessors. The learned counsel for the appellants claims to be heard on the facts and refers to the decisions reported in 18 W. R., 59 ; 24 W. R., 30 ; and I. L. R., 3 Calc., 765, as authorities for taking that course.

All these decisions were passed under earlier Codes of Procedure but those Codes contained provisions similar to section 536. In 3 Calc., 765, Mr. Justice Mitter doubted the correctness of the practice—but the other decisions are distinctly in point. Section 537 of the present Code provides that no finding of a competent Court shall be reversed on account of any irregularity during trial unless such irregularity has occasioned a failure of justice. A similar provision is to be found in section 283 of the old Code X of 1872. If it be granted that there is a possibility of the jury having gone wrong upon the facts, the accused would no doubt be prejudiced by being precluded from going into the facts before the Appellate Court. The only alternative in such a case would be to order a retrial, but this course is not desired either by the accused or by the prosecution. We think the reasonable course is to follow the cases reported in 18 W. R., 59, and 24 W. R., 30, treating the charge as the judgment in the case and the verdict of the jury as the opinion of the assessors.

Digitized by Google

tions 392 and 397, Indian Penal Code, and the Sessions Judge, as I understand, treating the findings of the jury in regard to the grievous hurt as the opinion of assessors, himself convicted the first accused of the offence of voluntarily causing grievous hurt, section 325, Indian Penal Code.

Against this conviction the first accused appeals and claims to be allowed to go into the evidence and to show that the offence under section 325, Indian Penal Code, is not proved.

The Public Prosecutor contends that in the present case the trial was by jury and takes the preliminary objection that under section 418, Criminal Procedure Code, an appeal in such a case lies on a matter of law only, not on a question of fact.

I do not think that the objection is sustainable. An offence under section 325, Indian Penal Code, is not triable by a jury, but by a Judge with the aid of assessors; and an offence punishable under Section 397, Indian Penal Code, is triable by a jury. An offence under the latter section is a compound offence. It is constituted by the combination of two offences committed in one transaction, that is the offence of voluntarily causing grievous hurt (section 325) and the offence of robbery (section 392). Each of these offences might have been, and in a Court in England would have been, separately charged. If they had been separately charged there can be no question but that the trial on the charges under sections 392 and 397 would have been by the jury and the trial on the charge under section 325 would have been by the Judge with the aid of the jurors as assessors. This is the procedure expressly prescribed by section 269 (3), Criminal Procedure Code, which provides that "when the accused is charged at the same trial with several offences of which some are and some are not triable by jury he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury." Had the charge been framed in this way an appeal on the facts as regards the offence under section 325, Indian Penal Code, would certainly have been open to the accused. Does the omission, then, to expressly frame a separate head of charge under section 325 make any difference as to the nature of the trial or the right of appeal? I do not think that it does. Broadly speaking an omission or error in a charge, or even the failure to frame a charge is treated by the Criminal Procedure Code as immaterial unless it in fact, leads to a failure of justice. When that is so, can it be supposed that an omission to separately charge a minor offence included in a greater offence actually charged would operate to deprive an accused person of a right of appeal which he would have if the minor offence had been separately charged? The charge under section 397 is an intimation to the accused that he is charged with robbery (section 392) and with voluntarily causing grievous hurt (section 325). He is on his trial with regard to both offences. One or the other or both may be proved against him. Section 238 (1), Criminal Procedure Code, provides that "when a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete minor offence and such combination is proved, but the remaining particulars are not proved he may be convicted of the minor offence, though he was not charged with it."

In this case the accused has in fact been convicted of the minor offence, and he has been convicted, as I understand it, by the Judge who treated the finding of the jury in regard to the grievous hurt as the opinion of assessors. It is not, in my opinion, correct to say that the conviction under section 325 was

Digitized by Google

by the jury. It is expressly a conviction by the Judge and the Judge's procedure was, I think, correct. I can see no reason why the accused should not be allowed to appeal on the facts. The decision of this Court in *Muthusami Pillai* v. *The Queen-Empress (1)* and in *Empress* v. *Mohim Chunder Rai* (2) support this view.

As regards the merits, I can find no reason for regarding the conviction under section 325, Indian Penal Code, as incorrect. The sentence, however, seems to me to be excessive considering that the complainant and the appellant are near relations and have always been on good terms. I would reduce the term of substantive imprisonment to three months and the imprisonment in default of payment of fine to two months. The amount of fine and order as to compensation I would leave unaltered.

BHASHYAM AYYANGAR, J.—The appellant, the first accused, was charged with robbery under section 392, Indian Penal Code, and also with the offence of causing grievous hurt at the time of committing robbery under section 397, Indian Penal Code, both being offences triable by a jury. The jury, while returning a verdict of not guilty on both the charges, found the appellant guilty of causing grievous hurt. The Sessions Judge, accepting their verdict of not guilty, acquitted the appellant on both the charges, but convicted him of causing grievous hurt under section 325, Indian Penal Code, and sentenced him to three years' rigorous imprisonment and a fine of Rs. 100, or in default six months' further rigorous imprisonment. The appellant's counsel contends that the appellant must be taken to have been convicted of an offence under section 325 by the Sessions Judge in a trial held before him with the aid of the jury as assessors inasmuch as an offence under section 325 is one not triable by a jury; and that therefore an appeal lies on a matter of fact as well as matter of law. I am unable to accede to this contention. If the Sessions Judge had also framed an additional charge under section 325 the appellant could have been tried by the Sessions Judge on that charge under sub-section 3 of section 269, Criminal Procedure Code, with the aid of the jurors as assessors. In my opinion the appellant was in fact tried by a jury and I may also add legally tried by a jury inasmuch as the two offences with which he was charged, viz., sections 392 and 397, Indian Penal Code, were triable only by a jury and that therefore under section 418 this appeal will be on a matter of law only. The omission to frame or add a charge separately under section 325 is not even a defect or irregularity and as such curable under section 537 (*a*) for under section 238 (1) the appellant was liable, without any separate charge, to be convicted incidentally of the minor offence though he was only charged with and tried for the compound offence. Reading section 418, Criminal Procedure Code, with section 536 it seems to me that the question as to whether an appeal will lie on a matter of fact as well as a matter of law or only on a matter of law depends upon the question as to whether the trial was in fact with the aid of assessors or was by a jury and not upon the question as to whether the offence of which the appellant has been convicted was of a class which ought to have been tried with the aid of assessors or one of a class which ought to have been tried by a jury; so far as trial by a jury is concerned the trial will not be invalid even if the accused is charged expressly with an offence triable with the aid of assessors and even if the objection to trial by jury was taken by the accused but was overruled by the Sessions Judge on the erroneous

(1) Criminal Appeal No. 215 of 1895—*vide* p. 243 *supra* (p. 232 of this book).
[2] I. L. R., 3 Calc., 765.

Digitized by Google

ground that it was triable by jury. In such a case the accused if convicted cannot claim the right of appeal on matters of fact, section 418.

Under sub-section (1) of section 238 the appellant was liable to be convicted of the minor offence under section 325, without there being a separate charge under that section. The effect of section 238 in my opinion is to invest a jury trying an offence triable by a jury with authority to find as an incident to such trial that certain facts only are proved in the trial which facts costitute a minor offence and return a verdict of guilty of such offence though such minor offence be not triable by a jury. And the Sessions Judge may thereupon record judgment convicting the accused of such minor offence although he is not charged with it and tried on such a charge by the Sessions Judge with the aid of the jurors as assessors. In cases in which having regard to the charge and the evidence adduced at the trial it is appropriate to do so, the Sessions Judge in his charge to the jury should draw their attention to the provisions of section 237 or 238 as the case may be so that the jury may, if they deem fit to do so, return a verdict of guilty on a cognate or minor offence though they return a verdict of not guilty on the offences with which the accused has been actually charged. In this case the jury found that the first accused was guilty of causing grievous hurt and the Judge has given judgment convicting him of the same. And therefore an appeal will lie from such judgment only on a point of law, the appellant having been convicted in a trial by jury *Bhootnath Dey* and others (1), *Surja Kurmi* v. *Queen Empress* (2). There being nothing contrary to law in the trial or in the conviction of the appellant for the reasons already given, the appeal in my opinion fails except in regard to the severity of the sentence. I agree with my learned colleague as to the reduction of sentence proposed by him.

1902, *March* 18. **I. L. R. 26 Mad. 249.**

Before Mr. Justice Bhashyam Ayyangar.

REGULA BHEEMAPPA AND THREE OTHERS, PETITIONERS *v.* EMPEROR, COUNTER-PETITIONER *

Penal Code—Act XLV of 1860, ss, 97, 101, 104—Private defence—" Protect a right "—Unlawful assembly.

The villagers belonging to C walked in a religious procession, through a part of the village of K, carrying with them a vessel containing water which purported to be consecrated. The villagers of K, objecting, obstructed the procession, whereupon the members of it resisted the obstruction, and used some violence, causing grievous hurt to one of the obstructors and hurt to others of them. The members of the procession were charged with and convicted of being members of an unlawful assembly, possessing deadly weapons, and causing grievous hurt, and their convictions were upheld on appeal. On rivision :

Held. that the convictions were wrong. The accused were justified, in the circumstances, in exercising their right of private defence; and the harm inflicted was not more than appeared to have been necessary for the purpose of self-defence.

CHARGES of being members of an unlawful assembly, possessing deadly weapons, and causing grievous hurt. All the accused belonged to the village of Chintakuta, and went in procession to worship a goddness in the village of

---

* Criminal Revision Petition No. 525 of 1901,

(1) 4 C. L. R., 405. (2) I. L. R., 25 Calc., 555.

Digitized by Google

Kaminahal,—situated three miles distant. A disturbance occurred, and 106 persons were charged by the police. The case for the defence was that a procession went from a temple situated in Chintakunta to a sacred spot in the limits of Kaminahal, a pot of consecrated water being carried with the people. When the accused had performed their acts of devotion and were returning, they were attacked by the people of Kaminahal, and the pot of sacred water was broken. Violence was used in defending the pot, It was contended for the defence that, in these circumstances, no offence was committed. The Sub-Divisional Magistrate of Adoni discharged 78 of the accused as they had not been sufficiently identified. He convicted the others and sentenced them to rigorous imprisonment for terms varying from four months downwards, and to fines varying from Rs. 300 to Rs. 50.

The accused appealed to the Sessions Judge who confirmed the convictions and sentences.

The accused now preferred this criminal revision petition.

Mr. *John Adam* for petitioners.

The Public Prosecutor in support of the conviction.

JUDGMENT—The convicton of the accused is based on the assumption that they were doing an illegal act so long as they were carrying, within the limits of the village of Kaminahal, the pot of water which was propitiated and taken from the pond in question. It is admitted that ordinarily anybody may take water in his pot from the tank, which is not, alleged to be the private tank of the Kaminahal villagers. Their objection to the accused carrying the pot of water in question on the particular occasion of the worship of a deity within the precincts of the tank is altogether a sentimental one founded upon certain notions which the Courts cannot take notice of as affecting the right of the accused to take water from the tank in a pot and carry it over the high-way to their own adjacent village, nor can the Court take any notice of the motives sentimental religious or otherwise which actuated the accused in taking water supposed to be consecrated or propitiated from a public tank and carrying it in a pot. They were therefore acting legally in carrying the water in a pot and the obstruction caused thereto on the high road by the villagers of Kaminahal was clearly unlawful. Their resistance amounted to wrongful restraint of the accused and at least to an attempt to commit mischief in respect of the pot of water which was the property of the accused. The accused therefore were justified under the circumstances in exercising their right of private defence of body and of property and resisting the villagers in the obstruction they offered to the carrying of the pot of water (*vide* section 97 first and secondly, and sections 101 and 104 of the Indian Penal Code). The harm inflicted by one or other of the accused on some of the prosecution witnesses was simple hurt and on one of them it was grievous hurt. I am unable to say from the evidence on record that within the meaning of section 99 any of the accused inflicted more harm than was necessary under the circumstances to inflict for the purpose of self-defence ; nor does either of the lower Courts find that if they had the right of private defence the accused exceeded the limits of private defence.

The conviction of all the petitioners is set aside and it is directed that they be set at liberty and the fines, is paid or realized, be refunded.

Ordered accordingly.

Digitized by Google

1902, *November* 5, 6. *December* 9, 12, 15. I. L. R. 26 Mad. 394

Before Mr. Justice Subramania Ayyar, Mr. Justice Davies and Mr. Justice Benson.

SEVAKOLANDAI, ACCUSED, *v.* AMMAYAN, COMPLAINANT*

Criminal Procedure Code—Act V of 1898, s. 528—Power of District or Sub-Divisional Magistrate to transfer a criminal case from the file of a Village Magistrate—Extent of power—Petty thefts triable under Regulation IV of 1821.

The jurisdiction which a District or Sub-Divisional Magistrate has, under section 528 of the Code of Criminal Procedure, to transfer a criminal case from the file of a Village Magistrate is limited to the cases (namely those relating to petty thefts) which a village Magistrate is empowered by Regulation IV of 1821 to try and punish.

REFERENCE for orders. The letter of Reference set out the facts as follows :—

" One Ammayan presented a complaint of insult (triable under Regulation XI of 1816) against one Sivakolandai in the Court of the Village Magistrate of Alambadi, Chidambaram taluk. The accused in the case petitioned the Deputy Magistrate, Chidambaram division, for the transfer of the case to the file of any other Magistrate on the ground that the Village Magistrate was prejudiced against him. The Deputy Magistrate, after hearing both sides, ordered the transfer of the case to the file of the Stationary Sub-Magistrate of Chidambaram. Against this order a so-called appeal has been presented to this Court by the complainant.

" From the proceedings of the Deputy Magistrate, dated 16th July 1902, it appears that there is sufficient ground for the accused to fear that a fair and impartial trial cannot be had before the Village Magistrate. The point for consideration, however, is whether the Deputy Magistrate had the power under the Criminal Procedure Code to make the order he did. Under the old Code (Act X of 1882) it was held that no such power existed. Clause 4 of section 528 was newly introduced in the present Code and although the intention of the Legislature appears to have been to invest a superior Magistrate with power to transfer *any* case pending before a Village Magistrate (see statement of objects and reasons of the new Code printed as supplement to the *Fort St. George Gazette*, dated 16th November 1897), yet the wording of the clause, which refers only to Regulation IV of 1821 under which petty thefts are triable, seems to include cases triable by a Village Magistrate under Regulation XI of 1816. I think, therefore, that the Deputy Magistrate's order was *ultra vires*.

" Again, I feel considerable doubt whether I have any appellate power or power of interference in respect of a Sub-Divisional Magistrate's order directing the transfer of a case, for the District Magistrate and the Sub-Divisional Magistrate have co-ordinate jurisdiction under section 528, Criminal Procedure Code. I understand that the High Court decided the question in a similar case on or about 25th June last. "

The District Magistrate concluded by stating that he considered that it was a case in which transfer should be made.

The case came on in the first instance before the Chief Justice and Bhashyam Ayyangar, J., who delivered the following judgments :—

SIR ARNOLD WHITE, C.J.—The question raised in this reference is whether under section 528 of the Code of Criminal Procedure a District or Sub-Divisional Magistrate has power to transfer any criminal case pending before

* (Criminal Revision Case No. 454 of 1902.)

Digitized by Google

a Village Magistrate or whether this power of transfer is limited to the case referred to in section 6 of Regulation IV of 1821, that is to say, petty thefts where the value of the property does not exceed one rupee.

Section 10 of Regulation XI of 1816 gave to heads of villages criminal jurisdiction "in cases of a trivial nature such as abusive language and inconsiderable assaults or affrays." By section 6 of Regulation IV of 1821 the powers granted to heads of villages under the section above referred to are extended to the punishment of petty thefts not attended with aggravating circumstances nor committed by persons of notoriously bad character and when the value of the property stolen does not exceed one rupee.

Paragraph (4) of section 528 of the Code of Criminal Procedure was apparently introduced to meet the decision of this Court in *Madavarayachar* v. *Subba Rau*(1), where it was held that since a Village Munsif was not a Magistrate under the Criminal Procedure Code, a Joint Magistrate had no power under section 528, as it then stood, to transfer a case from a Village Munsif. The offence in the case of *Madavarayachar* v. *Subba Rau*(1) though this is not stated in the report, as in the reference now before us, was abusive language

The amendment to section 528 is not happily worded. If the Legislature had adopted the phraseology of section 1 (2) *(b)* of the Code, viz., "Heads of villages in the Presidency of Fort St. George" no question could have arisen. The amending words in section 528 refer expressly to the Regulation of 1821 and do not refer to the Regulation of 1816. But having regard to the circumstances in which the amendment appears to have been made, viz., to meet a decision in general terms that a Joint Magistrate had no power to transfer any criminal case from a Village Magistrate, the intention of the Legislature seems obvious.

I cannot bring myself to believe that the Legislature intended to give a power of transfer when the case was theft of an article of the value of not more than one rupee and not to give this power in the case of the trivial offences referred to in section 10 of Regulation XI of 1816. I can conceive no object for making this distinction, The question is can we give effect to the intention of the Legislature without unduly straining the words of section 528. I think we can. Under section 6 of the Regulation of 1821 the powers granted by the Regulation of 1816 to punish trivial offences are "hereby extended . . . to the punishment of petty thefts, etc." It seems to me that the effect of those words is that the provisions of the Regulation of 1816 with reference to criminal offences of a trivial nature are implicitly incorporated and re-enacted in the Regulation of 1821 and that the head of a village under Madras Regulation IV of 1851 has jurisdiction under that Regulation to deal with cases of petty theft, and also has jurisdiction both under that Regulation and under the Regulation of 1816 to deal with the trivial offences referred to in the earlier Regulation.

This being so I think it was competent for the Deputy Magistrate to make the order of transfer.

BHASHYAM AYYANGER, J —The question for decision in this case is whether, under section 528, Criminal Procedure Code, a Sub-Divisonal Magistrate can withdraw from the head of a village, a case of "a trivial nature"—viz., "of abusive language"—and refer the same for trial to a Magistrate

(1) I. L. R., 15 Mad., 94.

Digitized by Google

subordinate to him. The solution of the question depends upon the right construction of sub-section 4 of section 528, Criminal Procedure Code, which was introduced for the first time in the the Code of 1898 and which runs as follows :—

" The head of a village under Madras Regulation IV of 1821 is a Magistrate for the purposes of this section."

If as is invariably the case, in various enactments [*e. g.*, section 50 of Act XXIV of 1859; section 6 of Act I of 1871 ; section 19 clause 16 of Act VII of 1870 (Court fees) ; section 26 (explanation) of Act I of 1872 (Evidence Act)] including section 1 (2) (*b*) of the Criminal Procedure Code, the functionary in question had been referred to in the above clause as " the head of a village in the Presidency of Fort St. George, " no doubt could arise as to the power of a District Magistrate or a Sub-Divisional Magistrate to withdraw *any* case from the head of a village and rfer it for trial to any other Magistrate or head of a village subordinate to him. The head of a village in this Presidency is empowered to act as a Magistrate and deal with " cases of a trivial nature, such as abusive language, inconsiderable assaults or affrays, " by section 10 of Regulation XI of 1816, and with cases of petty thefts by section 6 of Regulation IV of 1821. It will be noted that in sub-section 4 of section 528, Criminal Procedure Code, reference is made only to Regulation IV of 1821 and not to Regulation XI of 1816. If the object of the Legislature had been to empower District and Sub-Divisional Magistrates to transfer any case from the head of a village, it is unaccountable that it should have departed from the usual phraseology used in section 1 (2) (*b*) of the Criminal Procedure Code, and the various other enactments already referred to or that reference should have been made only to Regulation IV of 1821 instead of to both that and Regulation XI of 1816. The conclusion I have come to is that the power of transfer is limited to cases of " petty thefts " which are triable by heads of villages under Regulation IV of 1821 and does not extend to " cases of abusive language, and inconsiderable assaults and affrays " which are also trible by heads of villages but under Regulation XI of 1816.

The obvious and grammatical interpretation of sub-section 4 of section 528, Criminal Procedure Code, is that the head of a village *acting* under Madras Regulation IV of 1821 is a Magistrate for the purposes of section 528. I can see no reason for departing from this interpretation and, in my opinion, such interpretation leads to no absurd or incongruous results. It is by no means difficult—were it necessary to do so—to assign reasons why the Legislature, while conferring on District and Sub-Divisional Magistrates power to withdraw cases from the heads of villages, should have deliberately limited that power to cases of theft only. Cases dealt with by heads of villages under Regulation XI of 1816 are expressly of a trivial nature—a conviction in respect of which will in no case affect the character of the accused or subject him to any civil disability—and if it be one of " abusive language, " it will, in the majority of cases, not amount to any offence under the Indian Penal Code. But the case of a theft, though it be a petty one, the value of the property stolen not exceeding one rupee, stands altogether on a different footing. It is a serious offence under the general criminal law and a conviction for such an offence will permanently affect the character of the accused and subject him also to certain civil disabilities. There is nothing said in the Code of Criminal Procedure as to the law which is to be applied to a case transferred from the head of a village to a Magistrate appointed under the Code of Criminal Procedure. Under both the Regulations the head of a village may "on a verbal enquiry dismiss the parties"

Digitized by Google

or "if the offence charged is proved to have been committed by the accused and is of a nature deserving of punishment, he may confine the accused in the village choultry for a time not exceeding 12 hours" or if he be of a low caste, "put him in the stocks for a time not exceeding 6 hours." There can, however, be little doubt that when the case is transferred to and tried by a Magistrate, it will have to be dealt with by him, under the Indian Penal Code and the Code of Criminal Procedure and not under the provisions enacted in the Regulations. Cases of a trivial nature referred to in section 10 of Regulation XI of 1816 may not, in some cases, amount to an offence at all under the general criminal law and the Magistrate may therefore be unable to deal with the same under the Indian Penal Code and the Code of Criminal Procedure, whereas every case of theft under Regulation IV of 1821 can be dealt with by a Magistrate under the Indian Penal Code, and in some cases though the value of the property stolen may not be more than one rupee, the punishment which the head of a village can, under Regulation IV of 1821, inflict will be very inadequate and it will therefore be desirable to transfer the case to a Magistrate who can deal with it effectually under the Penal Code. It seems to me therefore by no means unlikely that the Legislature did not consider it advisable or necessary to empower District and Sub-Divisional Magistrates to withdraw, from heads of villages, "cases of a trivial nature" falling under Regulation XI of 1816 and deliberately limited the power to cases of theft falling under the later Regulation IV of 1821.

I am unable to adopt the view that inasmuch as the powers conferred upon heads of villages by clause (1) of section 10 of Regulation XI of 1816, to deal with and punish the offences therein referred to, have, by incorporation with section 6 of Regulation IV of 1821, been extended to the punishment of petty thefts under that section, the head of a village, should now be regarded as acting under Regulation IV of 1821, not only when he deals with cases of petty theft but also when he deals with "cases of a trivial nature" mentioned in section 10 of the Regulation of 1816 and that therefore under section 528 (4) of the Criminal Procedure Code any case may be withdrawn from the head of a village. This view proceeds on the assumption that not only does section 6 of the later Regulation incorporate with it the portion in question of section 10 of the earlier Regulation, but that section 10 has in its entirety been consolidated with and that it has merged in section 6 of Regulation IV of 1821. The case of *Boden* v. *Smith* (1) in no way lends any support to this view. All that was held in that case was that assuming that the 8 & 9 Vict., cap 21, was a "Local Act" and that as such the period of limitation applicable to suits thereunder would be the general period provided by 5 & 6 Vict., cap. 97, for suits under "Local Acts," yet that by reason of the incorporation generally in 8 & 9 Vict., of "all the provisions of any Act of Parliament relating to County Rates" (The County Rates Act 55 Geo. III, cap. 51), the shorter period prescriped by the 55 Geo. III should be held to apply to suits under the 8 and 9 Vict,. cap. 21, and that as far as regards the period of limitation for actions under this statute the 5 and 6 Vict., cap. 97, must be taken to have been repealed.

If the correct view be that section 10 of Regulation XI of 1816, has become merged in section 6 of Regulation IV of 1821, the former must be taken to have been spent and now become obsolete and heads of villages should be regarded as acting under Regulation IV of 1821, not only when they deal with cases of petty theft, but also when they deal with "cases of a trivial

[1] 18 L.J.C.P., 121.

Digitized by Google

nature, such as abusive language, inconsiderable assaults and affrays." In none of the Acts passed from time to time, ending with Act XI of 1901 repealing obsolete enactments, has the Indian Lagislature adopted this view either with reference to section 10 of Regulation XI of 1816 or with reference to various other enactments on the Indian Statute-book, which have been applied to or incorporated with later enactments. If the Legislature were now to repeal section 6 of Regulation IV of 1821, could it be contended that heads of villages in this Presidency could not deal with " cases of a trivial nature " provided for by section 10 of the earlier Regulation? Section 10 of Regulation XI of 1816 notwithstanding its incorporation with section 6 of the later Regulation has continued and still continues to be in force as part of the earlier Regulation and if the Legislature were now to repeal this Regulation, heads of villages could no longer deal with offences of " a trivial nature " mentioned in section 10. But such repeal would not affect the operation of section 6 of Regulation IV of 1821,—as regards petty thefts provided for therein—and this section would operate just as if the words of section 10 of the Regulation of 1816, defining the powers of heads of villages to deal with the trivial offences therein mentioned, and only those words had, without any reference to that section, been actually reproduced, written and printed in section 6 itself when it was passed [per Lord Denman, C. J., in *The Queen* v. *The Inhabitants of Brecon* (1).] Where the provisions of one statute are incorporated by reference in another.—a method which is frequently adopted in drafting statutes, to save labour and avoid repetition—the effect is not to repeal the former enactment by consolidating it with the latter, but only to extend its provisions, without actually reproducing the words therein to the new matters in the latter enactment; and should the Legislature afterwards repeal the earlier statute, the provisions thereof, which have been incorporated in the later enactment continue in force for the purposes of the later enactment notwithstanding such repeal [*Reg.* v. *Merionethshire* (2), *The Queen* v. *Smith* (3), see also section 4 of (India) Act XI of 1901].

As the case which was withdrawn by the Sub-Divisional Magistrate from the head of the village was one of " abusive language " and not " theft, " the order of the Sub-Divisional Magistrate should, in my opinion, be cancelled.

The case came on for further hearing before the Court constituted as above.

V. Krishnasami Ayyar for complainant.

V. C. Desikachariar for the accused.

JUDGMENT.—The question raised in this reference is whether a District or Sub-Divisional Magistrate has jurisdiction, under section 528, Criminal Procedure Code, to transfer any criminal case from the file of a Village Magistrate or whether the power of transfer is limited to the cases, viz., petty thefts which a Village Magistrate is empowered by Regulation IV of 1821 to try and punish.

We think that the power of transfer is limited to the latter class of cases.

Section 1 (2) (*b*) of the Code of Criminal Procedure enacts that, in the absence of any specific provision to the contrary, nothing in the Code shall apply to " heads of villages in the Presidency of Fort St. George, " and prior to 1898 it was held by the Courts that the effect of these words was that the

(1) 15 Q. B. Rep., 813 at p. 816 [2] 6 Q. B. Rep. 343 [3] L. R. 8 Q, B, 146,

Digitized by Google

power of transfer vested in the District and Sub-Divisional Magistrates under section 528 did not extend to cases pending before Village Magistrates in this Presidency.

By Act V of 1898, section 528 was amended: sub-section 4 of the amended section is as follows:—

"The head of a village under Madras Regulation IV of 1821 is a Magistrate for the purposes of this section."

The expression "Under Madras Regulation IV" is an elliptical one, and might grammatically mean either *appointed* under that Regulation or *acting*, that is, exercising powers under that Regulation. The Regulation, however, does not deal with the appointment of heads of villages, but merely gives them the same powers in regard to punishing petty thefts, which they already had under Regulation XI of 1816 "in cases of a trivial nature, such as abusive language and inconsiderable assaults and affrays." The clause therefore means "the head of a village acting in exercise of the powers conferred on him by Regulation IV of 1821." We do not think that it can properly be held that the provisions of Regulation XI of 1816 are implicitly incorporated and re-enacted in Regulation IV of 1821. If the Legislature had intended to give the power of transfer in the trivial cases punishable under Regulation XI of 1816, we think that that Regulation would have been specified in the section along with Regulation IV of 1821, or else the language of section 1 of the Code would have been followed and no reference to any particular Regulation would have been made.

The reference to Regulation IV was, we think, made advisedly for the purpose of limiting the power of transfer to cases punishable under that Regulation. There are many reasons why the Legislature may have thought such a limitation desirable. Theft—even petty theft—is a serious offence, punishable under the Penal Code with imprisonment for three years. A conviction for theft permanently affects the character of the accused and entails civil disabilities, and liability on a second conviction to greatly enhanced punishment. Conviction for the trivial offences triable under Regulation XI of 1816 entails none of these consequences. It may, therefore, well have been thought that the power of transfer was necessary in the one class of cases though not in the other. However that may be, when the words of the enactment are plain in tthemselves and can reasonably be given effect to in their ordinary grammatical meaning, we think that they should be so interpreted.

We, therefore, hold that the Sub-Divisional Magistrate had no power to transfer the cases of insult pending before the Village Magistrate to the Statoinary Sub-Magistrate of Chidambaram and we set aside his order.

As, however, the transfer is on the merits advisable, we in exercise of our powers under section 29 of the Letters Patent, transfer the case to the Sub-Magistrate specified in the Sub-Divisional Magistrate's order.

1903 February 6. **I. L. R. 26 Mad. 419.**

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

IN THE MATTER OF RAMAYA NAIKA (ACCUSED), PETITIONER *

* Criminal Revision Case No. 524 of 1902.

Digitized by Google

Penal Code—Act XLV of 1860, s. 187—Rendering assistance to a public servant—Refusal to sign search list by person who attended search under Abkari law—Liability—Criminal Procedure Code—Act V of 1898, s. 103 (1)—Party called upon to attend and witness a search.

A person was called upon by an Abkari Inspector to attend a search held under section 103 of the Code of Criminal Procedure, and did so. He, however, refused to sign the search list when it was prepared. On a charge being preferred against him under section 187 of the Indian Penal Code of intentionally omitting to assist a public servant in the execution of his duty.

Held, that the accused was not guilty of an offence under section 187. Assuming that a person called upon to attend and witness a search, under section 103 of the Code of Criminal Procedure, is under a legal obligation to attend the search and sign the search list, the "assistance" which a person is bound, by the earlier part of section 187 of the Penal Code, to render is *ejusdem generis* with the various forms of assistance referred to in the latter part of the section. It must have some direct personal relation to the execution of the duty by the public officer. The signing of the search list required by section 103, is an independent duty which is imposed on the witness, whereas the word, "assistance," as used in the section, implies that the party who assists is doing something which, in ordinary circumstances, the party assisted could do for himself.

QUESTION referred to a Full Bench. Accused was charged before the Second-class Magistrate of Kasaragod taluk with having wilfully neglected to aid a public servant, under section 187 of the Indian Penal Code. The complaint was lodged by the Sub-Inspector of Abkàri and Customs, under the orders of his Inspector. Complainant stated that on 18th March 1902 he had visited a certain house with the object of searching it for contraband liquor under the Abkàri Act. He called upon the accused and others, as respectable inhabitants of the locality, to accompany him and witness the search. The accused attended with reluctance and was present during the search, but, as the complainant alleged wilfully neglected and refused to attest the search list, though his attention was drawn to section 187 of the Indian Penal Code, and he was warned that he was bound to comply with the complainant's request. It was stated by the prosecution that the reasons which the accused gave for his refusal was that if he attested the search list he would have to attend at the enquiry and at Courts, which would put him to expense. The Magistrate held that this was not a lawful excuse, and that the conduct of the accused was an intentional omission to render or furnish assistance within the meaning of section 187, and inflicted a fine of Rs. 50 with one week's simple imprisonment on default. An appeal to the Deputy Magistrate was dismissed.

The accused preferred this criminal revision petition.

K. N. Ayya for petitioner.

The Public Prosecutor in support of the conviction.

The case came, in the first instance, before Subrahmania Ayyar and Davies, JJ., who made the following.

ORDER OF REFERENCE TO A FULL BENCH.—The accused, on requisition, attended a search held under section 103 of the Code of Criminal Procedure, and witnessed the search, but refused to sign the search list when it was duly prepared. The refusal was intentional. The question is whether the accused was guilty of an offence under section 187 of the Indian Penal Code. Having regard to the importance of the question, we refer it for the decision of a Full Bench.

The case came on for hearing in due course before the Full Bench constituted as above when the Court expressed the following

Digitized by Google

OPINION.—For the purposes of the question referred we assume that a party called upon to attend and witness a search under section 103 (1) of the Code of Criminal Procedure is under a legal obligation to attend the search and sign the search list.

Section 187 of the Indian Penal Code provides, first, in general terms, for the punishment when a person being bound by law to render assistance to a public servant in the execution of his public duty intentionally omits to assist; secondly, it provides for the punishment when the assistance is demanded for certain specified purposes. We think the "assistance" referred to in the former part of the section is *ejusdem generis* with the various forms of assistance specified in the latter half. The "assistance" must have some direct personal relation to the execution of the duty by the public officer. The signing of the search list required by section 103 is an independent duty imposed on the witness. The word " assistance " as used in the section implies that the party who assists is doing something which, in ordinary circumstances, the party assisted could do for himself.

Our answer to the question referred is, that on the facts stated, the accused was not guilty of an offence under section 187 of the Indian Penal Code.

1902, *January* 16, **I. L. R. 26 Mad. 421.**

Before Mr. Justice Subramania Ayyar & Mr. Justice Bhashyam Ayyangar.

VEMURI SESHANNA AND ANOTHER, ACCUSED IN CRIMINAL CASE No. 180 OF 1902*

Criminal Procedure Code—Act V of 1898, s. 423 (*b*)—Conviction of two accused and order against both accused to pay Court and process fees in equal shares—Acquittal of one accused on appeal—Order by Appellate Court for entire Court and process fees—Legality—" Enhancement of sentence. "

A Magistrate convicted two accused, and, in addition to the sentences which he passed on them, ordered them to pay the Court and process fees in equal shares. The Appellate Court acquitted one of the accused and ordered the other accused (whose conviction was affirmed) to pay the whole amount of the Court and process fees:

Held, that the order of the Appellate Court was legal under section 423 (*d*) of the Criminal Procedure Code and did not amount to an enhancement of sentence within the meaning of section 423 (*b*). Fees ordered to be paid under section 31 (iv) of the Court Fees Act are recoverable as if they were fines imposed by the Court, but they are not part of the fine imposed as a punishment for the offence.

Queen-Empress *v.* Tangavalu Chetti, (I. L. R., 22 Mad., 153), and the High Court Ruling, 20th July 1870, (5 M. H. C. R., App. 28) distinguished.

SENTENCE, on two accused, to undergo imprisonment and to pay a fine, respectively, and to pay Rs. 3-2-0 in equal proportions on account of Court and process fees. On appeal, the Head Assistant Magistrate altered the conviction in the case of the first accused, but confirmed the sentence, and quashed the conviction in the case of the second accused. He also directed that the Court and process fees should be paid by the first accused alone to the complainant. The District Magistrate referred the case for orders, as he entertained a doubt as to the legality of the Head Assistant Magistrate's order, as the order to pay

* Case referred for the orders of the High Court, under section 438 of the Code of Criminal Procedure, by R. Morris, District Magistrate of Kistna, in his letter dated 29th November 1902, Revision Case No. 1329 of 1902.

Digitized by Google

the costs was an integral part of the sentence, and to enhance the liability of the first accused by ordering him to pay the whole of the Rs. 3-2-0 instead of only a half of it was to enhance his sentence, which an Appellate Court is debarred, under section 423 of the Criminal Procedure Code, from doing. He referred to *Queen-Empress* v. *Tangavalu Chetti*(1)

The Court made the following

ORDER.—We think that the action of the Appellate Magistrate is legal under section 423 (*d*), Criminal Procedure Code, and it does not amount to an enhancement of sentence within the meaning of section 423 (*b*). Under section 31 (iv) of the Court Fees Act, the fees ordered to be repaid under that section are to be recovered as if they were fines imposed by the Court, but there is no warrant for treating the same as part of the fine imposed as a punishment for the offence. The present case is distinguishable from *Queen-Empress* v. *Tangavalu Chetti*(1) and from the *High Court Ruling, 20th July 1870*(2), though the view which we take is in apparent conflict with them. We therefore see no reason to interfere.

1902, *September* 17, 25. **I. L. R. 26 Mad. 454.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

CHEKUTTY AND TWO OTHERS (ACCUSED) PETITIONERS, *v.* EMPEROR, RESPONDENT*

Criminal Procedure Code—Act V of 1898, s. 235—" Same transaction "—Kidnapping of child and assault, at a later date, on mother—Conviction—Validity.

An accused was charged and tried at one trial with the offences of kidnapping, wrongful confinement and assault, and convicted. The case for the prosecution was that the accused had kidnapped and wrongfully confined a boy, and that when the boy's mother, a day or two afterwards, went to the house of the accused and asked that the boy might be allowed to return to her, the accused assaulted the mother. The conviction was upheld by the Sessions Court. On a revision petition being preferred in the High Court.

Held, that the charge of assault ought to have been brought separately and tried separately. The kidnapping and the assault were not committed in one series of acts so connected together as to from one transaction. The offence of kidnapping is complete when the minor is actually taken from lawful guardianship, and it is not an offence continuing as long as the minor is kept out of such guardianship. Even assuming that on the facts of this case the process of "taking" or "enticing" was going on at the time of the alleged assault on the mother, it was doubtful whether the assault was one of a series of acts so connected together as to form the same transaction, and the charge of assault should have been brought and tried separately.

CHARGES against first accused, of kidnapping, wrongfnl confinement and assault under sections 363, 343 and 352 of the Indian Penal Code ; against second and third accused of abetment of wrongful confinement and assault. The charge against first accused was that he kidnapped and wrongfully confined a boy who was in his service, and that when the boy's mother came, a day or two afterwords, and asked that the boy might be allowed to return to her, first accused assaulted her. The Special Assistant Magistrate of Malabar convicted first accused of all the three offences with which he was charged. He also convicted the other two accused. The accused appealed to the acting Sessions Judge, who upheld the convictions and sentences. The accused now preferred this revision petition.

---

[1] I. L. R.. 22 Mad , 153 [2] 5 M. H. C. R., App. 28.

* Criminal Revision Case No. 264 of 1902.

Digitized by Google

Dr. *Swaminatha* for petitioner.

The Acting Public Prosecutor in support of the conviction.

Sir ARNOLD WHITE, C. J.—In this case the first accused was charged with kidnapping (section 363, Indian Penal Code), wrongful confinement (section 343) and assault (section 352) and the second and third accused were charged with abetment of wrongful confinement and abetment of assault. The case against the first accused was that he kidnapped and wrongfully confined a boy who was in his service as a cowherd, and that, on the boy's mother a day or two afterwards, coming to the house of the first accused and asking that the boy should be allowed to return to her, he assaulted the mother. The first accused was charged with three distinct offences and tried at one trial for the three offences. The question is, were the three offences committed in one series of acts so connected together as to form the same transaction within the meaning of section 235 of the Code of Criminal Procedure. If they were not, the charge was bad and the trial was bad. No question arises with regard to the charges of kidnapping and wrongful confinement. The question is, were the kidnapping of the boy and the assault on the mother committed in one series of acts so connected together as to form the same transaction. In my opinion they were not. In support of the conviction it was argued that the offence of kidnapping was continuous and that the assault on the mother having been committed during the continuance of the kidnapping the two offences were committed in one series of acts so connected together as to form the same transaction. It has recently been held by a Full Bench of the Calcutta High Court in *Nemai Chattoraj* v. *Queen Empress* (1) that the offence of kidnapping from lawful guardianship is complete when the minor is actually taken from lawful guardinship and that it is not an offence continuing as long as the minor is kept out of such guardianship. The Madras case (*Regina* v. *Samia Kaundan* (2)) as the Chief Justice of the Calucutta High Court points out in the case just referred to was a case of kidnapping out of British India and as, when the accused intervened, the boy had not been actually taken out of British India the process of taking was regarded as continuing. I agree with the view of the Calcutta High Court, but even assuming that, on the facts of the present case, the right view is that the process of " taking " or " enticing " the boy was going on at the time of the alleged assault on the mother, I should feel considerable doubt as to whether the assault on the mother was one of a series of acts so connected together as to form the same transaction.

I think the charge of assault ought to have been brought separately and tried separately. The Magistrate in general terms, finds the three accused guilty of the offences with which they were charged and sentences the first accused to two years' rigorous imprisonment and the second and third accused to nine months' rigorous imprisonment each, and the Sessions Judge finds that the three charges are supported by the facts and dismisses the appeal.

In this state of things it seems to me that the proper order for us to make is to set aside the convictions and to order the retrial of the three accused.

MOORE, J.—I concur.

---

[1] I. L. R., 27 Calc., 1041. [2] I. L. R., 1 Mad., 173.

Digitized by Google

1902, September 30. **I. L. R. 26 Mad. 463.**

*Before Mr. Justice Davies and Mr. Justice Benson.**

IN RE BALAMBAL (SECOND ACCUSED), PETITIONER.

Penal Code—Act XLV of 1860, s. 498—"Enticing away" a woman—Charge of abetment against the woman enticed—Validity.

Where a man has been convicted of enticing away a woman, under section 498 of the Indian Penal Code, the woman who was enticed away by him cannot be guilty as an abettor.

Whether a woman could be convicted of abetting the taking away of herself within the meaning of section 498—Quære.

CHARGE (against first accused) of enticing away a married woman (second accused) under section 498 of the Indian Penal Code and (against second accused) of abetment of that offence under sections 498 and 109 of the Indian Penal Code. The Sub-Magistrate of Gingee convicted both accused, sentencing first accused to six months' rigorous imprisonment and to pay a fine of Rs. 100, with one month's further rigorous imprisonment in default, and sentencing second accused to three months' simple imprisonment. This reference was made by the District Magistrate on the ground that as the second accused was the woman whom first accused was charged with enticing away, the second accused could not be punished as an abettor.

The Public Prosecutor in support of the reference.

JUDGMENT.—Whether a woman could be convicted of abetting "the taking away" of herself within the meaning of section 498, Indian Penal Code, we need not now decide, as that is not the offence charged against her, but we are of opinion that when a man is convicted, as in this case, of "*enticing away*" a woman under section 498 Indian Penal Code, the woman cannot be guilty as an abettor.

We set aside the conviction of Balambal on a charge of abetting the enticing away of herself, and direct that her bail bond be discharged.

1902. *October*, 7. **I. L. R. 26 Mad. 464.**

Before Mr. Justice Davies and Mr. Justice Benson.

SINGARAJU NAGABHUSHANAM (ACCUSED), PETITIONER.*

Penal Code—Act XLV of 1860, s. 500—Defamation—True statement that complainant had been convicted of theft and sent to jail—Conviction—Validity.

An accused, who was the trustee of a temple, was convicted of defamation, the alleged defamatory statement being that the complainant, who performed the worship in a temple, had been convicted and sent to jail for the theft of idols belonging to the temple. At the time when the statement was made, an appointment was in question in connection with the temple.

Held, on revision, that the accused was justified in making the statement, either in the interest of the temple, or because the statement was no more than a publication of the result of proceedings in a Court of Justice.

CHARGE of defamation under section 500 of the Indian Penal Code. The complainant was the priest performing the worship in the temples of Agasthyswara Swamy and Ramalingeswara Swamy in Pedana. The alleged defamatory matter was written on a post-card, which was sent to and received by complainant in the ordinary course of post. The Magistrate found that the signature on one card was that of the accused. The writing stated that some years

* [Criminal Revision Case No. 36 of 1902.]

* Criminal Revision Petition No. 298 of 1902.

Digitized by Google

previously the complainant had been sent to jail in connection with a case of theft of idols in the temple of Ramalingeswara Swamy. Complainant admitted that this was true. The Magistrate held, however, that this was immaterial. He convicted the accused, imposing a fine of Rs. 25 with an alternative of one month's rigorous imprisonment.

The accused preferred this Criminal Revision Petition.

P. Nagabhushanam for petitioner.

K. Sreenivasa Ayyangar for complainant.

DAVIES, J.—I am unable to see wherein the defamation consists. The complainant had, as a matter of fact, been convicted of theft and sent to jail and that theft was of property belonging to the very temple the appointment to the "archakaship" of which was in question. There was no harm in the accused, who is the trustee of the temple, publishing that fact in order to forestall the complainant from setting up his rights in regard to a joint "archakaship" because it was in the interests of the temple that the trustee so acted. The conviction must be set aside and the fine, if levied, be refunded.

BENSON, J.—The statement alleged to be defamatory is that the complainant had gone to jail for having carried away certain idols. That statement was true, and the alleged defamatory statement was no more than the publication of the result of proceedings in a court of Justice, which is specially declared to be no defamation by exception 4 to section 499 of the Indian Penal Code.

The conviction must be reversed and the fine, if levied, refunded.

1902, *October* 7. **I. L. R. 26 Mad. 465.**

Before Mr. Justice Davies and Mr. Justice Benson.

MEYYAN AND ANOTHER (ACCUSED), *v.* EMPEROR (RESPONDENT).§

Criminal Procedure Code—Act V of 1898, ss. 391, 407—Sentence of whipping by Second-class Magistrate—Appeal—Application for postponement of sentence till hearing of appeal—Refusal—Validity.

When a Second-class Magistrate passes a sentence of whipping only, without imprisonment he has no power to postpone the execution of the sentence pending an appeal by the accused. It is only when whipping is added to imprisonment in an appealable case that the whipping may, and ought to, be postponed under section 391 of the Criminal Procedure Code.

SENTENCE of whipping passed by the Second-class Magistrate of Sivaganga. The Magistrate refused to allow time for an appeal to be preferred, and the sentence of whipping was executed. Upon the appeal being heard, the sentence was quashed. The District Magistrate made this reference to the High Court as to whether the execution of a sentence of whipping, when it is the sole punishment, may be postponed to allow time for an appeal to be preferred.

ORDER.—In our opinion the refusal of the Second-class Magistrate to postpone the sentence of whipping pending the intended appeal of the accused was the only order he could legally pass. The Code makes no provision whereby a Magistrate imposing a sentence of whipping only can suspend its execution, nor does it provide for the detention of a person so sentenced to allow of his appealing, nor for his re-arrest to undergo the whipping if the sentence is

§ Case referred (Criminal Revision Case No. 447 of 1902).

Digitized by Google

confirmed on appeal. It is only when whipping is added to imprisonment in an appealable case that whipping may, and ought to, be postponed (section 391, Criminal Procedure Code).

No doubt this state of the law, in effect, deprives persons sentenced by a Second-class Magistrate to whipping only, of the right of appeal which section 407, Criminal Procedure Code, gives them and we agree with the District Magistrate that such a result is unsatisfactory. It can, however, only be corrected by the Legislature. The difficulty does not arise in the case of First-class Magistrates, as the Code gives no right of appeal against a sentence of whipping only by such Magistrates (section 413 of the Criminal Procedure Code).

1902. *October* 15. **I. L. R. 26 Mad. 467**

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

GUZZALA HANUMAN (PRISONER), APPELLANT, *v.* EMPEROR, RESPONDENT. *

Penal Code—Act XLV of 1860, ss. 395, 411—Charges of dacoity and receiving stolen property—Charge to jury—Possession of stolen property—Misdirection.

On the trial of an accused, before a Judge and jury at a Court of Session, for dacoity and receiving stolen property, the Judge, in his charge to the jury, directed them that the fact of a stolen shirt having been found in possession of the accused two months after the dacoity, was sufficient to justify them in convicting the accused of the dacoity:

Held, on appeal, that this was a misdirection. Whether the prossession of the stolen property was recent enough to warrant a coviction for a substantive offence was a matter entirely for the jury and should not have been put to them in the positive way which the Judge adopted.

CHARGES of dacoity, under section 395, and of receiving stolen property under section 411 of the Indian Penal Code. The Sessions Judge, in the course of his charge to the jury, gave the following direction:—

" This is a simple case. On 31st January of this year a dacoity took place at Sanganakal in the house where the clerks of the District Court were staying. Prosecution witnesses Nos, 1 and 2 are two of the clerks who were there. The first of them lost, among other things, a flannel shirt. This shirt is identified both by the clerk and the man who made it for him (prosecution third witness), and also the tailor (prosecution fourth witness), who cut the shirt from the cloth. Two months afterwards, in connection with the investigation of another dacoity at Halvi, the Yemmiganur Inspector (prosecution fifth witness), searched the houses of Korachas and also surrounded certain date topes where a wandering gang of Korachas was encamped. Four out of ten wandering Korachas were captured. One of these is the prisoner before the Court. Upon him was found the identical shirt lost by the clerk in the dacoity. Two Inspectors (prosecution witnesses Nos. 5 and 6), who were present at the arrest of the accused prove that he was actually wearing the tell-tale garment. The prossession of a dacoited article within so short a time after the commission of the dacoity is evidence of dacoity against the accused unless he can prove that he honestly came by it. "

The jury convicted the accused on both charges and the Judge sentenced him to five years' rigorous imprisonment (the prisoner admitting a previous conviction).

---

* Criminal Appeal No. 532 of 1902.

Digitized by Google

The accused preferred this appeal but was not represented.

The Public Prosecutor in support of the conviction.

JUDGMENT.—There was a clear misdirection to the jury in the Judge's directing them that the finding of the stolen shirt with the accused two months after the dacoity was " so short " a time as to justify them in convicting the accused of the dacoity itself. Whether the possession of the stolen property was recent enough to warrant a conviction for the substantive offence was a matter entirely for the jury, and should not have been put to them in the positive way which the Judge adopted, The jury have not only convicted the accused of being in possession of stolen property under section 411, Indian Penal Code, but have also found him guilty of dacoity itself. This is manifestly a contradictory finding for if a man steals an article, he cannot also be convicted of receiving it, and the verdict of the jury as it is, cannot stand. We think the jury primarily intended to convict the accused of the offence under section 411, Indian Penal Code, and their conviction of the offence of dacoity as well was due to the misdirection pointed out above. We therefore set aside the verdict of guilty of dacoity and confirm the verdict of guilty of the offence under section 411, Indian Penal Code. In lieu of the sentence inflicted by the Judge, we sentence the prisoner to two years' rigorous imprisonment under sections 411 and 75 of the Indian Penal Code.

1902. *October 17.* **I. L. R. 26. Mad. 469.**

Before Sir Arnold White, Chief Justice.

KANNOOKARAN KUNHAMAD AND OTHERS (PETITIONERS), *v.* EMPEROR, RESPONDENT†

Criminal Procedure Code—Act V of 1898, s. 106—Order for security to keep the peace on convictions for offences not necessarily involving a breach of the peace—Validity.

Certain accused were convicted of theft, of mischief and of being members of an unlawful assembly. They were sentenced to imprisonment and were further required to give security to keep the peace. There was no finding that a breach of the peace had been committed by them.

Held, on revision, that the order requiring them to give security for keeping the peace must be set aside, as none of the offences for which they had been convicted necessarily involved a breach of the peace.

Whether such an order might be made in a case in which a person is not accused of an offence involving a breach of the peace, but there is nevertheless an express finding that a breach has been committed.—*Quære.*

(*Note* :—This case is R : 8 C. W. N. 517.)

ORDER requiring accused to give security for keeping the peace. Petitioners were convicted of theft, of mischief and of being members of an unlawful assembly. The Joint Magistrate of Malabar, before whom they were tried sentenced them to different terms of imprisonment, and ordered them to furnish security to keep the peace for one year under section 106 of the Code of Criminal Procedure. Petitioners appealed to the Acting Sessions Judge, who upheld the convictions, the sentences and the order. Petitioners preferred this criminal revision petition.

Ryru Nambiar for petitioners.

---

†Criminal Revision Case No, 231 of 1902.

Digitized by Google

ORDER.—In this case the accused were convicted of theft (section 329 of the Indian Penal Code), of mischief (section 426 of the Indian Penal Code) and of being members of an unlawful assembly (section 143 of the Indian Penal Code). None of these offences necessarily involve a breach of the peace. I express no opinion as to whether in a case in which a person is not accused of an offence involving a breach of the peace, or of taking unlawful measures with the evident intention of committing the same, but in which there is nevertheless an express finding that a breach of the peace has been committed or unlawful measures taken with the evident intention of committing the same, the accused could be called upon to give security to keep the peace under section 106 of the Code of Criminal Procedure. There are no such findings in the present case. So much of the sentence as requires the accused to give security for keeping the peace must be set aside.

1902. *October* 28. **I. L. R. 26 Mad. 470.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

EMPEROR, COMPLAINANT, *v.* VENKANNA PRABHU AND FOURTEEN OTHERS (ACCUSED). ‡

Forest Act —(Madras) Act V of 1882, s. 21 (*a*)—" Clearing "—Removal of trees or shrubs—Conviction where no evidence of such removal—Validity.

The word " clearing " as it is used in section 21 (*a*) of the (Madras) Forest Act of 1882, means something in the nature of the removal of trees or shrubs. Certain accused were convicted of an offence under the section, but there was no evidence on the part of the prosecution to show that there had been any removal of trees or shrubs by the accused, or that cultivation of the land in question could not have been carried on without such removal.

Held, that there was no evidence that the accused had committed an act prohibited by section 21.

CONVICTIONS, under section 21 (*a*) of the (Madras) Forest Act, 1882, for making a " fresh clearing, " as prohibited by section 7, on reserved forest land. The convictions were confirmed by the General Duty Deputy Magistrate. The case was referred to the High Court by the Sessions Judge of South Canara, from whose letter of reference it appeared that the accused admitted that they had cultivated the land in question, but maintained that it had been cultivated previously ; also that there was no evidence on the part of the prosecution that the accused had removed any trees or shrubs from the land.

The Acting Public Prosecutor in support of the reference.

ORDER.—Both the lower Courts appear to have based their decisions on the assumption that the mere cultivation of the land in question involved a " clearing " within the meaning of section 21 (*a*) of the Madras Forest Act, 1882, and that the only point for cosideration was whether what had been done by the accused was " fresh. " It seems to us that the word " clearing " means something in the nature of the removal of trees or shrubs. The provision is a penal one and must be strictly construed. There is no evidence that there was any removal of trees or shrubs by the accused or that cultivation of the land in question could not be carried on without such removal. In our judgment there is no evidence that the accused committed an act prohibited by section 21.

The conviction and sentence must be set aside and the fine, if paid, must be refunded.

---

‡ Case referred No 89 of 1902.

Digitized by Google

1902. October 28. **I. L. R. 26 Mad. 471.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

BELAGAL RAMACHARLU (SECOND DEFENDANT), PETITIONER, *v.* EMPEROR, RESPONDENT. *

Criminal Procedure Code—Act V of 1898, ss. 112, 118, 144, 145—Notice to give security for three months—Order to give security for twelve months—Validity—Discretion to proceed under s. 107 or ss. 144 and 145.

Where a notice is issued under section 112 of the Code of Criminal Procedure to a defendant to show cause why he should not give security to be of good behaviour for three months, the Magistrate has no power to order security to be given for a longer period.

Where a defendant is found by the Magistrate to be in prossession of land about which a dispute occurs, the Magistrate is not bound to act under sections 144 and 145, but has a discretion to proceed either under section 107 or under sections 144 and 145 of the Code.

Dolegobind Chowdhry *v.* Dhanu Khan, (I. L. R., 25 Calc., 559), distinguished.

(*Note* :—This case is Fol. 32 Calc. 966–968.)

ORDER to give security to keep the peace. The Head Assistant Magistrate of Hospet ordered two defendants to execute a bond for Rs. 100, with one surety each for a like sum, to keep the peace for a year. The notice which had been issued to the defendants called on them to show cause why they should not give security to be of good behaviour for three months. Second defendant filed this criminal revision petition, contending that the order was wrong: and that having regard to the finding of the Magistrate that the petitioner was in actual possession of the lands over which the dispute arose, the Magistrate should, if at all, have taken security only from the first defendant, or otherwise protected the petitioner's possession under section 145 of the Code of Criminal Procedure.

T. S. Krishna Ayyar for petitioner.

The Acting Public Prosecutor in support of the order.

ORDER.—The notice under section 112, Criminal Procedure Code, was to the petitioner to show cause why he should not give security to be of good behaviour for three months, but the order afterwards issued under section 118 binds the parties for a year.

Section 118 expressly provides that "no person shall be ordered to give security . . . . for a period longer than that specified in the order made under section 112. The Magistrate had no power to make an order for more than three months, the term in the notice issued under section 112.

We therefore revise the Magistrate's order by substituting three months for one year.

It is urged that the proper course was for the Magistrate to have acted under section 144, 145, Criminal Procedure Code, and reliance is placed on the case of *Dolegobind Chowdhry* v. *Dhanu Khan* (1).

The facts in that case are clearly distinguishable from those in the present case, but even were it otherwise we are not prepared to say that we should take the same view. We think the Magistrate has a discretion to proceed under section 107 or sections 144, 145, Criminal Procedure Code.

* Criminal Revision Case No. 400 of 1902.

(1) I. L. R., 25 Calc., 559.

Digitized by Google

1902, December 8. **I. L. R. 26 Mad. 475.**

Before Sir Arnold White Chief Justice.

ABDUL AZEEZ SAHIB (ACCUSED), PETITIONER *v.* CUDDAPAH MUNICIPALITY (COMPLAINANT), RESPONDENT*

District Municipalities Act—(Madras) Act IV of 1884 as amended by (Madras) Act III of 1897, s 269—Money due as tax, fee, toll or other payment—Money due on toll-contract—Applicability of section.

Money due under a contract entered into with a Municipality for the right to collect tolls in consideration of a money payment does not fall within any of the provisions of section 269 of the District Municipalities Act, 1884, and a contractor who fails to pay what is due under such a contract cannot be convicted and fined under that section.

CHARGE of failure to pay toll kists due to the Municipality of Cuddapah, amounting to Rs. 426-0-0. The charge was preferred by the Chairman of the Cuddapah Municipality, under sections 269, 103 and 111 of the Madras District Municipalities Act of 1884. The accused was tried summarily by the Town Bench and found guilty and fined 4 annas in addition to the amount still remaining due (a portion having since been paid). The accused preferred this criminal revision petition, on the ground that the amount, which was due under a toll contract, was not a tax, fee or toll or other payment due to the Municipal Council within the meaning of section 269 of the Act of 1884 as amended by the Act of 1897.

Mr. *A. S. Cowdell.* for petitioner.

The Public Prosecutor in support of the conviction.

ORDER.—The sum claimed by the Municipality from the accused is money due under a contract between the Municipality and the accused.

In my judgment the money due does not fall within any of the provisions of section 269 of Act IV of 1884.

The Public Prosecutor has argued that it is " rent " within the meaning of that section. I am clearly of opinion that it is not. He has also contended that it is a " toll. " The fact that the accused has had assigned to him the right to collect the tolls, in consideration of a money payment made by him to the Municipality does not make the money payable by the accused to the Municipality under his contract a " toll " within the meaning of the section.

If authority were needed, *In re Jagu Santram* (1) is a case in point.

The conviction is bad and must be set aside and the fine, if paid, must be refunded.

1902, *December* 8, **I. L. R. 26 Mad. 477.**

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

KALIMUTHU AND TWO OTHERS, ACCUSED, *v.* EMPEROR, RESPONDENT.‡

Criminal Procedure Code—Act V of 1898 (4)—Refusal by Sessions Judge to commit for trial—Subsequent commitment by District Magistrate after taking up the case suo motu—Legality.

* Criminal Revision Case No. 423 of 1902. (1) I. L. R.. 22 Bom., 709.
‡ Case referred No. 126 of 1902 (Revision Case No. 448 of 1902).

Digitized by Google

A Second-class Magistrate, after enquiring into a charge of murder, discharged the accused. A revision petition was then presented to the Sessions Judge, requesting that the accused might be committed for trial at the Sessions. The Sessions Judge dismissed the petition, holding that the Magistrate's reasons for discharging the accused were good. At a subsequent date, the District Magistrate took up the case *suo motu* and directed the commitment of the accused for trial at the Sessions Court on a charge of murder. On reference being made to the High Court for orders:

Held, that the commitment that was made under the District Magistrate's order was invalid and must be set aside. Under clause 4 of section 435 it was not competent to the District Magistrate to entertain an application for the commitment being ordered when the Sessions Judge had refused such an order. Nor could he act *suo motu*. The reason for the prohibition in the section was to avoid a conflict between the orders of two District authorities having co-ordinate powers, and that reason applied equally to cases in which the authorities acted *suo motu*.

COMMITMENT of accused for trial. The Second-class Magistrate of Mudukulattur held a preliminary enquiry in his Register case No. 5 of 1901, with regard to the case of three persons who were charged with having committed murder. In the result, namely, on 24th February 1902, the Magistrate discharged the accused. On 3rd April 1902, the complainant filed a revision petition in the Sessions Court, requesting that Court to direct the committal of the accused to the Sessions, but the Sessions Judge dismissed the petition, holding that the Magistrate's reasons for discharging the accused were good. On 30th April 1902, the District Magistrate took up the case *suo motu* and, on 31st May 1902, directed the commitment of the accused for trial on a charge of murder at the Sessions Court. The Sessions Judge now directed this reference to be made for the orders of the High Court.

The Public Prosecutor in support of the order of commitment.

ORDER.—No doubt the District Magistrate acted in ignorance of the order passed by the Sessions Judge, but that does not make the District Magistrate's order legal, if, under the recently enacted clause (4) of section 435, Code of Criminal Procedure, it was too late for him to act. Under that clause it was certainly not competent to the District Magistrate to entertain an application for the commitment being ordered when the Sessions Judge had refused such an order. The only question then is whether the District Magistrate could act *suo motu*. We must hold that he could not, for otherwise the salutory prohibition now enacted would be rendered nugatory. It could not have been intended that what the District Magistrate might not do on an application could yet be done by him by his dispensing with an application. The reason for the prohibition is the avoidance of a conflict between the orders of two District authorities having co-ordinate powers in the matter, and that reason applies equally to cases when they act *suo motu*. In this view the commitment that was made under the District Magistrate's order was invalid and we accordingly set it aside under section 215, Code of Criminal Procedure.

1902, *December* 10. **I. L. R. 26 Mad. 478.**

Before Sir Arnold White, Chief Justice.

SAMI AYYA (ACCUSED), PETITIONER, *v.* EMPEROR, RESPONDENT.‡

Criminal Procedure Code—Act V of 1898, s. 423—Power to "reverse the finding and sentence"—Reversal by Deputy Magistrate of an order acquitting accused on a charge of theft—Validity.

‡ Criminal Revision Case No. 484 of 1902.

Digitized by Google

A Deputy Magistrate has no power, under section 423 of the Code of Criminal Procedure, to reverse an order acquitting an accused person of a charge of theft. The words "reverse the finding and sentence" in clause 1 (*b*) of that section mean reverse the finding upon which a conviction is based, and do not empower the appellate tribunal [or at any rate an appellate tribunal other than the High Court] to reverse or set aside an acquittal.

Queen-Empress v. *Jahanulla*, [I.L.R., 23 Calc., 975), explained.

CHARGES of being members of an unlawful assembly, rioting, hurt and theft. The facts material to the point decided are set out in the judgment. The accused were convicted, by the Second-class Magistrate, on all the charges except that of theft. On this charge he acquitted them. The accused appealed against that conviction to the Deputy Magistrate, who committed them to the Sessions on a charge of dacoity. Against that order, first accused preferred this criminal revision petition.

T. Rangachariar for petitioner.

The Public Prosecutor for the Crown.

ORDER.—In this case the accused were charged with being members of an unlawful assembly, rioting, hurt and theft. The Second-class Magistrate acquitted them on the charge of theft on the ground that they had acted without dishonest intention. He convicted them on the other charges. The accused appealed. On appeal, the Deputy Magistrate was of opinion that on the facts as found by the Second-class Magistrate the offence of theft must be held to have been committed, and that the offence committed by the accused amounted to dacoity, and he committed them to Sessions.

One of the facts as found by the Second-class Magistrate was that the accused had acted without dishonest intention. The finding of the Deputy Magistrate, in the face of this, that the accused must be held to have committed theft, cannot possibly be supported. The Public Prosecutor, in fact, did not attempt to support it.

A further point taken on behalf of the accused was that it was not competent for the Deputy Magistrate to reverse the acquittal on the charge of theft. In effect, no doubt, the Deputy Magistrate reversed the acquittal on the ground of theft, since, so long as the acquittal on the charge of theft stood, a necessary ingredient of the offence of dacoity was wanting and a committal to Sessions on a charge of dacoity would have been clearly wrong.

I am of opinion that, under section 423, Criminal Procedure Code, the Deputy Magistrate had no power to reverse the acquittal on the charge of theft. It seems to me the words "reverse the finding and sentence" in clause 1 (*b*) mean reverse the finding upon which a conviction is based, and do not empower the appellate tribunal (or at any rate an appellate tribunal other than the High Court) to reverse or set aside an acquittal. The case of *Queen-Empress* v. *Jahanulla*(1) to which my attention has been called by the Public Prosecutor is distinguishable on the ground that the appellate tribunal in that case (the High Court) was a tribunal which had jurisdiction to set aside an acquittal.

The order of the Deputy Magistrate must be set aside.

The Public Prosecutor has urged that the sentences are inadequate and has asked that, as a Court of Revision, I should enhance the sentences. The sentences are no doubt light, but I do not think they are so clearly inadequate as to call for the interference of this Court.

[1] I. L. R. 23 Calc. 975.

Digitized by Google

1902, *December* 10. **I. L. R. 26. Mad. 480.**

Before Sir Arnold White, Chief Justice.

KARUPPANA SERVAGARAN AND ANOTHER, PETITIONERS, *v.* SINNA GOUNDEN AND ANOTHER, RESPONDENTS†

Criminal Procedure Code—Act V of 1898, s. 195 (b)—Sanction for prosecution—Appeal against order according sanction—Disposal of appeal after expiration of six months from order according sanction—Application for extension of time—"Good cause."

Sanction was accorded for a prosecution, and an appeal was preferred against the order, which was not disposed of until after the expiration of six months from the date of the order. Upon an application being made for an extension of time for the prosecution of the accused.

Held, that good cause had been shown for the extension.

(*Note*:—This case is Ref. 8 C. W. 797.)

PETITION for an extension of time for the prosecution of the accused. Sanction was granted on 17th March 1902; an appeal was preferred by the accused against the order according sanction, and that appeal was disposed of on 19th September, being two days after the expiration of the six months during which the prosecution should have been commenced. An extension of time was now applied for.

T. R. Venkatarama Sastri for petitioners.

ORDER.—Sanction for prosecution was granted on 17th March 1902. The six months during which the sanction remained in force [section 195 (*b*), Criminal Procedure Code] expired on 17th September 1902. The parties against whom the sanction was granted appealed from the order granting the sanction, but this appeal was not disposed of till 19th September, two days after the expiration of the six months.

Following the decision of this Court in *Ramudu Chetty* v. *Rungasaumy Chetty*(1) I hold that good cause has been shown for extending the time and I extend it to 10th January 1903.

1902, *December* 11. **I. L. R. 26 Mad. 481.**

Before Mr. Justice Subrahmania Ayyar, Mr. Justice Davies and Mr. Justice Benson.

SUBUDHI RANTHO AND FIFTEEN OTHERS (PETITIONERS) *v.* BALARAMA PUDI (COUNTER-PETITIONER)*

Penal Code—Act XLV of 1860, s. 424—Dishonest removal by tenants of crops—Ryots holding on varam tenure—Crops in possession of ryots—No taking out of possession—Offence.

If ryots holding land on varam tenure remove crops for the purpose of protecting them from injury or damage owing to delay or refusal on the part of the Zemindar to perform his part in the harvesting or division, such a removal would not be dishonest within the meaning of section 424 of the Indian Penal Code. But where it is proved that the crops have been removed dishonestly, or fraudulently, an offence is committed under section 424, even though the Zemindar, under the terms of the tenancy, acquires no property in the share due to him until the ryots have delivered it to him.

CHARGES of theft and of being members of an unlawful assembly, against nineteen tenants of the Zemindar of Chinna Kemedi. The facts as found by the Second-class Magistrate were as follows:—

"The Zemindar of Chinna Kemedi is entitled as landlord to a share of the produce of the village of Kullangi and the defendants Nos. 1 to 19 as tenants fully admit the title of the Zemindar. The Zemindar either takes the share of the produce directly from the tenants or leases it out to a third man

† Criminal Miscellaneous Petition No. 227 of 1902.

(1) Criminal Mis. Petition No. 78 of 1901 (unreported).

* Criminal Revision Case No. 78 of 1902.

Digitized by Google

for a money rent. For Fasli 1310 he leased the village to one Sukkuru Narusa Subudhi and others. The renters were in enjoyment of the lease for 9 months of the fasli but were not obeyed by the tenants for the rest of the fasli. The tenants cut the paddy crop and heaped it as they liked contrary to custom prevailing in all mustajary villages in the zemindari and tried to cause loss to the mustagers or renters. The renters finding their authority set at naught by the tenants relinquished their lease to the Zemindar. There was no lease executed except an order from the Zemindar to the ryots to give the landlord's share to the renters, and the Zemindar had to accept the relinquishment and sent his own servants, (1 P. W.), Balam Padhi, being one of them, to look after the crop. The 1st P. W. went to the village and finding every thing in disorder, put seals of the Zemindar on all the paddy heaps as a sign that either party should not tamper with them. Then again Budumkayala Balakristnamma Subudhi was sent by the Zemindar with a similar order to the tenants and he asked the tenants to thresh the crop, but they refused to do so, saying that they wrote a registered letter to the Zemindar about the matter and that they would not act as he wanted them to do. The renter went away and represented to the Zemindar that the tenants did not obey him. He also relinquished the village, as he says. The tenants (defendants Nos. 1 to 19) threshed the paddy at last on 20th April last and carried it away. The other defendants, it is said, directed them to thresh the paddy and carry it away."

The Magistrate also found that certain allegations made by the accused against the Zemindar in petitions sent to the Collector and the police, were not true and contained statements that were false; also that the accused were responsible for delay which had occurred in threshing the paddy; also that their action in carrying away the paddy was not *boná-fide*. He convicted fifteen of the accused and sentenced them to pay fines, with imprisonment in default. The accused appealed to the General Deputy Magistrate of Gunsur, who dismissed the appeals and confirmed the sentences.

The accused preferred this criminal revision petition.

T. Rangachariar and *V. Ramesam* for petitioners.

ORDER.—This is not the case of a farm labourer or cultivator for wages, nor that of a person entitled to the crops jointly with others as partners. It is the case of an ordinary ryot in a zemindari holding on a varam tenure. Until the delivery by the tenant to the Zemindar of the share of the crop payable to the latter, the possession of the whole crop, inclusive of such share, is clearly with the tenant. This being so, the removal of even the whole crop by the tenant is not a taking of anything out of the possession of the Zemindar. Consequently the first element in the offence of theft is wanting. But the removal, if dishonest or fraudulent, constitutes an offence under section 424 of the Penal Code, even if, as contended for the petitioners, the Zemindar acquires no property in the share due to him until delivery, a point on which it is unnecessary for us to express an opinion in the present case. None of the unreported cases to which our attention has been drawn conflict with this view. If the removal was for the purpose of protecting the ryot from injury or damage to the crops owing to the Zemindar's delay or refusal to perform his part with reference to the harvesting and division of the crop, such removal would of course not be dishonest. But in this case it has been proved that the crops were removed dishonestly and we are not prepared to say that that finding is not well grounded. The result is that we alter the conviction from theft under section 379, Indian Penal Code, into one under section 424 of the Penal Code, leaving the conviction under section 143 to stand. We see no reason to interfere with the sentences.

Digitized by Google

APPELLATE CRIMINAL—FULL BENCH.

1902, *Nov.* 6. *Dec.* 9. 1903 *Feb.* 20. **I. L. R. 26 Mad. 554.**

Before Mr. Justice Subrahmania Ayyar, Mr. Justice Davies and Mr. Justice Benson.

VIJIARAGHAVA CHARIAR (THIRD ACCUSED), PETITIONER, *v.* EMPEROR (COMPLAINANT), COUNTER-PETITIONER.*

Indian Penal Code—Act XLV of 1860, ss. 153, 296—Wantonly giving provocation with intent to cause riot—Disturbing a religious assembly—Religious procession on highway—Legality—Chanting hymns by ordinary worshippers.

By a decree in a civil suit, the Tengalai sect in a certain district were declared entitled to hold certain offices connected with a temple, and as such office-holders it was their duty to recite certain hymns in processions. The rights of the Vadagalai sect as ordinary worshippers were not affected by the decree, but the Vadagalais were ordered not to interfere with the Tengalais in the recital of the hymns otherwise than as ordinary worshippers. Subsequently to this decree, a religious procession was being conducted along a public highway. The Tengalais walked in front, chanting the hymns. In the rear, at such a distance that the Tengalais were not likely to hear them, the Vadagalais followed, also chanting hymns. A complaint was in consequence laid by a member of the Tengalai sect, charging the Vadagalais (1) with wantonly giving provocation with intent to cause riot and (2) with voluntarily disturbing an assembly lawfully engaged in religious worship.

Held, that neither offence had been committed.

Per DAVIES, J. (without deciding whether religious processions in public streets in India are "lawful" or not).—The Vadagalais had not exceeded their rights as ordinary worshippers and had not intended to provoke a breach of the peace, and were consequently not guilty of an offence under section 153. Moreover, no "disturbance" had been proved within the meaning of section 296.

Per SUBRAHMANIA AYYAR, J.—The object of section 296 of the Indian Penal Code presumably is to secure freedom from molestation when people meet for the performance of acts in a quiet spot vested for the time in assembly exclusively; and not when they engage in worship in an unquiet place open to all the public as a thoroughfare. The user of a highway for religious worship is altogether wanting in lawfulness. There is no peculiar right known to the law as a right of procession. Though the law accords to members of a procession no recognition in their collective capacity, yet the fact that a number of persons use a highway together for some common purpose does not detract in any way from such use being lawful; but as the circumstances attending a procession may in consequence of their being inconsistent with the paramount idea of passage be of such a character as to render the user by the processionists otherwise than lawful and as carrying on worship on a highway is of that character, it cannot be affirmed that the Tengalais on the occasion in question constituted an assembly engaged in worship lawfully, within the meaning of section 296 of the Indian Penal Code.

Per BENSON, J.—The contention that the Tengalais were not "lawfully" engaged in religious worship because they were engaged in it on a highway, could not be accepted. There is nothing illegal in India (where highways have from time immemorial been used for the passing of religious processions), in a procession or assembly engaging in worship while passing along a highway. If it were necessary to refer the origin of the use of highways for religious processions to a dedication of the highway to such use, such a dedication could reasonably be presumed, history, literature and tradition showing that such processions have formed a feature of the national life from the earliest times, and it being unreasonable to suppose that a dedicator would make a reservation against religious processions, which would be wholly opposed to the sentiment of the community. A religious procession is entitled to the special protection given by the Penal Code to assemblies engaged in religious worship. In the present case, however, no "disturbance" had been proved, and consequently no offence had been committed.

Per BHASHYAM AYYANGAR, J. (at the first hearing, the Chief Justice dissenting).—Inasmuch as the Vadagalais had acted as ordinary worshippers, which they were not prohibited from doing under the decree, the act complained of was not illegal within the meaning of sections 153 and 43 of the Indian Penal Code. With regard to the charge under section 296, the accused had not been shown, on the facts as found, to have voluntarily caused disturbance to an assembly lawfully engaged in the performance of religious worship. No assembly can be so

* Criminal Revision Case No 292 of 1902.

Digitized by Google

"lawfully engaged" (within the meaning of that section), on a highway, unless it be established or can be reasonably presumed that the dedication of the highway was subject to such user. User of a highway as a place of worship is not the legitimate user of it as a highway. The conviction was wrong on this ground and on the ground that in fact no disturbance had been proved.

CHARGES of wantonly giving provocation with intent to cause riot and of voluntarily disturbing an assembly lawfully engaged in religious worship. Fifteen persons were charged as aforesaid under sections 153 and 296, respectively, of the Indian Penal Code, and one other, namely, the eleventh accused, was charged with abetment of those offences. The Joint Magistrate convicted the third and seventh accused on both charges, and he convicted the eleventh accused of abetment. He imposed a fine of Rs. 100 on each accused, with fifteen days' simple imprisonment in default of payment. The convictions and sentences were confirmed, on appeal, by the Sessions Judge.

The facts as well as the material portions of the prayer in Original Suit No. 295 of 1886, as well as of the decree in that suit, are set out and explained in the judgments of the High Court.

The third accused preferred this criminal revision petition.

V. Krishnaswamy Ayyar for petitioner.

The advocate-General, the Public Prosecutor and *K. Narayana Rau* in support of conviction.

Sir ARNOLD WHITE, C. J.—These are petitions against convictions for offences under sections 153 and 296 of the Indian Penal Code. It appears that on the occasion of the festival of Vedanta Desikar, the god of the Velakadi Kovil temple is taken in procession through the public streets to the gate of the temple of another deity, a distance of some two miles. It is customary for the Tengalai goshti or assembly to march in front of the god singing a Tamil chant known as a Prabandham, which is a portion of the ritual in which the Vadagalai inhabitants of Conjeeveram as well as the Tengalai inhabitants are entitled to take part, the latter in the capacity of office-holders and as worshippers, the former only in the capacity of worshippers. It is also customary for the Vadagalais to form a goshti behind the god, forming part of the procession and chanting the Sanskrit Vedam. On the occasion in question a body of Vadagalais interposed themselves behind the god and between the god and the goshti engaged in chanting the Sanskrit Vedam and took part in the procession, chanting a different portion of the Prabandham from that which was being chanted by the Tengalais who were marching in front of the god. There is no evidence that the Tengalais in front could hear the actual words which were being chanted by the Vadagalais behind, but there is evidence that they could hear that Tamil, and not Sanskrit, was being chanted. Certain of the Tengalais left their part of the procession and approached the Vadagalais requesting them to desist. This the latter declined to do. There was no actual disturbance as the police were in attendance, but the police evidence is to the effect that if the police had not been present there would have been a riot. The Vadagalais admit that the introduction into the procession of a separate goshti for the purpose of reciting the Prabandham is an innovation. On the other hand, the Tengalais concede, as I understand the case, that the Vadagalais are entitled to join forces with the goshti which marches in front of the god for the purpose of taking part in the procession and chanting the Prabandham. Their right to do this, in the capacity of worshippers, and of worshippers only, as contradistinguished from office-holders, appears to have been established by the judgment of this Court in Second Appeal No. 1423

Digitized by Google

of 1899, Original Suit No. 295 of 1886, instituted in the District Munsif's Court of Chingleput. In the suit of 1886 the Tengalais claimed a declaration of their exclusive right to the Thodakkam and Adhyapakam miras in question, and asked for an injunction restraining the Vadagalais from reciting the Thodakkam, Mantram and Prabandham either jointly with the Tengalais or separately in procession within the temple and outside the Prakaram. The decree declared the exclusive rights of the Tengalais to the Adhyapokam miras with the exception of the Thodakkam, one of the rights of the Adhyapakam miras being declared to be the exclusive right of reciting the usual Tamil Prabandhams in the temple of Deepaprakasaswami at Velakadi Kovil and in the shrines attached to it. It was also declared that the Tengalais were entitled to discharge the duties on all occasions on which the ceremony was performed, as well at the time of procession as at services in the temple and its shrines. The terms of the injunction were that the Vadagalais were to be restrained from interfering with the Tengalais in the recital of the Mantram and Prabandham otherwise than as ordinary worshippers. The effect of this, I take it, is to recognize a right in the Vadagalais in their capacity as worshippers, as distinguished from the "exclusive rights" to be enjoyed by the Tengalais as office-holders, which are referred to in paragraph 4 of the decree.

The question therefore comes to this.—In acting as they did on the occasion in question did the Vadagalais exceed the limits of their right as "ordinary worshippers" which is recognized by the decree—in other words, did they, as between themselves and the Tengalais, do that which was illegal in the sense that it amounted to a breach of the terms of the injunction to which I have referred. Mr. Krishnaswami Aiyar laid much stress upon the fact that in the suit of 1886 the Court did not allow the injunction to go in the terms asked for by the Tengalais, viz., that the Vadagalais should be restrained from reciting the Prabandham jointly with the Tengalais, or separately in procession within the temple and outside the Prakaram. Now the effect of the decree in the suit of 1886, as I understand it, is that Vadagalais are entitled to recite the Prabandham either jointly with the Tengalais or separately, either within the temple, or without, if, in so doing, they do not interfere with the Tengalais in their recital of the Prabandham, except in so far as interference is necessarily involved in the exercise by the Vadagalais of their rights as ordinary worshippers. Now, first, was there interference? On the facts found I think there was. If the Vadagalais had been content to form a separate Vadagalai goshti for the purpose of chanting the Prabandham at the rear of the procession, it might have been otherwise. But by interposing themselves immediately behind the god they formed an integral part of the procession. Admittedly this was an innovation. It seems to me that by so interposing themselves and by chanting a different portion of the Prabandham from that in which the Tengalais were engaged in front, in such circumstances that what they were doing came to the knowledge of the Tengalais in front, the Vadagalais interfered with the Tengalais in the recital of the Prabandham I do not lose sight of the fact that this took place in the public highway. The Vadagalais have of course as much right to use the public highway for the purpose of a religious procession as have the Tengalais. Paragraph 6 of the decree must no doubt be read by the light of paragraph 5; but, so reading it, I am of opinion that the effect is to restrain the Vadagalais generally, that is to say, whether the procession takes place within the temple or its shrines or without. If this is so, the ordinary rights enjoyed by Tengalais and Vadagalais alike as members of the public, as between themselves and in connection with the matters of controversy which are incessantly arising between them

Digitized by Google

are governed by the decision by which the Courts have from time to time attempted to define their respective rights.

Then, assuming there was interference, was the interference only that which was necessarily involved in the exercise by the Vadagalais of their rights as worshippers?

The learned Vakil who appeared for the petitioners was unable to inform me whether the taking part in the procession was part and parcel of the ritual of worship or not. If it is not, the Vadagalais cannot claim the benefit of the limitation imposed on the scope of the injunction by the words "otherwise than as ordinary worshippers." Assuming it is, it was open to the Vadagalais to follow the course hitherto adopted—to which as I understand no exception would, or could, have been taken by the Tengalais, viz., to fall in with them in front of the god and join with them in the chanting of the Prabandham. This has hitherto been regarded as a proper and sufficient method of discharging their religious obligations (if any) as "ordinary worshippers" so far as taking part in the procession is concerned. It seems to me that in attempting to assert a right to form a *goshti* of their own for the purpose of the independent recitation of the Tamil Prabandhan in a procession in which the Tengalais were engaged in exercise of their rights as office-holders in reciting the Prabandham, they went beyond their rights as "ordinary worshippers." In a second appeal which came before this Court in 1882 (Second Appeal No. 969 of 1882) this court upheld a judgment by the Munsif declaring the right of defendants to recite the same or different texts separately, provided that they followed at a reasonable distance behind the plaintiffs' *goshti* so as not to interfere with the plaintiffs' recitation. So far as the facts of that particular case were concerned, there may be no reason to question the soundness of the decision, but it affords one no assistance for the purpose of determining whether, on the facts of the case now before the Court, the Vedadgalais were within their legal rights in acting as they did. If, as in my view it was, the action of the Vadagalais was "illegal," I find no difficulty in holding that they acted malignantly or wantonly within the meaning of the section.

On the facts found in connection with the making of Mr. Scott's order—which was issued in connection with a different ceremony—I do not think it can be said that the Vadagalais acted under the *bonâ fide* belief that the authorities had sanctioned the innovation which they sought to introduce. The evidence shows that the provocation was in fact given and I think it must be taken that the Vadagalais knew that such provocation would be likely to cause a riot.

I also think there was "disturbance" within the meaning of this word as used in section 296, Indian Penal Code, and that the Tengalais were lawfully engaged in the performance of a religious ceremony not withstanding the fact that the cermony was being conducted in a public highway.

BHASHYAM AYYANGAR, J.—The main facts on which the decision of this case rests are not in dispute and an accurate statement of those facts coupled with a critical examination of the prayers in Original Suit No. 295 of 1886 and of the decree therein is sufficient in my opinion to show that the conviction of the third, seventh and eleventh accused by the Joint Magistrate which has been upheld in appeal by the Sessions Judge must be set aside as being bad in law.

During the celebrated annual festival at Conjeeveram in June 1901, in connection with the big temple there—which festival commencing on the 30th

Digitized by Google

or 31st May extended over 10 days—a festival in connection with another smaller temple which is independent of the big one and under the management of separate trustees, took place on the ninth day of the former. This minor festival consisted in the idol of Vedanta Desikar, the deity of the smaller temple, being taken in procession through the public streets over a distance of nearly two miles to the entrance of the big temple and then brought back. The idol was preceded at a short distance by a congregation (goshti) of the Tengalai Vaishnava inhabitants of Conjeeveram, whose exclusive right to the office of Adhyapaka miras in the said temple has been definitively established by the decree in the said Original Suit No. 295 of 1886. They were discharging the duties of that office, to which emoluments are attached, by reciting the Prabandham, after first reciting for a few minutes the Tengalai Mantram. Between them and the idol, in the procession, there was a passing crowd of devotees and worshippers. Behind the idol, at a distance of about 180 feet from the Tengalai goshti in front, marched a congregation of some Brahmin Vadagalai inhabitants of Conjeeveram reciting the Prabandham. Between this goshti and the idol, there was likewise a passing crowd of worshippers. This goshti in turn was followed by another goshti of some other Vadagalai Brahmins of Conjeeveram reciting the Vedas. The Prabandham is the sacred literature in Tamil consistiong of 4,000 stanzas and the Vedas, the sacred literature in Sanskrit. These two are common to both the Tengalai and the Vadagalai sects. The Tengalai Mantram (in Sanskrit) however, which is short and immediately precedes the recitation of the Prabandham, is peculiar to the Tengalais, just as the corresponding Vadagalai Mantram (also in Sanskrit) is peculiar to the Vadagalai sect each being addressed to the respective founders of the two rival sects.

It appears from the evidence of the second prosecution witness—who was Police Inspector in Conjeeveram form 1889 to 1900—that for sometime after 1889, the Tengalais and Vadagalais used to form one goshti jointly reciting the Prabandham in front of the deity, but this having led to a quarrel which resulted in a criminal prosecution and the conviction of some of the Vadagalais in connection with a festival of the big temple, they, since that time, used to form a separate goshti behind the idol and go in procession reciting the Vedas in connection with the festivals of both the big and the smaller temples. But during the annual festival in June 1901, on the occasion in question, some of the Vadagalais for the first time, formed themselves into another separate goshti, reciting the Prabandham and followed the idol of Vedanta Desikar when it was taken in procession to the big temple as above described. This new goshti marched between the idol and the old goshti of Vadagalais reciting the Vedas behind the idol. Two of the Tengalais brought this, as an innovation, to the notice of the then Inspector of Police, the third witness for the prosecution, and asked him to prohibit the Vadagalais from reciting the Prabandham. There being no disturbance or rioting, the Inspector of Police did not interfere in the matter. It appears from his evidence that when he was accompanying the Tengalai goshti he could hear only a ' confused noise of reciting, that he could not distinguish whether it was Sanskrit or Tamil, that the two Vadagalai goshtis were visible from where the Tengalai goshti was going and that the Tengalais had out-posts to tell them what was going on.

Five or six days prior to this, in connection with the third day festival of the *big temple*, one of the Vadagalai Brahmins, who joined the Tengalai goshti reciting the Prabandham in front of the god, appears to have been arrested, in consequence of which the remaining Vadagalais had to withdraw from that

Digitized by Google

goshti and when this matter was brought to the notice of the District Magistrate who was then present at Conjeeveram and it was represented to him that the Tengalais would not allow the Vadagalais to join with them and recite the Prabandham in peace, the District Magistrate arranged that the Vadagalais should form a separate goshti behind the idol and recite the Prabandham there, so as to avoid any breach of the peace ' by the Vadagalais and the Tengalais being close together ' by forming one goshti and reciting the Prabandham. This arrangement was, after some reluctance on the part of the Vadagalais to forego the honour of being in the procession in *front* of the deity along with the Tengalais, at last adopted at the procession on the morning of the fourth day of the festival in the presence of the District Magistrate himself and was since then continued throughout the remaining days of the festival of the *big temple*.

The dispute now in question arose on the adoption by the Vadagalais of the same arrangement in the procession in connection with the festival of the *smaller temple* also. The complainant in the case, a leader of the Tengalai party, preferred this complaint to the Joint Magistrate of Chingleput accusing several Vadagalais and one of the trustees of the smaller temple—a weaver by caste—who accompanied the procession in question, of the offences defined by sections 143, 153, 296 and 298 of the Indian Penal Code. The charges under sections 143 and 298 were not at all made out but the Joint Magistrate convicted the third and seventh accused under sections 153 and 296, Indian Penal Code, and the eleventh accused, the trustee, as abettor of those offences and sentenced each of them to a fine of Rs. 100 and the convictions and the sentences were upheld by the Sessions Judge in appeal.

Upon the above facts, it would of course, be impossible to sustain the the conviction unless the same be warranted by the decree in the said Original Suit No. 295 of 1886. That was a suit brought on behalf of the Tengalai Brahmin inhabitants of Conjeeveram against two sections of the Brahmin Vadagalai inhabitants therein, and the Sudra trustees of the smaller temple to establish the exclusive right of the Tengalai Brahmins to the office of Adhyapaka miras (including the Thodakkam) in the temple and to recover arrears of the emoluments of the office. One section of the Vadagalais and the trustees denied the existence of any such office in the temple, while the other section of the Vadagalais claimed the office exclusively for themselves. The prayer in the plaint, so far as it has a bearing upon the present case, was as follows:—

" (6) Plaintiffs pray for a decree declaring the exclusive right of the plaintiffs and the Brahmins of their sect to the Thodakkam Adhyapaka miras in question, for an injunction restraining the Thathachars and other Brahmins of the Vadagalai sect from reciting the Thadakkam, Mantram and Prabandham referred to in the plaint, either *jointly* with plaintiffs' sect or *separately*, or any other Mantram or Prabandham in the *sannadhis* referred to in the plaint, during the daily and special puja and fastivals and in procession within the temple and outside the Prakaram, " etc. (The italics are mine.)

The District Munsif in paragaph 36 (2) of his judgment after, adverting to the injunction prayed for restraining the defendants from reciting the Thodakkam, Mantram and Prabandham " either jointly with the plaintiffs or separately " or any other Mantram or Prabandham in the temple during the daily and special puja and festivals and in procession within the temple and outside it, states as follows :—

Digitized by Google

"Clearly the plaintiffs cannot have such an injunction. The defendants may be ordered not to interfere with the plaintiffs in the recital of the Mantram and the Prabandham otherwise than as ordinary worshippers."

The reservation of the right of the Vadagalais as "ordinary worshippers" is explained as follows in paragraph 35 of the judgment:—"It is not denied by the plaintiffs that the Vadagalais are entitled to recite the Prabandham in the temples in dispute as ordinary worshippers. Nor have the plaintiffs any right to deny to the Vadagalais their privilege of reciting the Prabandhams as ordinary worshippers." It will be observed that there is no reference here to their reciting the Prabandham as ordinary worshippers only in *conjunction* with the Tengalai goshti or officeholders. The material portion of the decree runs as follows.—

"I declare that—

(1) The Adhyapaka miras, except Thodakkam of the plaint Deepaprakasaswami temples and the shrines, including Vedanta Desikar's shrine attached to the said temple, belongs exclusively to the Tengalai sect residing at Conjeeveram.

(4) The rights of the Adhyapaka miras are—

(i) the exclusive right of chanting the Mantram "Sri Sailesa Dayapatram,"

(ii) the exclusive right of reciting the usual Tamil Prabandhams in the temple of Deepaprakasaswami at Velakadi Koil and in the shrines, including the *Sannadhi* of Vedanta Desikar, attached to it;

(5) The Tengalais are entitled to discharge the duties on all occasions, in which the ceremony is performed, as well at the time of procession as at services in the said temple and its shrines.

(6) I order that an injunction be issued to the Vadagalais and Thathachars, defendants, enjoining them to abstain from interfering with the Tengalais in the recital of the Mantram and Prabandham, otherwise than as ordinary worshippers."

There was a similar dispute between the Tengalai and Vadagalai Brahmins of Conjeeveram, in regard to the office of Thodakkam and Adhyapaka miras in the *big temple*, which had previously been decided in 1882, on substantially the same lines (*Krishnasami* v. *Krishnama*(1)).

The conviction under section 153, Indian Penal Code, can be upheld only if the accused in forming themselves into a separate goshti on the highway and reciting the Prabandham, behind the idol, when it was taken in procession on the day in question, acted "illegally," "malignantly or wantonly" and thus gave provocation to the Tengalai goshti, intending or knowing it to be likely that such provocation would cause the offence of rioting to be committed. Having regard to the antecedent relations between the two rival sects, there can be no doubt that if the action of the Vadagalais was illegal, they ought to have known that it was likely to provoke the Tengalais and to lead to a breach of the peace. The two questions, therefore, which have to be considered in connection with the charge under section 153, Indian Penal Code, are [i] whether the Vadagalais acted "illegally" in forming themselves into a separate goshti and reciting the Prabandham on the above occasion and (ii) whether such action was "wanton" or "malignant.

(1) I.L.R., 5 Mad., 313.

Digitized by Google

Both the Joint Magistrate and the Sessions Judge apparently assume that the injunction extends to processions outside the temple and also to the Vadagalais reciting the Prabandham *separately* and that the decree permits the Vadagalais only to *join* the Tengalai goshti and recite the Prabandham along with them. The Joint Magistrate in construing that portion of the decree which restrains the Vadagalais from interfering with the Tengalais, in the recital of the Mantram and the Prabandham, otherwise than as ordinary worshippers, says that the words "ordinary worshippers" "must be construed very literally and that can only be by assuming that what is meant is that the Vadagalais, if they *join* at all in the Tamil recitation can do so only by *joining* with the Tengalai goshti and singing with them." (The italics are mine.) The Sessions Judge also concurs in this view and holds that if the Vadagalais wish to recite the Prabandham they must go along with the Tengalais and recite, as ordinary worshippers, the same portion of the Prabandham that the Tengalais are reciting and that they cannot be regarded as reciting the Prabandham as ordinary worshippers if they form a separate goshti of their own in a different part of the procession and recite a different portion of the Prabandham as they are proved to have done in the present case. This view proceeds altogether on a misconstruction of the decree in question and a misapprehension of the expression "ordinary worshippers" occurring therein. A breach of an injunction contained in a decree of a competent Civil Court, is no doubt "illegal" (section 43, Indian Penal Code) but it must be clearly made out that the act complained of is prohibited by the decree; and this is specially so, when, as in the present case, it is sought to bind by the decree persons who were not actually parties thereto, but were only constructively represented therein. It will be seen from the extracts given above that the plaintiffs in Original Suit No. 295 of 1886 prayed for an injunction restraining the Vadagalais from reciting the Prabandham either *jointly* with the plaintiffs' sect or *separately*, during the daily and special puja and festivals and in processions within the temple and outside the temple, but that the decree only declared the exclusive right of the Tengalais to discharge the duties of the office of Adhyapaka miras, on all occasions in which the ceremony is performed, as well at the time of procession as at services in the said temple and its shrines and enjoined the Vadagalais to abstain from interfering with the Tengalais in the recital of the Mantram and the Prabandham, otherwise than as ordinary worshippers. (The italics above are mine.) It seems to me, therefore, perfectly clear that the plaintiffs' prayer that the Vadagalais be restrained from reciting the Prabandham separately—either individually or in a goshti—was not granted and must, therefore, under explanation III to section 13, Criminal Procedure Code, be taken to have been refused. As regards the other prayer, *i. e.*, that the defendants be restrained from reciting the Prabandham jointly with the plaintiffs, that was granted only with a substantial qualification, viz., that as ordinary worshippers they may interfere and join with the Tengalais in the recital of the Mantram and the Prabandham and such qualification was engrafted upon the injunction notwithstanding that the exclusive right of the Tengalais to the office of Adhyapaka miras was established and declared by the decree. The office-holders, therefore, in a body or goshti, chant the Prabandham in discharge of their duties in the performance of the services and are exclusively entitled to the emoluments appertaining to that office. Instead of the Vadagalais, whose right to the office (except to that of Thodakkam) was negatived by the decree, being absolutely restrained from *interfering* with the Tengalais by joining them and jointly chanting the Prabandham with them, while the latter were discharging the functions of their office, the decree un-

Digitized by Google

ortunately allowed them to *interfere* as ordinary worshippers, thereby implying that they might take part in the discharge by the Tengalais of the functions of their office of Adhyapaka miras, but merely as ordinary worshippers or volunteers, not entitled to a distributive share along with the office-holders in the emoluments of the office. The office-holders, as may have been expected, naturally resent such intrusion and the complainant at the conclusion of his evidence in the present case states as follows:—

"The Vadagalais can join our goshti with our permission. If we don't give permission, they cannot come. If they join as ordinary worshippers we should not object; but they must not repeat anything that we don't."

The result therefore has been that when, at the beginning, the Vadagalais used to form one goshti with the Tengalais there were, as might have been expected, breaches of the peace, and in consequence the Vadagalais used to form a separate goshti behind, chanting the Vedas or Sanskrit prayers. But on the occasion in question they also formed another goshti chanting separately the Prabandham. This goshti being separate from the Tengalai goshti in front of the idol, and at a distance of about 180 feet, each goshti would not hear what was being recited by the other; and the evidence is that, at the same time, the two goshtis were chanting different stanzas of the Prabandham. There is nothing whatever in the decree to prevent the Vadagalais of Conjeeveram, either individually or in a goshti, from reciting the Prabandham separately from and quite independently of the office-holders. Whether they do so jointly with, as apparently permitted by the decree, or separately from the Tengalai goshti of office-holders, in either case, they do so and can do so only as ordinary worshippers who can claim no share in the emoluments attached to the office of Adhyapaka miras. If, as admitted, they have committed no breach of the injunction, by forming themselves into a separate goshti and reciting the *Vedas*, while the Tengalai goshti in front of the idol was chanting the Prabandham, it is difficult to conceive how the Vadagalais contravene the terms of the injunction by forming themselves into a separate goshti and reciting the *Prabandham*. Both the Joint Magistrate and the Sessions Judge seem to consider that the Vadagalais cannot be regarded as "ordinary worshippers" unless they interfere with the Tengalai goshti and join it in reciting the Prabandham. This is based altogether on a misapprehension of that expression in the decree. The Brahmin Tengalai inhabitants of Conjeeveram have an interest in the temple, not only as worshippers or devotees like the Vadagalais, but also as office-holders of the Adhyapaka miras The expression "ordinary worshipper" is used in the decree as it was already used by the High Court in *Krishnasami* v. *Krishnama*(1) in the sense of a person who is interested in the temple as a mere worshipper or devotee as distinguished from one entitled to any office therein and carrying on worship in discharge of the functions of that office. The Vadagalai Brahmins, who either individually or in a body recite the Prabandham, the Vedas or any other hymns, do so only as "ordinary worshippers" and they can be neither more nor less than such when they recite the Vedas or the Prabandham separately from the Tengalai goshti.

On the grounds, therefore, that the extravagant prayer made in the plaint—that the Vadagalais should be restrained from reciting the Prabandham *separately* from the Tengalai goshti—was not granted, that within the meaning of the decree, the Vadagalais in reciting the Prabandham separately from the Tengalai goshti interfere with the Tengalai goshti, if it is an interfer-

[1] I.L.R., 5 Mad., 313.

Digitized by Google

ence at all, only as ordinary worshippers—in which capacity they are permitted by the decree to interfere with the Tengalais in the recitation of the Prabandham—, and that there is nothing whatever in the decree to warrant the assumption that the Vedagalais can, as ordinary worshippers, recite the Prabandham only by *joining the Tengalai goshti* and reciting the Prabandham along with them,—I am decidedly of opinion that the act complained of is not illegal within the meaning of sections 153 and 43 of the Indian Penal Code (see also *Queen Empress* v. *Kahanji* (1)).

I am also of opinion that the action of the Vadagalais cannot be regarded as "malignant" or "wanton" within the meaning of section 153, having regard to the fact that such action was in pursuance of the arrangement which was introduced by the District Magistrate about the same time, in connection with the processions of the idol of the *big temple*, in view to avoid friction between the two sects and consequent breach of the peace. Technically no doubt the District Magistrate's sanction had reference only to the processions connected with the *big temple* and it could not be relied upon as a *bar* to the prosecution if the action of the accused, in reference to the procession of the deity of the *smaller temple*, were otherwise illegal. But it has an important bearing on the question as to whether the action of the accused in forming a separate goshti and reciting the Prabandham—which is not repugnant to the Tengalais—was "malignant" or "wanton." The rival sects interested in both the temples are the same and their respective rights, so far as the question under consideration is concerned, are identical in respect of both the temples and the same have been declared and settled in substantially the same terms, though by decrees passed in two different suits. The action of the District Magistrate who was present at the spot on the occasion of the annual festival of the big temple was, in my opinion, very proper and eminently calculated to preserve peace between the rival sects and he rightly declined to change the arrangement introduced by him. The Vadagalais must therefore be regarded as having acted in perfect good faith and not "malignantly" or "wantonly," when during the same festival, though in connection with the *smaller temple*, the deity of which was being taken in procession to the *big temple*, they adopted the same arrangement of forming a separate goshti behind the idol, reciting the Prabandham.

The question, however, not having been raised, I do not pause to consider whether paragraph 5 of the decree can rightly and reasonably be construed as in any degree granting the prayer in the plaint as to processions *outside* the temple—especially as neither the local authority in whom the public streets are vested nor the owner of the freehold in the soil thereof was represented in the suit.

The conviction under section 296, Indian Penal Code, is equally unsustainable. The Joint Magistrate says that though the two goshtis were a considerable way apart and the Tengalais in front could hear little or nothing of what was going on in the rear, beyond perceiving that the Vadagalais were chanting in Tamil, yet he must hold that the worship by the Tengalais was disturbed, because the fact that two or three of the Tengalais went back and remonstrated with the Vadagalais shows that their mind was disturbed. The Sessions Judge, too, finds that there was a disturbance because "the assembly of persons lawfully engaged in the performance of religious worship is the unit and the assembly is said to be disturbed when some particular members of it are disturbed" and "one of the Tengalais actually went back and took down

(1) I. L. R. 18 Bom. 753

Digitized by Google

the names of some members of the Vadagalai goshti on a piece of paper." In my opinion, the facts as thus found cannot legally amount to voluntarily causing disturbance to an assembly lawfully engaged in the performance of religious worship or religious ceremonies and I presume that the Joint Magistrate and Sessions Judge would not have convicted the accused under section 296 but for their having arrived at the conclusion with reference to the charge under section 153, that the action of the Vadagalais in forming themselves into a separate goshti reciting the Prabandham was illegal, being in contravention of the decree in Original Suit No. 295 of 1886. If their action was not illegal there is no more reason, under the circumstances (see section 79, Indian Penal Code), for convicting the accused of the offence under section 296 than there would be for convicting the Tengalais for disturbing the Vadagalai goshti, which, like the Tengalai goshti, was engaged in the performance of religious worship. In a recent case before this Court (Criminal Revision Case No. 151 of 1902) in which, in connection with a procession relating to the big temple, a Vadagalai Brahmin was convicted under section 296, but the conviction was quashed by a Bench of this Court, of which I was one of the members, in revision, on the ground that the facts as found by the Magistrate did not amount to a disturbance within the meaning of section 296, it was observed that "in the decision of such sectarian disputes and cases, public streets or highways cannot in law be regarded as temples or places of worship belonging, or dedicated for the time being to the votaries or the communities concerned, simply because a customary religious procession is passing over a public street or highway" and I adhere to the opinion therein expressed. Within the meaning of section 296, Indian Penal Code, no assembly can, in my opinion, be lawfully engaged in the performance of religious worship or religious ceremonies on a *highway* unless it be established or can be reasonably presumed that the dedication of the highway was subject to such restriction and user. Otherwise persons riding on horses or driving in vehicles at the time and thereby effectually disturbing the worship by interrupting or suspending the same will be liable to conviction under section 296, Indian Penal Code. In a country where there are so many rival sects and religions intolerant of one another, it will be impossible to presume a dedication of a highway by members of one sect or religion for religious processions or worship to be conducted on such highway by followers of other rival sects and religions. If it be asked what the ancient common law of India was as to the use of public streets and highways by different races, castes and outcastes and as to their use for religious and other processions by various sects, the answer would obviously be one which, according to the law as administered by the British Courts, could not be tolerated for a moment. Using the highway as a place of worship is not the legitimate user of it as a highway "for the purpose of using it in order to pass and re-pass or for any reasonable or usual mode of using the highway as a highway" *Harrison* v. *Duke of Rutland*(1), *Hickman* v. *Maisey*(2): "see also Dicey's 'Constitution Law' (Fourth Edition) at p. 430), and the conversion of the highway, though but temporarily, into a place of sectarian worship, amounts, in law to a trespass upon the freehold in the soil of the highway and in cases in which there is a statutory vesting of the highway in a local authority also to a trespass upon the highway itself (*Harrison* v. *Duke of Rutland*(3), *Hickman* v. *Maisey*(4), *Reg.* v. *Pratt*(5) *Reg.* v. *Graham and*

[1] L.R. (1893), 1 Q.B., 142 at p. 146.
[2] L R. (1900), 1 Q.B., 752 at pp. 755, 757, 758.
[3] L.R. (1893), 1 Q.B., at pp. 146, 147, 151.
[4] L.R. (1900), 1 Q.B., 755.
[5] 4 E. & B., 860; 24 L. J. (M.C.), 113.

Digitized by Google

Burns(1), and *Rex.* v. *Carlile*(2)). It does not follow that the use of a highway for a purpose which does not amount to an indictable offence is necessarily lawful. If the user is for a purpose which amounts to a trespass (civil) on the freehold in the soil, it is unlawful, as was held both in *Harrison* v. *Duke of Rutland*(3) and *Hickman* v. *Maisey*(4). The two recent English cases are very instructive on the question of what constitutes a reasonable use of a highway as such and the principles therein enunciated will have an important bearing on the decision of questions that often arise in this country as to the user of a highway by particular sects for religious, devotional and similar purposes. No doubt in every country and particularly in this country highways are by sufferance used for purposes which are decidedly in excess of their legitimate and reasonable use as a highway—especially when such use has been customary—and the same is tolerated and no notice is taken of the trespass thus committed on the highway and the freehold in the soil, so long at any rate as such use of the highway does not cause any special or serious inconvenience or obstruction. *In Ex parte Lewis*(5), Wills, J., in holding that "a claim on the part of persons so minded to assemble in any numbers and for so long a time as they pleased to remain assembled upon a highway (Trafalgar Sq.) to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage" and that there is "no authority whatever in favour of it" observed as follows:—"Things are done every day in every part of the kingdom without let or hindrance, which there is not and cannot be a legal right to do and not infrequently are submitted to with a good grace because they are in their nature incapable, by whatever amount of user, of growing into a right." The remarks of Wills, J., apply with peculiar force in this country to a large and increasing class of religious, sectarian and other similar processions, to preaching on highways and to the common use of public streets and highways by occupants of houses abutting on the same, for various purposes connected with the weaving and other industries and for drying paddy and other grains and for similar purposes. But doing a thing by sufferance is one thing and claiming it as lawful and invoking the aid of the executive authority to do it, as of right, is quite another thing.

On the grounds, therefore, that there was neither in law, nor in fact, any disturbance of the Tengalai goshti, that if the Tengalai goshti can be lawfully regarded as engaged in the performance of religious worship or religious ceremonies, on the highway, on the occasion in question, the Vadagalai goshti was equally lawfully engaged in the performance of religious worship on the same occasion, but that in my opinion neither assembly can be regarded as lawfully engaged in the performance of religious worship on a highway which it is not alleged or shown was dedicated as a highway subject to such restriction and user, I think the conviction under section 296, Indian Penal Code, should also be quashed.

So far as the conviction of the eleventh accused as an abettor is concerned, it is, in my opinion, clearly wrong. The case against him is simply that as the Sudra trustee of the temple, "he was a man in authority" and "was conducting the procession and that he made no attempt to stop the formation of the separate goshti, but rather encouraged it." The Sessions Judge in appeal says nothing specially about the eleventh accused. In my opinion the conviction of the eleventh accused as an abettor is in any event entirely unwarranted and ought to be set aside.

(1) (1883), 4 Times Law Rep., 212 at p 226.
(2) 6 C. and P., 636.
(3) L.R. (1893) 1 Q.B. 142, at p. 146, 147 and 151.
(4) L.R. (1900) 1 Q.B. 752, at p. 755.
(5) L.R. 21 Q.B.D., 191 at p. 197.

Digitized by Google

In consequence of this difference of opinion, the case was referred to a Full Bench consisting of Subramania Ayyar, Davies, and Benson, JJ.

The case came on for hearing in due course, and the Court delivered the following judgments :—

SUBRAHMANIA AYYAR, J.—It is necessary first to consider the charges against the third and seventh accused, whom the eleventh accused has been charged with abetting.

Taking up the charge under section 153 of the Indian Penal Code, the question on which practically the case turns is whether the recitation by the two accused during the procession in question of Prabandhams or Tamil hymns, was illegal, not on the ground that it was against any usage of the institution, but with reference to the decision in Original Suit No. 295 of 1886, in the District Munsif's Court of Conjeeveram. That decision only declared that the Tengalais were entitled to the office of Adhyapakam, and in that capacity, as usual, to recite the Prabandham on all the prescribed occasions of worship, without let or hindrance by the Vadagalais. It did not in the least affect the rights of the Vadagalais as ordinary worshippers. Having regard to the fact that that suit was entirely in relation to an office, it must, even if the decision had been silent as to the rights of the Vadagalais as ordinary worshippers, not office-holders, be taken that such rights were left untouched ; but the decision is not silent on the matter. It, in express terms, refers to and preserves the rights of the Vadagalais as ordinary worshippers, to recite the Prabandhams even in the company of and jointly with the office-holders whose duty it is to recite them on such occasions. The attempt on behalf of the prosecution to construe this reference in the decision to the right of the Vadagalais to so join in the recitation, as a declaration that the Vadagalais are disentitled from reciting except in conjunction with the office-holders, is on the face of it untenable. The Tengalais, as Adhyapakars, are subject to a duty to recite Prabandhams, the performance of such duty entitling them to the emoluments of the office They cannot, in consequence of their being Adhyapakars, claim an exclusive right to recite them and as the recitation of Prabandhams is a recognised form of worship both with the Vadagalais and the Tengalais, every Vadagalai must *prima facie* be held entitled to recite them by way of worship otherwise than in conjunction with the office-holders. No doubt, if the Vadagalais join the office-holders in the recitation on occasions of worship, it stands to reason that they should do so without in any manner interfering with the due recitation by the office-holders. In such circumstances the office-holders would be entitled to insist that the Vadagalais should recite only those hymns which they themselves were reciting, as otherwise they would be interfered with in the due discharge of their duties. But there is nothing to prevent a Vadagalai by himself or Vadagalais in a body reciting the Prabandhams separately from the office holders and in doing so reciting, verses different from those which the Adhyapakars may be reciting, provided that that is done without interference with the Adhyapakars.

Such being the rights of the Vadagalais, did the accused on the occasion in question interfere with the office-holders by the recitation complained of ? Clearly not. Admittedly, the parties were at that time at a distance of 150 feet from each other. Between them stood the body of tom-tom beaters doing their part of the work and those who carried the idol, as well as the motley crowd which assembles at these festivals. Having regard to the bustle and confusion inevitable on such occasions, it is impossible for the office-holders to have heard anything of the recitation by the accused. This is almost conclu-

Digitized by Google

tively proved by the fact that the office-holders had to send out persons to ascertain whether any recitation by the Vadagalais was taking place. It must consequently be held that the accused did not interfere with the office holders, by reciting Prabandhams as they did and that they were not therefore guilty of any illegal act so as to bring them within the purview of section 153.

The charge under section 296 of the Indian Penal Code may now be examined. Presumably the object of the section is to secure freedom from molestation when people meet for the performance of acts which ordinarily take place in some quiet spot vested for the time in the assembly exclusively; and one cannot but feel serious doubts as to whether that section was intended to secure to persons who choose to engage in worship in an unquiet place open to all the public as a thoroughfare the immunity from disturbance due to those who meet to worship in a church, a mosque, or temple or other place appropriate for such a purpose.

Turning to the language of the provision, it is clear that the persons assembled are given a right in their collective capacity. What is thereby constituted an offence has no necessary reference to the individuals forming the assembly and a disturbance punishable under the section may result from acts which involve no violation of their personal rights. The precise point for determination is whether the Tengalais on the occasion in question were an assembly lawfully engaged in religious worship within the meaning of the section, and having regard to the fact that they were then on a highway, an affirmative answer to the question would assume that a procession on a highway has a specific legal character and that the members of the procession have a right to use a highway as a place of religious worship.

Are these assumptions well founded? In the discussion of these questions it is scarcely necessary to point out that we should not proceed on the supposition that processions are social phenomena peculiar to this country and consequently that the rule to be laid down in cases like the present must necessarily be different from what prevails in other countries, inasmuch as such a supposition would be incorrect. In the words of the judgment in *In the matter of Frazee* "It has been customary from time immemorial in all free countries and in most civilized countries for people who are assembled for common purposes to parade together by day or reasonable hours at night with banners and other paraphernalia and with music of various kinds. These processions for political, religious and social demonstrations are resorted to for the express purpose of keeping up unity of feeling and enthusiasm and frequently to produce some effect on the public mind by the spectacle of union and numbers. They are a natural product and exponent of common aims and are valuable factors in furthering them."(1)

With these prefatory remarks let us proceed to examine what are the fundamental legal principles underlying the use of a highway by processions. Such principles, it is obvious, must be essentially the same as those on which the analogous so called right of the public to use public places for holding meetings must rest, and which have been most carefully examined by Professor Dicey. His observations apply with equal force here. The learned author thus points out the fallacies of the ordinary conceptions on the subject:— "The notion that there is such a thing as a right of meeting in public places arises from more than one confusion or erroneous assumption. The right of public meeting—the right of all men to come together in a place where they may lawfully be for any lawful purpose . . . . is confounded with the

(1) 63 Michigan 396; 6 American State Reports, p. 311 at p. 315.

Digitized by Google

totally different alleged right of every man to use for the purpose of holding a meeting any place which in any sense is open to the public. The two rights, did they both exists, are essentially different and in many countries are regulated by totally different rules. It is assumed again that squares, streets or roads which every man may lawfully use are necessarily available for the holding of a meeting. The assumption is false. A crowd blocking up a highway will probably be a nuisance in the legal, no less than in the popular, sense of the term, for they both interfere with the ordinary citizen's right to use the locality in the way permmitted to him by law" (Dicey's 'Law of the Constitution,' 4th edition, page 430). The learned author's exposition of the true legal aspect of meetings in those places is as follows:— "The right of assembling is nothing more than a result of the view taken by the Courts as to individual liberty of person and individual liberty of speech. There is no special law allow *A*, *B*, and *C* to meet together either in the open air or elsewhere for a lawful purpose, but the right of *A* to go where he pleases so that he does not commit a trespass and to say what he likes to *B* so that his talk is not libellous or seditious, the right of *B* to do the like, and the existence of the same rights of *C*, *D*, *E*, and F and so on *ad infinitum* leads to the consequence that *A*, *B*, *C*, *D* and a thousand or ten thousand other persons may (as a general rule) meet together in a place where otherwise they each have a right to be for a lawful purpose in a lawful manner" (*Ibid* p. 258). Interference with a lawful meeting will therefore not be, to use the words of the same writer "an invasion of a public rights, but an attack on the individual rights of A and *B*, and must generally resolve itself into a number of assaults on definite persons, members of the meeting. A wrong-doer who disperses a crowd is not indicted or sued for breaking up a meeting but is liable (if at all) to a prosecution or an action for assaulting A, a definite member of the crowd."

Another learned writer, Mr. Justice Collett, in his comments on the Indian Penal Code, takes the same view and in addition puts processions on a highway on precisely the same footing as public meetings. His observations are as follows :—" It may be convenient here just to notice the popular error that there is some such a right as to hold a meeting in a public place or to move in procession along public streets. There can, in truth, be no such right other than or apart from that of each individual to pass and re-pass in a public place and therefore no right of public meeting or procession (however lawful the purpose) in any sense paramount to general convenience . . . . Apart from all express law there can *ex natura rei* be no such right as to hold meetings or to move in procession in public places" (Commentaries on the Indian Penal Code, pages 235, 236).

Before passing to another authority bearing on the present question, it is perhaps well to point out that the alleged right of procession must not be confounded with a reasonable interruption limited as to time such as that caused by fairs and markets, subject to which interruption a dedication of a highway may lawfully be made. The alleged right of procession suggests a right on the part of as many of His Majesty's subjects as may be so disposed, to occupy a highway whenever and so often as they may wish for a procession, or possibly for more than one procession to be conducted by persons of conflicting views and sympathies, beliefs and opinions. That such a right cannot be rested on dedication as at present known to the law follows from what was said by Wills and Grantham, JJ., *In Ex parte Lewis*(1) with reference to the alleged right of

[1] L.R., 21 Q. B. D., 191 at p. 197.

Digitized by Google

meeting. The learned Judges say: "We were informed by Mr. Lewis that there was no statute conferring or recognising such rights. He alleged that they rested upon dedication. It is, however, a species of dedication at present unknown to the law and of which there is no trace in our law books. The only dedication in the legal sense that we are aware of is that of a public right af passage of which the legal description is a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and re-pass without let or hindrance."

Upon the authorities I have thus referred to it is perfectly clear that, in the eye of the law, a procession as such has not any specific legal character and that the only rights claimable by those constituting a procession on a highway are what appertain to them as individuals using the highway. Such right is to pass and re-pass, allowing these words the largest possible construction with due reference to all the exigencies of the public. No doubt, many acts may be done on a highway by persons using it which, though not strictly passing and re-passing, would yet be in the nature of incidents to such passing and re-passing. Though it would not be easy to enumerate them exhaustively and precisely, yet there can be no difficulty generally in drawing the line between what is so incidental and what is not, for nothing can be treated as so incidental which is inconsistent with, in the words of Collins, L. J., "the paramount idea that the right of the public is that of passage" (*Hickman* v. *Maisey*(1)). But in no view can it be held that the doing of anything so altogether foreign to that paramount idea as the carrying on of religious worship on a highway is a proper incident to the right of passage even according to the most extended notions that can reasonably be entertained of that right. Though ordinarily it would, no doubt, be difficult to hold that persons passing along a highway appropriate it for purposes of worship merely by doing such equivocal acts as singing hymns and the like, yet this case presents no difficulty, inasmuch as here the prosecution case itself is that what the Tengalais were doing on the occasion in question did constitute religious worship and it is impossible to avoid the conclusion that such user of the highway was altogether wanting in lawfulness.

The soundness of this view is supported not only by decisions in cases where the question of lawfulness arose with reference to the owner of the freehold, but also by decisions in cases where such question arose with reference to the liability of those who were bound to maintain a highway in a proper state of repair but who had neglected to do so. *Stinson* v *City of Gardiner*(2) is a leading decision on the point. The law as to the proper use of a highway was there laid down in the following terms :—" All persons have the right to pass and re-pass upon public roads so long as they violate no laws for the common good or for the protection of individuals. Within these restrictions they are entitled to the use of the highway for the purposes of travel whether the object of that travel is business or pleasure, whether they pass on foot, with carriages or in the various modes which each individual may choose to adopt Any part of the highway may be used by the traveller and in such direction as may suit his convenience or taste provided he therein conforms to all laws and well-settled rules connected with such use Children are not restricted in passing and re-passing upon the streets and roads more than adults. And the same rules are to be applied equally to all in regulating the use of highways for the objects designed." And notwithstanding the broad view thus

[1] L.R., [1900], 1 Q. B; 752 at p. 757.
[2] 42 Maine, 248; 66 American Decisions, 281, cited in 'Beven on Negligence,' p. 431.

Digitized by Google

taken of the law it was held that " when children appropriate a part of the road for their sports and cease to use it as a way for travel, the town or city through which the way passes is not responsible for injuries which may be received by any of the children so engaged, although the injuries may take place through a defect in the road." And as at the trial of the case the Judge had refused to instruct the jury that if the plaintiff, a child, had, at the time of the accident, been using the highway as a play-ground, and not as a traveller she could not recover, a new trial was granted on the ground that if, as alleged, she had been using the road as a play-ground and not as a traveller, the use for purposes of travel must be regarded as entirely suspended and that she had been using the ground for an object altogether different from that contemplated by the statute which imposed on the city the liability to maintain the road in repair. Precisely the same decision wa given in *Blodgett* v. *City of Boston*(1). Ahd in *Mc Carthy* v. *Portland* (2) it was held that a person using a highway wholly for the purpose of horse racing could not recover for injuries happening to him, because the town did not afford him and his horse a safer and more perfect track. In *Vosburg* v. *Moak* (3), also cited in 'Beven,' page 126, it was held that where a number of persons were playing a game of cricket on a highway and the ball hit a passer-by, not only the particular individual who sent the ball, but all the persons engaged in the play were liable in damages as joint tort-feasors, inasmuch as they combined in using the highway for a purpose foreign to the appropriate user of the same.

Compare *Truro Corporation* v. *Row* (4) where the mere fact of the defendant marking off a part of the foreshore for depositing oysters dredged by him in deep water, and claiming property in the oysters deposited therein was held to have rendered his user of the foreshore in excess of the right accorded to every subject to use the foreshore for the purpose of fishing.

To guard against any misconceptions arising with reference to the view adopted by me, I would observe that, upon the principles already expounded, processions *per se* are quite unobjectionable and that, as rightly decided in the American Case of *S.* v *Hughes.* (cited in a note to " Russell on Crimes,' 6th edition, vol. I, page 787) " a peaceable procession in the streets of a town if lawful and if the streets are not obstructed more than is ordinarily the case under such circumstances is not an indicatable offence on the part of the members composing it. " The cases of *Parthasarathi* v. *Chinnakrishna*(5), *Muthialu Chetty* v. *Bapun Saib*(6), *Sundram Chetti* v. *The Queen*(7) cannot, in my opinion, be taken to lay down anything more.

I may further observe that even when the members of a procession transgress the limit of lawful user of a highway as by setting up an untenable right to carry on worship there, they are not necessarily guilty of a common nuisance, for to be indictable there must be much more than a user not lawful. Though authority may scarcely be necessary for such an obvious proposition I may quote a few lines from *Fairbanks* v. *Kerr*(8) as there allusion is made, by way of an illustration, to the very user in question here. Agnew, J., said : " A street may not be used in strictness of law for public speaking, even preaching or public worship, but it does not follow that every one who speaks or preaches in the street or who happens to collect a crowd there by other means is, therefore, guilty of the indictable offence of nuisance. His act may become a nuis-

(1) 8 Allen, 241, cited in the note to the above case in 66 American cases, at p. 284.
(2) Cited in the same note. (3) 1 Cushing, 453 ; 48 American Decisions, 613.
(4) L.R., (1902), 2 K.B., 709. (5) I.L.R., 5 Mad., 305. (6) I.L.R., 2 Mad., 140.
(7) I.L.R., 6 Mad., 203. (8) 70 Pennsylvania St., 86; 10 American Rep., 664, at p. 669.

Digitized by Google

ance by his obstruction of the public highway, but it will not do to say it is a nuisance *per se*." This statement, which I adopt as perfectly correct, must be sufficient to repel the idea that every user of a highway, such as that in question here, could be interfered with without reference to the question of a real nuisance having been caused thereby (as to some of the considerations governing the determination of which see *Original Hartpool Collieries' Co.* v. *Gibb*(1) and *Attorney-General* v. *Sheffield Gas Consumers' Co.*(2) So long as that is not the case the authorities should and would treat the matter in the spirit in which Cozens-Hardy, J, viewed the case of the clergymen who set up a right to deliver sermons to the public on the foreshore. Though upon the authority of *Blundell* v. *Caterall*(3) where it was held that, according to the common law, the public at large having the right to go on the foreshore for two purposes only, viz., navigation, commerce, etc., and for fishing, they could not go there for the purpose of bathing, the right set up by the clergymen was negatived, yet an injunction against him was refused for reasons thus humourously expressed by the learned Judge:—" There are persons who derive satisfaction from listening to the addresses of the defendant, and the defendant derives satisfaction from delivering these addresses. I cannot conceive why they should be deprived of their innocent pleasure." [*Llandudno Urban District Council* v. *Wood*(4)].

But it is one thing thus to take an indulgent view of the matter, and quite another to treat the members of a religious procession on a highway as an assembly lawfully engaged in worship there for the purpose of fixing criminal responsibility on others under section 296 of the Indian Penal Code, on the extraordinary ground that they were similarly engage there an in the teeth of the rule that all His Majesty's subjects have in respect of the highway equal rights.

My conclusions on this part of the subject may be put shortly thus: There is no peculiar right known to the law as a right of procession; though the law accords to members of a procession no recognition in their collective capacity, yet the fact that a number of perons use a highway together for some common purpose does not detract in any way from such use being lawful; but as the circumstances attending a procession may, in consequence of their being inconsistent with the paramount idea of passage already referred to, be of such a character, as to render the user by the processionists otherwise than lawful and as carrying on worship on a highway is of that character, it cannot be affirmed that the Tengalais on the occasion in question consituted an assembly engaged in worship lawfully within the meaning of section 296 of the Indian Penal Code.

The result is that the charges against the third and seventh accused under both sections fail and with them those against the eleventh as abettor.

Before concluding it seems but right to observe that one specially objectionable feature of this case is that the accused have been convicted and punished for acting in obedience to, or, at all events, in the spirit of the District Magistrate's order passed in connection with a fastival in the principal temple of the place, which was going on at the same time, whereby the Vadagalais were prohibited from joining the Tengalais in the recitation, but were allowed to recite separately—an order evincing judgment and discretion, inasmuch as whilst it prevented collisions between these rival sects, it secured to them both the opportunity of worshipping peaceably.

(1) L. R., 5 Ch. D., 713 at p. 721.
(2) 3. De. G. M. & G., 304 at p. 339.
(3) 5 B. and Ald., 263; 24 R. R., 353.
(4) L. R., [189], 1 Ch., 705.

Digitized by Google

I would, therefore, reverse their conviction, set aside the sentences passed on them, and acquit them. The fines, if levied, should be refunded.

DAVIES, J.—Taking the facts to be as found, namely, that the Vadagalais joined the procession in a separate goshti or group and recited one portion of the Prabandham in Tamil, while the Tengalais infront were reciting another portion also in Tamil, and that this action of the Vadagalais was an innovation it seems to me that they committed neither of the offences charged against them or any other offence.

To constitute an offence under section 153 of the Penal Code the Vadagalais must have been acting illegally and also with the intention of provoking a riot. On the first point the case for the prosecution is that the Vadagalais were acting illegally in that they were disobeying the injunction of a Civil Court. But on reading the judgment and decree of the Civil Court referred to, I can find to injunction prohibiting the Vadagalais from doing what they did. On the contrary I find that the particular prayer of the Tengalais that the Vadagalais should not be allowed to recite the Prabandham either jointly with or separately from the Tengalais, that is, that the Vadagalais should not be allowed to recite the Prabandham at all, was expressly refused. While the exclusive right of the Tengalais to the emoluments attached to the performance of the service of recitation was declared the right of the Vadagalais to recite Prabandham "as ordinary worshippers" was recognized and was reserved to them. No attempt was made to define their rights as ordinary worshipbers. It was not laid down that they must worship singly or by twos or by threes and not in a large group, nor that they must march together with the Tengalais and not separately, nor that they might not utter Tamil—these being matters of ritual which are beyond the provience of a Civil Court to determine. Therefore, it cannot be said that the Vadagalais in the present instance exceeded their rights as ordinary worshippers and cosequently they did not act "malignantly or wantonly by doing anything which is illegal." Of course, if they, being five or more, had attempted to enforce their rights by means of criminal force or show of crininal force, they would have been amenable to the criminal law, but they did nothing of the kind here. Now comes the second point, that is, whether they were intending to provoke a breach of the peace, and in regard to this I must also hold them to be innocent. By separating themselves from the Tengalais and going far behind them with the idol between, they were only following the directions of the District Magistrate in respect to a similar procession carried on at about the same time and place for the express purpose of preventing a breach of the peace. So that the canviction for the offence under section 153 of the Penal Code entirely fails.

As to the other offence under section 296 of the Penal Code, disturbing a religious assembly, the case for the prosecution is that the recital by the Vadagalais disturbed the recital by the Tengalais by, it would seem, the noise it made, but the facts show that this could not have been the case. In the first place a certain amount of noise is of the essence of these street processions of a deity. It is not alleged that whatever the noise was that the Vadagalais made it drowned all other noises, and from the evidence it would appear that it did not reach the ears of the Tengalais, who were well away in advance, so long as they remained there. It was only by some of the Tengalais coming back to where the Vadagalais were reciting that it was known they were reciting and in Tamil. If they had been reciting in Sanskrit, however loudly, the Tengalais could have had no objection, because the right of the Vadagalais to form a separate group reciting in Sankrit is admitted. So that the head

Digitized by Google

and front of the Vadagalais offending even in the eyes of the Tengalais was really nothing more than their reciting in Tamil instead of in Sanskrit. This could not have been a "disturbance" of the worship of the Tengalais within the meaning of section 296 of the Penal Code, unless it prevented the Tengalais from performing their part of the worship which it never did The conviction under this section, therefore, in my opinion, also fails. I wish to offer no opinion as to whether religious processions in public streets in India are "lawful" or not, as from my point of view the decision of the question is unnecessary for the disposal of this case. I would quash both the convictions and acquit the three accused. The fines inflicted on them, if levied, must be refunded.

I should add that the whole proceedings in the Criminal Courts have been taken upon the erroneous view that the sole right of the Tengalais was a sole right to worship instead of a sole right to the emoluments attaching to the worship.

BENSON, J.—With regard to the charge under section 153, Indian Penal Code, the two questions for decision are, firstly, whether the action of the accused Vadagalais in forming a separate group (goshti) behind the idol, and there singing the Tamil hymn (Prabandham) was in contravention of the injunction contained in the decree of the Civil Court, and, secondly, whether it was "wanton" or "malignant." If their action was in contravention of the decree, it was "illegal" within the meaning of that word as defined in section 43, Indian Penal Code, and having regard to the previous disputes between the two sects, there can be little doubt that it was also "wanton" and "malignant" unless the accused *bonâ fide* believed that they were acting in accordance with the orders of the District Magistrate, who, as Magistrate, had the power to regulate the processions in such a way as to prevent a breach of the public peace. If their action was not "illegal," no offence under section 153 could have been committed. If it was "illegal," it must also appear that it was "wanton" or "malignant" in order to justify the conviction. On both points I am of opinion that the decision must be in favour of the accused. The decree established the exclusive right of the Tengalais as office-holders and to the enjoyment of the emoluments of the office, and it restrained the Vadagalais from interfering with the Tengalais by reciting the hymns as office-holders, though it expressly preserved the right of the Vadagalais to recite the hymns as "ordinary worshippers." The exact order or ritual to be followed by "ordinary worshippers" is naturally not defined in the decree, but there is nothing in it to prevent a Vadagalai, or a group of Vadagalais from reciting the hymns as ordinary worshippers in any part of the procession, provided that they do not do it in such a way as to interfere with the office-holdrs discharging their duty as such. In the present case there was no such interference, and, therefore, no illegality in the action of the Vadagalais, and no offence under section 153. Even if the action of the Vadagalais was illegal, it would, I think, be difficult to say that it was "wanton" or "malignant," since it was in accordance with the orders of the District Magistrate in regard to the kindred processions to the big temple which had been going on for the previous four days—orders which the District Magistrate issued with a view to preventing the rival sects coming into collision and which were carried out under his own supervision and were successful in achieving the object aimed at. No special order was issued as regards the procession out of which the present prosecution arose, but the circumstances were so similar to those connected with the big temple processions as to raise a strong presumption in favour of the *bona fides* of the

Digitized by Google

accused, a presumption which is not rebutted by the evidence or by other circumstances connected with the procession.

As regards the offence under section 296, Indian Penal Code, viz., "voluntarily causing disturbance to an assembly lawfully engaged in the performance of religious worship and ceremonies," I cannot accept the contention that the Tengalais were not "lawfully" engaged in religious worship because they were engaged in it on a highway. No doubt a higway is primarily, intended for the use of individuals passing and re-passing along it in pursuit of their ordinary avocations, but in every country, and especially in India, highways have, from time immemorial, been used for the passing and re-passing of processions as well as of individuals and there is nothing illegal in a processions or assembly engaging in worship while passing along a highway, any more than in an individual doing so. No doubt, if a religious, or any other procession, interferes with the ordinary use of the highway by persons not members of the procession, the procession may be prohibited or controlled by the proper authorities, and I take it that no Court would convict a person under this section on an allegation that he voluntarily disturbed a religious procession if he could show that he was only using the road in the ordinary way and with due regard to the rights of others equally entitled to use it. But, subject to such control and the rights of others entitled to use the highway, there is, in my judgment, nothing illegal in a procession engaging in worship on a highway In a case referred to in a note to 'Russell on Crimes,' page 787, sixth edition, it was held that "a peaceable procession in the streets of a town if lawful and if the streets are not obstructed more than is ordinarily the case under such circumstances, is not an indictable, offence on the part of the members composing it."

The same view was accepted as beyond dispute by Turner. C. J., and Muttusami Ayyar, J., in the case of *Parthasarathi* v. *Chinnakrishna*(1) where it was stated that persons of whatever sect "are entitled to conduct religious processions through the public streets, so that they do not interfere with the ordinary use of such streets, by the public and subject to such directions as the Magistrate may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace." This passage was referred to with approval in the recent case of *Shadagopachari* v. *Rama Row*(2) in both of which the dispute was between the same rival sects as in the present case.

Again, in the case of *Muthialu Chetti* v. *Bapun Saib*(3) Turner, C. J., and Muttusami Ayyar, J., said: "It is a right recognized by law that persons may, for a lawful purpose, whether civil or religious, use a common highway by parading it attended by music so that they do not obstruct the use of it by other persons." Again in the Salem Full Bench Case *Sundram* v. *The Queen*(4) Turner, C. J, reaffirmed in no uncertain terms the right to go in procession through the public streets subject to the control of the Magistrate and referred to previous decisions of this Court in support of his view, and Innes, J., said: "I entirely concur with the Chief Justice in his exposition of the law relating to processions which is in accordance with the decisions of this and of the late Sadr Court for many years past."

Lord Esher. M. R., has well expressed the necessity for caution in restricting the use of highway by a too narrow reference to their primary purpose as a means of merely passing and re-passing. Referring to the judgment

(1) I. L. R., 5 Mad; 305.
(2) I. L. R., 26 Mad., 376. (3) I. L. R., 2 Mad., 140. (4) I. L. R., 6 Mad., 203.

Digitized by Google

in *Reg.* v. *Pratt*(1) he says: "I must observe that I think that if the language of Earle, J., and of Crompton, J., in *Reg.* v *Pratt*(1), were construed too largely the effect might be to interfere with the universal usage as regards highways in this country in a way which would be mischievous, and would derogate from the reasonable exercise of the rights of the public. Construed too strictly it might imply that the public could do absolutely nothing but pass or re-pass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that this is so. Highways are, no doubt, dedicated *primâ facie* for the purpose of passage; but things are done upon them by every body which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser" (*Harrison* v. *Duke of Rutland*(2)).

This passage is referred to with approval by Collins, L. J., in *Hickman* v *Maisey*(3) and he adds "now primarily the purpose for which a highway is dedicated is that of passage as is shown by the case of *Dovaston* v. *Payne*(4) and, although in modern times a reasonable extension has been given to the use of the highway as such, the authorities show that the primary purpose of the dedication must always be kept in view. The right of the public to pass and re-pass on a highway is subject to all those reasonable extensions which may, from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilized, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of public is that of passage."

with these remarks I entirely agree. The practice of using the public highways for religious processions has existed in India for thousands of years. History, literature and tradition all tell us that religious processions to the village shrines formed a feature of the national life from the very earliest times. That alone is sufficient to raise a presumption that it is lawful and to throw on those who allege it to be unlawful the onus of showing that it is forbidden by law, but this it admittedly is not. The law recognizes the use of the highway by processions as lawful, and gives the Magistrate and superior officers of Police power to direct the conduct of assemblies and processions through the public streets and to regulate the use of music in connection with them, and to prevent obstructions on the occasion of such assemblies and processions (Madras Police Act XXIV of 1859 section 49). The law recognizes religious processions as lawful just as much as it recognizes other processions. If it were necessary to refer the origin of the use of highways for religious purposes to a dedication of the highway to such use, I should find no difficulty in presuming such a dedication, for it is unreasonable to suppose that the dedicator would make a reservation against religious processions which would be wholly opposed to the sentiment of the community, and of which we can find no trace in the history or customary law of the country. It is more reasonable to suppose that he would dedicate the highway to the purposes for which, in accordance with the custom of the country, it would be required by the people. The penal law of India extends a special protection against voluntary disturbance to all assemblies lawfully engaged in religious worship A procession is but an assembly in motion and if it is a religious procession, it is in my judgment, entitled to the special protection given by the Penal Code to assemblies lawfully engaged in religious worship.

(1) 4 E. & B., 860.
(2) L. R., [1893], 1 Q. B., 146.
(3) L.R. [1900], 1 Q. B., 757.
(4) 2 H. Bl., 527.

Digitized by Google

It may, or may not, be desirable to declare that religious processions on highways are unlawful, and that the processionists are trespassers, but this must be done, if at all, by the Legislature, not by the Courts.

I think, then, that it cannot be said that the Tengalais were not lawfully engaged in religious worship within the meaning of section 296, but I am of opinion that the other element required to constitute the offence, viz, "disturbance" has not been made out. No doubt, the Courts below have both held that there was "disturbance," but it is clear that this finding was based on the supposed illegality of the Vadagalais' action. That action, however, as we have seen, was not, in fact, illegal, and, that being so, it was not, in my judgment, of such a character as to cause any disturbance within the meaning of the section.

For these reasons I concur with my learned brothers in holding that the convictions must be reversed and the fines, if levied, refunded.

1902. *July* 22. **I. L. R. 26 Mad. 592.**

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

IN THE MATTER OF GOVINDU AND ANOTHER, PRISONERS†

Criminal Procedure Code—Act V of 1898, ss. 195, 233 to 239—Joinder of offences and accused—Preliminary enquiry—Power of Sessions Court to try offenders seperately where jointly committed for trial—s. 195—Sanction to prosecute—Notice to accused—Necessity.

The sections of the Code of Criminal Procedure which relate to joinder of charges (including section 239) refer to the trial of the accused. The ruling in *Subrahmania Ayyar* v. *Emperor*, (I. L. R., 25 Mad., 61), cannot be extended to a preliminary enquiry held by the Magistrate committing a case to a Sessions Court, so as to render the commitment itself illegal because there was misjoinder of offences or of offenders. In such a case, the Sessions Judge, if he considers it necessary, can frame charges against and try the accused separately.

There is no hard and fast rule that notice must be given in all cases to an accused person before sanction is accorded for his prosecution.

REFERENCE to the High Court for orders. It appeared from the letter of reference that two police constables had been committed to the Sessions Court of Kistna, by the Head-quarters Deputy Magistrate, for trial for an offence punishable under section 193 of the Indian Penal Code. The alleged false statements were made before the Bandar Bench Magistrates in a criminal case. An application for sanction to prosecute the two constables under section 211 of the Indian Penal Code was thereupon made to the Stationary Sub-Magistrate of Bandar, but was rejected on the ground that the falsity of the statements was not apparent from a perusal of the record in the Bench case, and, under the Ruling in *In the matter of the petition of Jai Prakash Lal*(1) the Sub-Magistrate was precluded from travelling beyond that record. Subsequently, under instructions from the Head-quarters Deputy Magistrate, the Sub-Magistrate held a preliminary enquiry under section 476 of the Code of Criminal Procedure, and sent the constables before the Deputy Magistrate to be tried for an offence under section 211. The Deputy Magistrate held that the facts did not disclose the commission of an offence under section 211, but one under section 193, and that as the accused were entitled to a separate trial, he could not himself deal with them except by commencing proceedings afresh. This, however for reasons which he recorded, he refused to do, and, instead, committed the accused to the Court of Session on a joint charge. One question referred was whether this joint committal was legal, having regard to

† Criminal Revision Case No. 272 of 1902.

[1] I.L.R., 6 All., 29.

Digitized by Google

section 239 of the Code of Criminal Procedure; and to the Ruling in *Subrahmania Ayyar* v. *King-Emperor*(1). A second question had reference to the sanction. It appeared that up to the time of committal to the Court of Session, the sanction accorded related to an offence under section 211 of the Indian Penal Code, and that no sanction had been accorded for an offence under section 193. Subsequently to the committal, however, the Public Prosecutor moved the Stationary Sub-Magistrate to accord sanction under the latter section, which he did. Objection was taken to this sanction, as it had been accorded without notice to the accused (*Pampupati Sastri* v. *Subba Sastri*(2)).

BHASHYAM AYYANGAR, J.—I do not think that there are proper grounds for quashing the order of commitment and directing fresh enquiry separately against the two accused. So far as the question of sanction is concerned I do not think there is any validity in the objection. Apart from the sanction which has been obtained since the order of commitment (which sanction under the Ruling in *Pampapati Sastri* v. *Sabba Sustri*(2) cannot, I think, be held to be invalid by the Court which has to try the accused merely because the sanction was obtained without giving notice to the accused), the accused are not entitled to plead that they cannot be tried and convicted in the absence of a sanction under section 195, Criminal Procedure Code, for their being prosecuted for the offence of giving false evidence. The case was sent to the Committing Magistrate under section 476, Criminal Procedure Code on the same facts as those on which they have been charged by the Committing Magistrate with an offence under section 193, Indian Penal Code, instead of section 211, Indian Penal Code, the section mentioned by the Magistrate while sending the case under section 476, Criminal Procedure Code. The Committing Magistrate, who was bound to proceed according to law, was authorized to commit the case to the Sessions Court under section 347, Criminal Procedure Code, charging the accused with the offence which, according to law, they were guilty of on the facts with reference to which proceedings were taken against them under section 476, Criminal Procedure Code (*vide* also section 195 (5), section 230 and section 537 (*b*), Criminal Procedure Code). As regards the question of misjoinder it is quite clear that in the case of an offence under section 193, Indian Penal Code, the two accused cannot be tried jointly but ought to be charged and tried separately. The Sessions Judge ought to frame separate charges against them and try them separately just as if there had been two commitments, I do not think that the commitment should be quashed as illegal because the Magistrate held proceedings against the two accused jointly. The sections of the Criminal Procedure Code relating to joinder of charges, viz., 233, &c., and including section 239, refer to the trial of the accused. The ruling of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor*(1) followed recently by the High Court of Calcutta in *Gobind Koeri* v. *Emperor*(3) cannot, I think, be extended to preliminary enquiries held by Magistrates committing a case to the Sessions Court so as to render the commitment itself illegal, because there was misjoinder of offences or of offenders in the preliminary enquiry.

MOORE, J.—I agree. When the case came before him the Sessions Judge, if he considered that the accused persons should be tried separately, should have framed charges accordingly and gone on with the trial. The Criminal Procedure Code gives him full powers to do this. There is no hard-and-fast rule that notice must be given in all cases to an accused person before sanction is granted. The committal is not irregular and the Sessions Judge should proceed to try the case.

[1] I.L.R. 25 Mad. 61. [2] I.L.R. 23 Mad., 210. (3) I.L.R. 29 Calc. 385.

Digitized by Google

1903. *February* 9. **I. L. R. 26 Mad. 598.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

RAMAKRISHNA REDDI (FIRST PRISONER), APPELLANT, *v.* EMPEROR, RESPONDENT.*

Criminal Procedure Code—Act V of 1898, ss. 269. (3), 309—Sessions Judge sitting with jury—Charges of theft and administering drug—Opinion of only two jurors taken as assessors on second charge—Validity.

At the trial of an accused, before a Sessions Judge and a jury, for theft in a building [an offence triable by a jury] and for administering a noxious substance [an offence triable by assessors], the Judge took the verdict of the jury on the former charge, and took the opinion of only two of them [as assessors] on the latter :

Held, that, under sections 269 [3] and 309 of the Code of Criminal Procedure, the Judge should have taken the opinion of all the jury as assessors, on the latter charge, and that his failure to do so was not an "omission" or " irregularity " to which section 537 applied.

CONVICTIONS for theft in a building and for administering a stupefying substance with intent to facilitate the commission of an offence. Accused No. 1 was charged and tried as aforesaid, under sections 380 and 328 of the Indian Penal Code, before the Sessions Judge sitting with a jury. Accused Nos. 2 and 3 were charged with abetment of theft, under sections 109 and 379. The Judge directed the jury on the charge of theft, and they returned an unanimous verdict of guilty against first accused on the substantive offence, and against the accused Nos. 2 and 3 on the charge of abetment. The Judge then dealt with the charge against first accused under section 328. He took the opinion of two of the jurors, as assessors, on this charge. Their opinion was that the first accused was guilty. The Judge agreed, and sentenced first accused, under sections 380 and 328, to five years' rigorus imprisonment. He sentenced the other two accused to two years' rigorous imprisonment.

All the accused appealed.

The Public Prosecutor in support of the conviction.

JUDGMENT —As regards the offence of theft with which all the accused were charged, the jury were properly directed by the learned Judge and the appeals of the second and third accused have already been dismissed. With regard to the charge under section 328, Indian Penal Code, the Judge only took the opinion of two of the jurors, as assessors. He ought undoubtedly, under the provisons of sections 269 (3) and 309 of the Code of Criminal Procedure, to have taken the opinion of all the jurors as assessors. We do not feel satisfied that his failure to do this can be treated as an " omission " or " irregularity " to which section 537 of the Code of Criminal Procedure applies. We accordingly set aside the conviction under section 328, Indian Penal Code. The Judge passed one sentence in respect of both offences. We modify the sentence by sentencing the accused to four years' rigorous imprisonment under section 380 of the Indian Penal Code.

1903. February 23. March 19. **I. L. R. 26 Mad. 607.**

Before Sir Arnold White, Chief Justice, Mr. Justice Davies and Mr. Justice Benson.

ADAMS (ACCUSED), PETITIONER, *v.* EMPEROR (COUNTER-PETITIONER).§

Evtradition Act—XXI of 1879, ss. 4 and 6—Criminal Procedure Code, s., 4—Indian.

* Criminal Appeal No. 775 of 1902. § Criminal Revision Case No. 429 of 1902.

Digitized by Google

Penal Code, s. 40—Offence—Jurisdiction of Magistrate in Mysore to try and convict an European British subject for an act amounting to an offence under the Mysore law, but not an offence under the Indian Penal Code.

An European British subject was charged and tried before, and convicted by, a First-class Magistrate and Justice of the Peace appointed, under the Extradition Act, 1879, in and for the territories of Mysore. The act for which he was so tried and convicted (namely being in possession of mining materials) constituted an offence under the Mysore Mines Regulation, but was not an offence under the Indian Penal Code. It was contended, in revision, in the Madras, High Court that the conviction was wrong on the ground that a Justice of the Peace appointed under the Extradiction Act has no authority to deal with an offence committed by an European British subject against a law of the Mysore State.

Held, that the Magistate had power to try the accused, or to commit him for trial in the Madras High Court.

Per Sir ARNOLD WHITE., C. J.—Section 8 of the Act of 1879 extending to European British subjects in states in India in alliance with His Majesty the law relating to offences and to criminal procedure for the time being in force in British India ought not to be read so as to restrict the powers of the Governor-General which are declared by section 4 and which may be delegated to his officers under section 6. The word "offences" as used in section 6 of the Act of 1879 is not restricted to offences as defined by section 40 of the Indian Penal Code. Nor is it restricted to any definition of "offence" to be found in the Code of Criminal Procedure, although, as a matter of fact, the present definition of "offence" in the Code of Procedure (section 4 (o)), which is the same as that contained in the General Clauses Act is sufficiently wide to include the wrongful act with which the accused in the present case was charged.

CHARGE of being in unlawful procession of mining materials, under the Mysore Mines Regulation (III of 1897). The second accused, who was an European British subject, was tried and found guilty by a Magistrate, whose position was that of a First-class Magistrate and Justice of the Peace, and who had been appointed, under section 6 of the Foreign Jurisdiction and Extradition Act, 1879, in and for the territories of Mysore. The act for which the accused was charged and committed constituted an offence under the Mysore Regulation already referred to, but it did not amount to an offence under the Indian Penal Code. The Magistrate inposed a small fine.

The accused preferred this criminal revision petition.

Mr. Barton for accused.—By Regulation I of 1886, section 1, practically the whole of the chapter relating to European British subjects has been excluded from application in Mysore. [He referred to *Government of Mysore* v. *Fuller*(1). If a Justice of the Peace in Mysore tries a case as Justice of the Peace, an appeal lies to the High Court. But a Justice of the Peace, has no jurisdiction to try an European British subject, as a Justice of the Peace, and convict him under a special Act of a foreign country. One country cannot enforce the criminal law of another; and the Courts of British India cannot enforce the criminal laws of a Native State. [He referred to Story's Conflict of Laws' sixth edition, chapter 16, pages 812 and 814.] The trial by Mr. Plumer (the Magistrate who convicted the accused) was, in effect, a trial by a British Indian Court, though the actual trial took place in Mysore. [He referred to Dicey's 'Conflict of Laws,' edition of 1897, page 220.] The Magistrate's jurisdiction was conferred by the Extradition Act (XXI of 1879). The preamble and section 6 (under which Justices are apppointed) show that Magistrates can only administer the law of British India. Section 8 relates only to acts which are offences in British India, and section 11 shows that it was not contemplated that a foreign statute should be enforced. [He referred to the definitions of an offence in section 4 of the Criminal Procedure Code and section 40 of the Indian Penal Code, as explain-

(1) 5 Mysore Rep., 281; and Mayne's 'Crl, Law of India,' 269,

Digitized by Google

ed by sections 41 and 42.] Section 188 of the Criminal Procedure Code really re-enacts sections 9 and 10 of the Extradition Act, which were repealed by section 10 of the Criminal Procedure Code of 1882. So, if section 188 is read in its place, namely, after section 8 of the Extradition Act, the word " offence " must mean an offence punishable under the law in force in British India. The definition of stolen property in section 410, Indian Penal Code, expressly includes property found within or without British India ; yet it was held in *Empress* v. *Moorga Chetty*(1) that the Bombay High Court had no jurisdiction to deal with the case as the Indian Penal Code was not in force in the place where the property was found. [He also cited *Queen-Empress* v. *Natwarai*(2) and *Queen-Empress* v. *Ganpatroo Rámchandra*(3).]

The Acting Public Prosecutor (Hon'ble Mr. *Sankara Nair*) in support of the conviction.—The rules of English law having been found unworkable, many exceptions have been made, which are set out in Wharton, paras 15 and 811. [He also referred to Ilbert's ' Government of India,' page 108.] The rights of the Governor-General in Council were not created by the Extradition Act, but only regulated by it. See Ilbert, page 458. This jurisdiction is referred to in the Extradition Act as existing when the Act was passed. The jurisdiction which exists over British subjects in Mysore is set out in Mayne's ' Criminal Law,' page 259. If the Extradition Act is construed in the light of the fact that the Governor-General may delegate a jurisdiction which has all along been vested in him, section 6 will be found to have nothing to do with section 8. The jurisdiction is not created by section 8. And even if section 8 had not been enacted, the Governor-General could, under section 6, have delegated the powers of a First-class Magistrate—such as are defined in sections 446 and 447 of the Criminal Procedure Code. Section 8 enables Courts in British India to try European British subjects or native Indian subjects for offences under the Penal Code in Mysore. The result is that the Mysore authorities frame the offence, and the persons who offend are tried by the Governor-General in Council, or the Justice whom he appoints. Section 9 (now section 188 of the Criminal Procedure Code) provides the mode in which a British subject may be dealt with for committing offences out of British India and refers to all offences ; then, section 4 of the Criminal Procedure Code defines an offence. That section 8 of the Extradition Act does not give the jurisdiction to the Justices is shown by the fact that that section also refers to all native Indian subjects of His Majesty. Such subjects must in any case be governed by the Mysore laws. The real question is not the liability to conviction, but the machinery by which that liability is to be ascertained. [He also referred to articles 17 and 18 of the Instrument of Transfer of the Mysore Territories, dated March 1st, 1881, reproduced in Aitcheson's ' Treaties, ' Volume VIII, third edition *(1892)*. [These are sufficiently set out in the judgments.] He also referred to the decisions in *Rex* v. *Churchley* (4), *Rex* v. *Ryder*(5) and *Empress* v. *Moorga Chetty*(1) (where the act had been committed in Mauritius) and to *Queen-Empress* v. *Natwarai*(2) where the accused was a subject of a Native State to which the Extradition Act did not apply.] Appellate jurisdiction has been conferred on the High Court, by notification, in the case of European British subjects, being Christians, and the Statute of Geo. III, as well as the Charter Act, confer jurisdiction on the High Court.

Mr. *Barton* replied.

(1) I.L.R., 5 Bom., 338. (2) I.L.R., 16 Bom. 178. (3) I.L.R., 19 Bom., 105.
(4) Madras Sessions Case No. 13 of 1901 (unreported).
(5) Crl. App. No. 345 of 1901 (unreported).

Digitized by Google

SIR ARNOLD WHITE, C.J.—The question raised in this case is whether a Justice of the Peace appointed under section 6 of the Foreign Jurisdiction and Extradition Act, 1879, has power to try an European British subject for an offence against the provisions of the Mysore Mines Regulation, 1897. The Regulation in question is a legislative enactment of the Mysore State, and certain offences created by the Regulation are offences against the law of Mysore but not offences which come within any of the provisions of the Indian Penal Code.

Section 4 of the Act of 1879 empowers the Governor-General in Council to exercise any power or jurisdiction which he for the time being has within any country or place beyond the limits of British India and to delegate the same to any servant of the British Indian Government in such manner and to such extent as he may from time to time think fit. Section 6 empowers the Governor-General in Council to appoint any European British subject to be a Justice of the Peace in or for any such country or place. The section further provides that every such Justice of the Peace shall have, in proceedings against European British subjects, all the powers conferred by the Code of Criminal Procedure on Magistrates of the first class who are Justices of the Peace and European British subjects.

The question whether a Justice of the Peace appointed under the Act of 1879 has authority to deal with an offence committed by a European British subject against a law of the Mysore State cannot be determined with reference to the provisions of the Procedure Code. The question involves wider considerations. The first question is, has the Governor-General in Council power and jurisdiction to deal with such an offence? If the answer to this question is in the affirmative, the second question is, is there any legislative enactment which precludes the officer appointed under section 6 of the Act of 1879 from exercising the power and jurisdiction of the Gevernor-General in Council? As pointed out by Sir Courtney Ilbert in his book on the 'Government of India' (page 452), the Governor-General in Council has, in his executive capacity, extra-territorial powers far wider than those which may be exercised by the Indian Legislature. . . .

With reference to section 6 of the Act of 1879, the learned writer observes: "The powers and jurisdiction referred to in this section are recognized and confirmed by, but are not derived from, the Indian Legislature. That Legislature gives them its support to the extent of its powers and could, to that extent, restrict as well as regulate their exercise. The support is useful as far as it goes, because the Indian Legislature has power to bind the British Indian Courts, and can regulate the mutual relations of British Indian and extra-territorial Courts and provide for their mutual co-operation. But the jurisdiction exists irrespectively of the support, and, in order to cut down and restrict the range of powers transcending the sphere of the Indian Legislature, much clearer words would appear to be required than are contained in the Act of 1879."

It is of course a well-settled principle of international law that a person in a country is amenable to the criminal laws of that country, whether native-born or a stranger. See Wheaton on 'International Law,' sections 84, 113. The principle is thus stated by Pollock, B., in *Queen* v. *Ganz*(1): "Whatever rights, civil or otherwise, a man may have which may be affected by his domicile, it is and must be perfectly clear by the law of all nations that

(1) L.R., 9 Q.B.D., 93 at p. 100.

Digitized by Google

each person who is within the jurisdiction of the particular country in which he commits a crime is subject to that jurisdiction; otherwise the criminal law could not be administered according to any civilized method. That has been the law from very far back; it is recognized by the earliest writers upon law; it has been adopted again and again in treaties and dealings between this country and other countries, and is to be found stated in all the text-books on the subject, and in all cases in which the matter has been discussed."

Where a question arises as between the Courts of a protecting and a protected state the general rule may only be applicable subject to qualifications, and the operation of the general rule can, of course, in all cases be controlled by treaty or agreement.

In dealing generally with the question of the jurisdiction exercisable by the Court of a protecting state within the territories of a protected state, the learned author, already quoted, remarks that this jurisdiction "may extend to all or any of the subjects, either of the protecting state or of the protected state, and, subject to certain limitations, to persons not belonging to either of these categories. The extent to which, and the cases in which, the jurisdiction is exercised over particular classes of persons are to be determined by agreement between the state which exercises the jurisdiction and the state within whose territories the jurisdiction is exercised, and, in the absence of express agreement, are to be inferred from usage and from the circumstances of the case."

As regards Mysore, the agreement between the state which exercises the jurisdiction and the state within whose territories the jurisdiction is exercised is to be found in the Instrument, dated March 1st, 1881, and known as the Instrument of Transfer, which defines the conditions subject to which the British Government entrusted to the Maharajah the government of the territories of Mysore. Article 17 of the Instrument of Transfer provides that plenary criminal jurisdiction over European British subjects in Mysore territories shall continue to be vested in the Governor-General in Council and the Maharajah of Mysore shall exercise only such jurisdiction in respect to European British subjects as may from time to time be delegated to him by the Governor-General in Council. It is clear that the Mysore Courts have no criminal jurisdiction over European British subjects except such as may be delegated to them by the Governor-General, and this view has been adopted by the Chief Court of Mysore (*Government of Mysore* v. *Fuller*(1)). The Magistrates and Police of Mysore have authority to arrest European British offenders, but the Mysore Courts have no jurisdiction to inquire into or try a charge against such offenders. See notification, April 7th, 1886, set out in Mayne's 'Criminal law of India,' page 260.

It would seem that the words "plenary criminal jurisdiction" as used in article 17—mean jurisdiction to administer the criminal law with reference to British subjects. (This appears to be the sense in which the word "jurisdiction" is used later on in the same article.) The question of legislation is dealt with in a separate article, article 19. But, assuming the word "jurisdiction" in article 19 includes jurisdiction to legislate in criminal matters as well as jurisdiction to administer the criminal law, so far as European British subjects are concerned, it is to be observed that the words of the article are "plenary criminal jurisdication", not "exclusive criminal jurisdiction". If the words are capable of a constuction which would not derogate from the ordinary principle that a man in a country is amenable to the laws of that

[1] 5 Mysore Reports, 281, cited in Mayne's 'Criminal law of India,' 260.

Digitized by Google

country, I think that construction should be adopted. No doubt the effect of the article is to reserve to the Governor-General the right to administer the criminal law so far as European British subjects are concerned, but having regard to the fact that the legislative enactments of the Mysore State do not become operative till they have received the assent of the Governor-General, I do not think its effect is to place European British subjects in Mysore outside the scope of the legislative powers of the Maharajah in regard to criminal matters. Further, I see no good reason for construing the words "plenary criminal jurisdiction" so as ao restrict their application to cases of offences which are offences against the law of British India for the time being. It seems to me that "plenary criminal jurisdiction" includes jurisdiction in the case of offences committed by European British subjects against the law of the State of Mysore. In the case of such offences it is open to the Governor-General in Council, in exercise of the power reserved by article 17 of the Instrument of Transfer, to delecate the jurisdiction to the Maharajah of Mysore or, in exercise of the powers given by section 6 of the Act of 1879, to delegate the jurisdiction to a duly appointed officer.

The next question is—is there any legislative enactment which limits the jurisdiction of a Justice of the Peace in the case of proceedings against British subjects to cases where the offence charged is an offence against the law of British India for the time being? I think not. Section 8 of the Act of 1879 extends to European British subjects in states in India in alliance with His Majesty the law relating to offences and to criminal procedure for the time being in force in British India. This section, as distinguished from section 4, is enactment and not declaration. It is an entirely independent provision and ought not, in my opinion, to be read so as to restrict the powers of the Governor-General which are declared by section 4 and which may be delegated to his officers under section 6. It is by virtue of section 8 that an European British subject can be tried in Mysore for an offence against the Indian Penal Code. The law which is extended to European British subjects in Mysore by virtue of section 8 is not so extended to the exclusion of all other law. This is clearly not the case so far as Native Indian subjects of His Majesty, referred to in paragraph (*b*) of the section, are concerned (for it cannot be said that the effect of the section is to render Native Indian subjects not amenable to the law of Mysore), and why should a different construction be adopted in the case of European British subjects referred to in paragraph (*a*)? I do not think it can have been intended, by a side-wind, to bring about a state of things in which an European British subject can be tried in Mysore for an offence against the Indian Penal Code and for no other offence. The operation of section of 11 of the Act of 1879 is expressly limited to offences against the law of a "foreign" state when the act done would, if done in British India, have been an offence against the Indian Penal Code. There is no such limitation in section 6. I am of opinion that the word "offences" as used in section 6 of the Act of 1879 is not restricted to offences as defined by section 40 of the Indian Penal Code. I am also of opinion that it is not restricted to any definition of "offence" to be found in the Code of Criminal Procedure, although, as a matter of fact, the present definition of "offence" in the Code of Procedure (see section 4 (*o*)) which is the same as that contained in the General Clauses Act, is sufficiently wide to include the wrongful act with which the accused in the present case were charged. Although the point does not arise in the present case, I am of opinion that where a person is charged with an offence against the Mysore Mines

Digitized by Google

Regulation, 1897, a Justice of the Peace, appointed under the Act of 1879, has jurisdiction to commit for trial to this Court under the powers conferred by section 6 of the Act and the notification of the Government of India, dated July 21, 1881.

I think the revision petition should be dismissed.

BENSON, J.—The accused has been found guilty of the unlawful possession in Mysore of mining materials, an offence punishable under the Mysore Mines Regulation (III of 1897), and has been sentenced to pay a small fine by Mr. Plumer who is a First-class Magistrate and a Justice of the Peace appointed under section 6 of the Foreign Jurisdiction and Extradition Act, 1879, in and for the territories of Mysore.

The accused is an European British subject and the act for which he has been punished is not an offence against the laws of British India.

The questions for decision are whether an European British subject is punishable for an act committed in Mysore which is not an offence against the laws of British India though it is an offence against the laws of Mysore, and whether, if the act is punishable, Mr. Plumer has jurisdiction to deal with it.

I answered both questions in the affirmative in the case of *Rex* v. *Churchley*(1) in these words:—" By the Act of Rendition in 1881, paragraph 17, it was provided that ' plenary criminal jurisdiction ' over European British subjects in Mysore should continue to vest in the Governor-General in Council. By section 4 of the Foreign Jurisdiction and Extradition Act (XXI of 1879), the Governor-General in Council may exercise any power or jurisdiction which he has for the time being within any country or place beyond the limits of British India or may delegate the same to any servant of the British Indian Government. Under section 6 he has delegated to Justices of the Peace appointed by him certain of those powers; that is to say, he has directed that, in proceedings against European British subjects, the Justice of the Peace shall have, within the area for which he is appointed, all the powers conferred by the Criminal Procedure Code on Magistrates of the first class who are Justices of the Peace and European British subjects. Such Magistrates have power under the Criminal Procedure Code to try, or commit for trial, European British subjects who, within their jurisdiction, commit any offence. The word ' offence ' in the Criminal Procedure Code means any act or omission made punishable by any law for the time being in force. The law may be the Penal Code, or it may be any special or local law, *i.e.*, a law limited to a particular place only. The act now charged against the accused is an offence under the Mysore law (approved by the Governor-General in Council), and has been committed within the jurisdiction of the Committing Magistrate. The fact that it is not an offence elsewhere makes no difference. If an act is an offence within the local jurisdiction of a Magistrate he may try an offender for it, even though it be no offence in any other locality. The misapprehension lies in supposing that an act cannot be an offence in one locality unless it is an offence elsewhere also. The Justice of the Peace with jurisdiction at the Kolar Gold Fields has jurisdiction to try or enquire into offences committed there by an European British subject against any law in force there, and, if he thinks the case is a proper one to commit to a Court of Session for trial, he is required to commit it to this Court (Notification of the Government of India, Foreign Department, Judicial, No. 159, I.J., 21st July 1881). "

(1) Mad. Sessions Case No. 13 of 1901 (unreported).

Digitized by Google

A Bench of this Court, however, in Criminal Appeal No. 345 of 1901 (unreported) having taken a different view, it becomes necessary to consider more fully what the law is.

The first question, viz., whether an European British subject is punishable for an act done in Mysore when such act is not an offence against the laws of British India though it is an offence against the laws of Mysore, is one of some difficulty, and I can find no reported case of this, or of any other, High Court which deals with the question. Sir Courtney Ilbert in his 'Government of India' and Mr. Lee Warner in his 'Protected Princes of India' have dealt at great length with the question of British jurisdiction and the position of European British subjects in Native states, but neither of them throws any light on the question how far an European British subject is answerable for an act which, though not an offence against the law of British India, is punishable by the law of the Native state. I cannot find that the former touches on the matter at all. The latter merely observes that it "leaves room for discussion," and adds "two propositions may with confidence be laid down. The British subject is not deprived of his rights of protection by residence out of the British possessions, and he may invoke the assistance of the Political officer to secure the privileges of just and civilized treatment which are his birthright. The protected prince on his side cannot reasonably object to a provision embodied in the Turkish Capitulations of 1675 and confirmed by treaty in 1809, whereby if any Englishman happens to commit a crime, 'the Governors in our sacred dominions shall not proceed to the cause until the Ambassador or Consul shall be present.' The judicial systems of the various states differ, and upon the case being so reported to the British Agent, the paramount power would issue such special directions as might be required" (page 354). In the absence, then, of any specific authority, it is necessary to decide the question by reference to the legislative powers of the Mysore Government, and the immunities enjoyed by European British subjects in regard to criminal jurisdiction in Mysore.

The general principal of international law is that every person who is found within a foreign state is subject to, and is punishable by, its law. The English lawyers base this rule on the principle that a person who enters a state becomes entitled to the protection of its law, and is, therfore, bound to render it obedience. It is perhaps sufficient to say, in the words of Baron Pollock, "Otherwise the criminal law could not be administered according to any civilized method" (*Queen* v. *Ganz*(1)). The state to which the accused belongs can only demand that he be fairly tried under the Municipal law of the *forum*, provided such law is in conformity with those sanctions of justice which all civilized nations hold in common, and does not contravene some special right acquired by treaty by the country whose aid is invoked [Taylor's 'International Public Law,' 1901, page 242].

Such is, very briefly, the ordinary law as between two states which are independent of each other, but the relationship is liable to be modified by treaty, that is, by agreement between the states.

With regard to Mysore, we know that the government of that country was taken over in 1831 by the British Indian Government by an Act of State, and, in accordance with the terms of a previous treaty, was administered by the Indian Government until 1881 when its administration was by an Act of State again transferred to a Native ruler. The "conditions" under which the government of the country was transferred to the Maharajah are recorded in a formal

(1) L.R., 9 Q.B.D., 93 at p. 100.

Digitized by Google

'Instrument of Transfer,' dated 1st March 1881, and signed by the Viceroy and Governor-General. It is, I take it, by reference primarily to the terms of this document that we must determine what are the legislative powers of the Government of Mysore, and how far, and by what machinery, penal laws passed by that Government can affect European British subjects.

"The jurisdiction exercisable by the Courts of a protecting state within the territories of a protected state may extend to all or any of the subjects, either of the protecting state or of the protected state, and, subject to certain limitations, to persons not belonging to either of these categories. The extent to which, and the circumstances in which, the jurisdiction is exercised over particular classes of persons are to be determined by agreement between the state which exercises the jurisdiction and the state within whose territories the jurisdiction is exercised, and in the absence of express agreement, are to be inferred from usage or from the circumstances of the case." (Ilbert's 'Government of India,' page 459, and Sir H. S. Maine's Minute No. 22—1—37 there quoted.)

The Instrument of Transfer will be found printed *in extenso* at page 450 of Rice's 'Mysore,' Volume I, and at page 481 of Volume 8 of Aitchison's 'Treaties,' third edition. Paragraph 17 runs as follows:—

"Plenary criminal jurisdiction over European British subjects in the said territories shall continue to be vested in the Governor-General in Council and the Maharajah of Mysore shall exercise only such jurisdiction in respect to European British subjects as may from time to time be delegated to him by the Governor-General in Council."

One contention on behalf of the accused is that the words "plenary criminal jurisdiction" include the exclusive power to *legislate* in criminal matters; but I do not think that this is so. I do not think that the article has any reference to legislation. *That* is dealt with by article 19, which runs:—"All laws in force and rules having the force of law in the said territories when the Maharajah Chamarajendre Wodiar Bahadur is placed in possession thereof, as shown in the schedule hereto annexed, shall be maintained and efficiently administered, and except with the previous consent of the Governor-General in Council, the Maharajah of Mysore shall not repeal or modify such laws, or pass any laws or rules inconsistent therewith."

This article assumes that the Maharajah shall have power to legislate, subject to the restriction specified in the article. These restrictions have no reference to European British subjects. The only article which refers to European British subjects is article 17, and in that article I think that "jurisdiction" has its ordinary meaning, viz., authority to apply the law, not to make the law,—(*that* is legislation),—but to enquire into, and try, alleged offences. That is the sense in which the word is ordinarily used, *e. g.*, "The sovereign of a country, acting through the Courts thereof, has jurisdiction over (*i.e.*, has a right to adjudicate upon) any matter with regard to which," etc. (Dicey's 'Conflict of Laws,' page 1). That is also the sense in which the Government of India has construed the word as used in Mysore Regulation I of 1886, which introduced the Indian Criminal Procedure Code into Mysore, but provided that nothing therein should "be deemed to confer any jurisdiction in proceedings against European British subjects." The Governor-General in Council by notification No. 20, dated 7th April 1886, directed that "expression 'jurisdiction' in section 1 of the Regulation shall be held to mean jurisdiction to enquire into or try a charge" (see also the recent Privy Council case

Digitized by Google

Muhammad Yusuf-ud-Din v. *Queen-Empress*(1)). It would, no doubt, be open to us to hold that in an instrument defining the powers of a state the words "criminal jurisdiction" mean "power to legislate as well as to adjudicate upon criminal matters," and this view receives considerable support from the fact that in article 9 of the same instrument the word "jurisdiction" is used in this wider sense. In that article the Maharajah agreed to grant such lands as might be required for cantonments and "to renounce all jurisdiction within the lands so granted." In pursuance of that agreement the Maharajah a few days later signed a grant to the British Government of the lands forming the Civil and Military Station of Bangalore and "renounced the exercise of all jurisdiction in the lands so assigned." Since that time the Maharajah has retained the bare sovereignty of those lands, and what may, perhaps, be called the reversionary interest in the jurisdiction assigned, but all the actual powers of government, including taxation and legislation, have, in fact, been exercised by the British Government. It is to be observed that the word "jurisdiction" in this article is used with reference to a local area; and the requirements of the matter dealt with, as well as the usage of the two contracting parties since 1881, show that it includes power to legislate as well as to administer the law. But these arguments do not equally apply to the word "jurisdiction" in article 17. There the word is applied to a class of persons, not to a local area, and the obect in view, viz., the protection of those persons against oppression by improper criminal laws, could be attained equally well by vesting the administration of the criminal law, *qua* such persons, in the Governor-General in Council, as by vesting in him the exclusive right to legislate for such persons in criminal matters, especially as no law could be passed by the Maharajah without his consent under article 19.

It would seem, then, that we are not bound to construe "jurisdiction" in article 17 in the same way as in article 19, and if we look at the whole scope and arrangement of the Instrument of Transfer, and at the action of the contracting parties since 1881, there appears to be good reason for holding that they intended "jurisdiction" in article 17 to be used in the narrower sense of the right to administer the law, rather than the right to make it. In the Instrument of Transfer a variety of miscellaneous matters are dealt with in the first fifteen articles of the Instrument. In the 16th, the Maharajah of Mysore is required to arrest and hand over to the British Government any person in his territory who is accused of having committed and offence in British India. Then comes the 17th article which says that plenary criminal jurisdiction over European British subjects shall continue to be vested in the Governor-General in Council and the Maharajah shall exercise only such jurisdiction in respect of European British subjects as may from time to time be delegated to him by the Governor-General in Council. It is difficult to suppose that the delegation of jurisdiction here contemplated refers to legislative power, though the words apply naturally enough to the right to adjudicate upon charges made against European British subjects. After the 17th article comes the 18th article which deals with a wholly alien subject, viz., the manufacture of salt and opium, and then the 19th article deals with the laws in force and the legislative powers of the Maharajah already referred to. Thus it will be seen that the only provisions which concern jurisdiction over European British subjects do not occur in the article which deals with the legislative powers of the Maharajah, nor even in an article in juxtaposition thereto, but in an article separated therefrom by independent

[1] I.L.R., 25 Calc., 20.

Digitized by Google

matter, and immediately following an article dealing with the kindered right of the British Government to adjudicate upon offences committed in British India by persons found in Mysore. As I read the instrument article 16 secures to the British Government the right to obtain the surrender of, and to adjudicate upon, all persons in Mysore, who are accused of having committed offences in British India; article 17 secures to the British Government the right to adjudicate upon European British subjects who are accused of having committed an offence even in Mysore; and article 19 alone regulates the legislative powers of the Maharajah. Admittedly there is nothing in article 19 to specially restrict those powers in regard to European British subjects.

There is also good reason to think that the high contracting parties have understood article 17 in the restricted sense I have indicated. The gold meaning industry is essentially an European industry, and the Mines Regulation was passed for the purpose mainly of regulating work on the mines, and for ensuring the responsibility of managers and superior officers in regard to precaution against accidents, reporting them, and so forth. Almost all the managers and superior officers are European British subjects, and it was mainly to bring them under control that the Regulation was passed in 1897. It was assented to by the Governor-General in Council, but though nearly five years have elapsed since then, the Governor-General in Council has taken no step by notification, or otherwise, so far as I can ascertain, to specifically extend its operation to European British subjects, but it has been treated by all parties as a law applicable to them. The strong inference is that both the Government of Mysore and the Governor-General in Council regarded the regulation, when passed by the Mysore Government with the assent of the Governor-General in Council, as applicable, *proprio vigore*, to European British subjects, but this could only be so if article 17 was understood as not limiting the legislative powers of the Maharajah. A similar argument may be drawn from other regulations of the Mysore Government, such as those relating to Forests, Excise and Municipalities, the penal clauses of which would naturally be applicable to European British subjects. We have not been referred to any case in which the penal sections of such regulations have been extended to European British subjects by the Government of India. The inference is that they apply *proprio vigore*. It would appear, therefore, that there is nothing in the Instrument of Transfer to render the Mines Regulation inoperative in the case of European British subjects.

It is, however, argued that section 8 of the Foreign Jurisdiction and Extradiction Act, XXI of 1879, excludes the application of any penal laws save those of British India to European British subjects in Native states. There is, in my judgment, no warrant for this contention. Section 8 enacts that the law relating to offences and to criminal procedure for the time being in force in British India, shall . . . extend (*a*) to all European British subjects in the dominions of princes and states in India in alliance with her Majesty, and (*b*) to all Native Indian subjects of Her Majesty, in any place beyond the limits of British India. It will be observed that, so far as this section is concerned, natives of British India anywhere outside British India, and European British subjects in Native states in India, are on exactly the same footing. The law of offences in force in British India extends to both; but that does not prevent other laws also being applicable. The section does not exclude other laws. It would, for instance, be absurd to suppose that this section could be pleaded as a protection by a native of British India who was charged in France with an offence against the penal laws of France. For the

Digitized by Google

same reason this section cannot be pleaded by an European British subject if he is charged in a Native state by a Court competent to try him for an offence committed against the law of the state. It is admitted that section 8 has never been held to prevent the Mysore Magistrates from trying natives of British India for offences committed in Mysore against the laws in force in Mysore. It is also admitted that the Mysore Magistrates have no jurisdiction to try European British subjects for any offence, whether against the laws of British India or of Mysore. This is in consequence of the restriction imposed by article 17 of the Instrument of Transfer (*Government of Mysore* v. *Fuller*(1)). The gold mining industry, as already observed, is essentially an European industry and there are many other Mysore Regulations also to which Europeans would naturally be amenable, such, for instance, as the Excise and Municipal Regulations. It would be strange, indeed, if there was no *forum* for the trial of European British subjects for offences against these various laws. The Mysore Magistrates have no jurisdiction ; and the next question is whether Mr. Plumer, who is a Justice of the Peace appointed by the Governor-General in Council, has jurisdiction.

By the common law of England the Courts in England have no jurisdiction over a British subject in respect of offences committed by him in other countries. The reasons appear to have been because such an act could not be said to be done " against the peace of the King's realm, his crown and dignity ", and also because the Courts could only try an offence by means of a Jury *de vicineto*, that is, drawn from the locality in which the offence was committed. But by statutes passed from time to time the English Courts were empowered to try certain specified offences committed abroad by British subjects, and when commercial factories and settlements came to be established, from the 16th century onwords, in partly civilized countries, the right of the British Government to exercise civil and criminal jurisdiction by means of local Courts within the limits of such factories and settlements, came to be gradually recognized by treaty, usage, or sufferance, and these tribunals have received parliamentary sanction by a series of Foreign Jurisdiction Acts, the latest of which is that of 1890 (53 and 54 Vict., c. 37). In like manner the Indian Courts, which are creatures of statute, were at first essentially Courts of local jurisdiction, but gradually obtained a considerable extra-territorial jurisdiction, the extent and limits of which are fully examined by sir Courtney Ilbert in his ' Government of India, ' page 442, *et seq*. But the Governor-General in Council has, in his executive capacity, extra-territorial powers far wider than those which may be exercised by the the Indian Legislature. In the words of Sir Courtney Ilbert, " By successive Charters and Acts extensive powers of sovereignty have been delegated by the English Crown, first to the East India Company, and afterwards to the Governor-General in Council as its successor. The Governor-General in Council is the representative in India of the British Crown, and as such can exercise, under delegated authority, the powers incidental to sovereignty with reference both to British India and to neighbouring territories, subject to the restrictions imposed by parliamentary legislation and to the control exercised by the Crown through the Secrectary of State for India. Thus he can make treaties and conventions with the rulers not only of Native States within the boundaries of what is usually treated as India, but also of adjoining states which are commonly treated as extra-Indian, such as Afghanistan and Nepaul, and can acquire and exercise within the territories of such states powers of legislation and jurisdic-

[1] 5 Mysore Reports, 281, cited in Mayne's ' Crl. Law of India, ' 260.

Digitized by Google

tion similar to those which are exercised by the Crown in foreign countries in accordance with the Foreign Jurisdiction Acts and the orders in Council under them, and extending to persons who are not subjects of the Crown. The existence of these powers is declared, and their exercise is to some extent regulated, by the Foreign Jurisdiction and Extradition Act, 1879" ('Government of India,' page 452).

This Act is an Act of the Governor-General's Legislative Council, which is expressly empowered by the Government of India Act, 1865 (28 and 29 Vict., c. 17) to make laws and regulations for all British subjects within the dominions of princes and states in alliance with His Majesty. Thus the powers conferred by this Act in regard to European British subjects have for their basis the authority of the Governor-General in Council, *i.e.*, the British Indian Government, acting through its Legislature, and also of the British Crown acting through Parliament, which has delegated its authority in this matter to the Indian Legislature.

The preamble of the Act recites that "by treaty, capitulation, agreement, grant, usage, sufferance and other lawful means, the Governor-General of India in Council has power and jurisdiction within divers places beyond the limits of British India." We have seen that by terms of article 17 of the Instrument of Transfer it was agreed that "plenary criminal jurisdiction" over European British subjects in Mysore should continue to be vested in the Governor-General in Council. By section 4 of the Act of 1879 the Governor-General in Council may exercise any power or jurisdiction which, he, for the time being, has within any country or place beyond the limits of British India, and may delegate the same to any servant of the Bsitish Indian Government, in such manner, and to such extent, as the Governor-General in Council from time to time thinks fit. This authority has recently been confirmed by an order in Council known as "The Indian (Foreign Jurisdiction) Order in Council, 1902," which directs that the Governor-General in Council may, on His Majesty's behalf, exercise any power or jurisdiction which His Majesty or the Governor-General of India in Council, for the time being, has within the limits specified in the order, and may delegate the same, as already stated and the order confirms all existing appointments and delegation (*Gazette of India*, 13th September, 1902, p. 667).

Under section 6 of the Act of 1879, the Governor-General in Council has appointed Mr. Plumer to be a Justice of the Peace, and by virtue of section 6 Mr. Plumer is therupon invested in proceedings against European British subjects with "all the powers conferred by the Code of Criminal Procedure on Magistrates of the first class who are Justices of the Peace, and European British subjects." Such Magistrates have power, under the Criminal Procedure Code, to try or commit for trial, European British subjects who within their jurisdiction commit any offence. The word "offence" in the Criminal Procedure Code means any act or omission made punishable by any law for the time being in force. The law may be the Penal Code, or it may be any other law. All that is necessary is that it should be a law in force in the locality where the Magistrate has jurisdiction. We have seen that the Mines Regulation is in force in Mysore, *i.e.*, in the locality where Mr. Plumer has criminal jurisdiction. The fact that it is not in force in British India makes no difference as regards any one who offends against its provisions in the locality where it is in force.

It is argued that the British Government would not execute foreign law in a foreign state, and that, if it did, it might be called upon to execute an

Digitized by Google

unreasonble law, such as that which, in some states, has, in the past, made, cow-killing a capital offence. In regard to this, it seems enough to say that no stich law could be passed in Mysore without the approval of the Governor-General in Council and subject to such exemptions as he might impose. If in any other state a British Magistrate were called on to execute an unreasonable law not sanctioned by his Government, he would, no doubt, seek the instructions of his Government, and be guided by them. In the State of Mysore, at all events, the objection seems to be of no practical importance.

The whole argument and conclusion may be briefly stated as follows:—

The accused has offended against a law passed by the Ruler of Mysore in the exercise of his legislative powers as sovereign, acknowledged by the British Government in the Instrument of Transfer. The accused would, therefore, by the laws of nations be ordinarily punishable by the Ruler of Mysore, or by the Magistrate to whom the Ruler might delegate his authority. But the accused is an European British subject, and by the Instrument of Transfer, crimianl jurisdiction over such subjects is reserved to the Governor-General in Council. The validity of such a reservation, and the power to delegate its exercise, are acknowledged and confirmed both by the India Legislature, in the Foreign Jurisdiction Act, 1879, and by the British Legislature in the Foreign Jurisdiction Act, 1890, and the Indian Order in Council, 1902, made thereunder. The Governor-General in Council, acting under section 6 of the Act of 1879, has appointed Mr. Plumer to be a Justice of the Peace in and for the territories of Mysore, and that section enacts that thereupon he is invested in proceedings against European British subjeets with all the powers conferred by the Code of Criminal Procedure on Magistrates of the first class who are Justices of the Peace, that is, among other things, with powers to try and commit for trial any European British subject who commits any offence, that is, does any act punishable by any law in force within his local jurisdiction. He, therefore, has power to try (or to commit for trial) the accused in this case who is charged with having offended against the Mysore Mines Regulation. Mr. Plumer's jurisdiction is derived from the Governor-General in Council, who appointed him to be a Justice of the Peace, and who, acting through his Legislative Council, declared in section 6 of the Act the powers to be exercised by Mr. Plumer as a Justice of the Peace, and thereby delegated to him the powers specified in that section.

The Governor-General in Council himself derived jurisdiction from the Act of State whereby the Government of India, in pursuance of a previous treaty, assumed the Government of Mysore in 1831, and from the Ruler of Mysore by agreement with him in 1831 and in 1881, and that jurisdiction, and the power to delegate it, are acknowledged and confirmed both by the Indian Legislature in the Act of 1879, and by the order of His Majesty in Council issued under the authority of the British Legislature in the Act of 1890.

For these reasons, I am of opinion that Mr. Plumer had jurisdiction to convict the accused in the case before us. If he had jurisdiction there is no ground for revision.

DAVIES, J.—I am not prepared to differ from the conclusion arrived at by my two learned colleagues.

Digitized by Google

1903. *February* 10, 11. **I. L. R. 26 Mad. 640.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

RAYAN KUTTI (PRISONER), APPELLANT, *v.* EMPEROR, RESPONDENT.*

Penal Code—Act XLV of 1860, ss. 211, 182—Instituting false complaint—Giving false information—Criminal Procedure Code—Act V of 1898, s. 531—Proceedings in wrong place.

The word "charges" as it is used in section 211 of the Indian Penal Code, means something different from "gives information." The words "false charge" as there used, must be construed with reference to the words which speak of the institution of proceedings.

Semble, the true test is :—Does the person who makes the statement which is alleged to constitute the charge, do so with the intention and object of setting the criminal law in motion against the person against whom the statement is directed ? Such object and intention may be inferred from the language of the statement and the circumstances in which it is made.

A petition was presented with the object (as the High Court held from its terms) of bringing to the knowledge of the authorities certain matters regarding which the petitioner had received information, in order that there might not be a repetition of an alleged tutoring of witnesses, and not with the object that the authorities should institute criminal proceedings :

Held, that the petition did not amount to a "charge" within the meaning of section 211 of the Indian Penal Code.

To constitute an offence under section 182, it must be shown that the person giving the information knew or believed it to be false, or that the circumstances in which the information was given were such that the only reasonable inference is that the person giving the information knew or believed it to be false. The fact that an information is shown to be false does not cast upon the party who is charged with an offence under the section the burden of showing that, when he made it, he believed it to be true. The prosecution must make out that the only reasonable inference was that he must have known or believed it to be false.

Section 531 of the Code of Criminal Procedure applies to a case where a Magistrate who has authority to commit a case for trial, does so, but has not territorial jurisdiction in the place where the offence to be tried is alleged to have been committed.

CHARGE of preferring a false complaint under section 211 of the Indian Penal Code. The accused was charged with preferring a false complaint, of fabricating false evidence against the Station-House officer of Malappuram. The alleged complaint was contained in a petition which was presented to the Sub-Magistrate, Manjeri, in the following terms:—"The petition presented by Pookatan Rayan Kutti, the elder brother of Pookatan Ali, the accused in the above case, on reasons shown below :—In the above case, the said Ali and others are arrested and they are in the sub-jail. At the time when the said Ali and Koya were arrested, one of the complainants had gone to Madras. Excepting him Ali and Koya were shown to the rest of them at the Malappuram Station House and they were also tutored. The man who had gone to Madras returned lately, and, in order to show to him and tutor him, he was also brought by the Malappuram head constable to the Manjeri sub-jail on Sunday, the day before yesterday, the 13th of this month ; and he was also shown and tutored. The Assistant Collector of Malappuram and the Assistant Superintendent have seen him brought to Manjeri to show him the prisoners as stated in paragraph 3. It is a matter of great grievance and also contrary to law, to fabricate evidence by bringing persons to whom the said Ali and Koya were unknown, and showing them the said Ali Koya and tutoring them and making them say that they know the said persons by sight. On making enquiries to the persons who are in the sub-jail and others, it will be known that the above allegations are true. Prays, therefore, that the Court may be pleased to make enquiries, to find out the truth of the above allegations and to take the necessary steps in this matter. (Signed) Rayan Kutti, 15th April 1902."

* Criminal Appeal No. 731 of 1902.

Digitized by Google

The Police Inspector filed a petition before the Special Assistant Magistrate of Malabar, asking that the accused might be sent under section 476 of the Criminal Procedure Code for trial to the nearest First-Class Magistrate. The Special Assistant Magistrate considered there was a strong *prima facie* case of preferring a false complaint, and sent the accused in custody to the Head Assistant Magistrate, Palghat Division, for trial. The last-mentioned Magistrate committed the accused to the Sessions at South Malabar on a charge of having instituted a false complaint under section 211 of the Penal Code. The assessors were of opinion that charge of preferring a false complaint under section 211, clause (2) had been made out, and that opinion was concurred in by the District Judge who said :—" The accused does not venture to maintain that he saw what happened, although that is the only inference which can be drawn from the terms of his complaint. He now pleads only that he heard this from some persons whose names he could not mention in the lower Court and who have now dwindled into one man." He convicted and sentenced the accused. The accused preferred this appeal on the grounds among others, that the Judge had not found that the statemennts in the petition were false to the knowledge of the accused; that the petition was not a complaint, and that no offence had been made out under section 211 (2). The ground was also relied on that the order passed by the Special Assistant Magistrate of Malabar sending the accused for trial to the Head Assistant Magistrate, Palghat Division, was invalid, and that in consequence the committal by the last-named Magistrate was also invalid.

The accused preferred this appeal.

Dr. *Swaminathan*, for appellant, argued that the conviction ought to be quashed as the commitment to the Sessions was invalid. The Head Assistant Magistrate of Palghat, who committed the case, would ordinarily have had jurisdiction under section 177, Criminal Procedure Code, only if the alleged offence had been committed within the limits of his local jurisdiction. Admittedly the alleged offence took place outside his local jurisdiction, and the proceeding under section 476 of the Special Assistant Magistrate, which, if valid, would have conferred jurisdiction on the committing Magistrate, were invalid, as the matter did not come before the Special Assistant Magistrate in the course of a judicial proceeding. As regards the merits of the case, he contended that exhibit A did not anount to preferring a charge or instituting criminal proceedings within the meaning of section 211, Indian Penal Code, and cited *Raghavendra* v. *Kashinath Bhat*(1). Finally he contended that the conviction could not be sustained, even under section 182, as there was absolutely nothing to indicate that the accused knew the contents of A to be false, or that the petition was not put in *boná fide* and in furtherance of justice

The Public Prosecutor, in support of the conviction, contended that the accused was properly convicted under section 211 for falsely charging a person of having committed an offence knowing that there was no just or lawful ground for such charge.

JUDGMENT. Objection has been taken to the legality of the conviction in this case, on the ground that the order of commitment was invalid and that consequently the Session Judge has no jurisdiction to try the case.

A First-class Magistrate made an order under section 476 of the Code of Criminal Procedure sending the case for enquiry to the nearest First-class

(1) I.L.R., 19 Bom., 717.

Digitized by Google

Magistrate, who committed the accused to Sessions. The Magistrate to whom the case was sent had not territorial jurisdiction over the place in which the offence was alleged to have been committed. This being so, it was argued that it was not competent for him to take cognizance of it and that the order of commitment made by him was invalid. Section 531 of the Criminal Procedure Code provides that no order of a Criminal Court shall be set aside merely on the ground that the proceedings in which the order was made took place in a wrong local area unless the error in fact occasioned a failure of justice. Section 531 applies to a case where the Magistrate has authority to commit, but has not territorial jurisdiction in the place were the offence is alleged to have been committed. *Queen-Empress* v. *Abbi Reddi* (1), *Queen Empress* v. *James Ingle* (2), and *Queen-Empress* v. *Fazl Azim* (3).

We are satisfied in the present case that no failure of justice has, in fact, been occasioned by the order of commitment having been made by a Magistrate who had not territorial jurisdiction in the place where the offence is alleged to have been committed.

The objection is overruled.

As regards the merits, the Public Prosecutor concedes that a conviction on the charge actually preferred, viz., the institution of criminal proceedings knowing that there was no just or lawful ground for such charge cannot be supported. He has contended, however, that the accused was properly convicted under section 211 for falsely charging a person of having committed an offence knowing that there was no just or lawful ground for such charge.

Now it is obvious that the word "charges," as used in the section, means something different from "gives information." We think, the words "falsely charges" must be construed with reference to the words which speak of the institution of proceedings. The true test seems to be, does the person who makes the statement which is alleged to constitute the "charge" do so with the intention and object of setting the criminal law in motion against the person against whom the statement is directed. Such object and intention may be inferred from the language of the statement and the circumstances in which it is made. Applying this test to the present case we are clearly of opinion that the petition which is said to constitute the "charge" is not a charge within the meaning of section 211. There is no statement in the petition that the accused had seen the "tutoring" of the witness to which he refers. In fact, in his subsequent deposition, he stated expressly that he was not in a position to prove the statements which he had made.

The language of the petition makes it clear that the intention of the accused was to bring to the knowledge of the authorities certain matters as to which he had received information, in order that there might not be a repetition of the alleged "tutoring," and that it was not his object or intention that the authorities should institute criminal proceedings against the constable in question. We are of opinion that the petition does not amount to a charge within the meaning of section 211, and that the conviction under that section cannot be upheld. There remains the question, whether we can, in exercise of the powers conferred by section 237 of the Code of Criminal Procedure, convict the accused of an offence under section 182 of the Indian Penal Code. To constitute an offence under that section it must be shown that the person giving the information knew or believed it to be false or that the circumstances in which the information was given were such that the only reasonable inference

(1) I.L.R., 17 Mad., 402. (2) I.L.R., 16 Bom., 200. (3) I.L.R., 17 All., 36.

Digitized by Google

is that the person giving the information knew or believed it to be false. It cannot be said that this has been shown in the present case. The fact that the information is shown to be false does not cast upon the party who is charged with an offence under this section, the burden of showing that when he made it he believed it to be true. The prosecution must make out that the circumstances were such that the only reasonable inference was that he must have known or believed it to be false. The evidence in the present case does not establish this, and there are circumstances in the case which make us think it not unlikely that at the time the information was given the accused believed the information to be true.

The conviction and sentence must be set aside and the accused set at liberty. The fine, if paid, must be refunded.

APPELLATE CRIMINAL—FULL BENCH.

1903. *February* 17, 18, 24. **I. L. R. 26 Mad. 656.**

Before Sir Arnold White, Chief Justice, Mr. Justice Davies and Mr. Justice Benson.

EROMA VARIAR AND ANOTHER (PETITIONERS) *v.* EMPEROR.*

Criminal Procedure Code—Act V of 1898, ss. 195 [7], 407 [2]—Court to which appeals ordinarily lie—Refusal to accord sanction—Appeal to Magistrate who has been directed and empowered to hear appeals under section 407 (2).

A Magistrate who has been directed and empowered to hear appeals under the provisions of section 407 (2) of the Code of Criminal Procedure is not the "Court to which appeals ordinarily lie" within the meaning and for the purposes of section 195 (7) of the Code. (BENSON, J., dissenting.)

(Note: This case is Ref: 27 Mad. 124.)

QUESTION referred to a Full Bench. In Criminal Revision Case No. 539 of 1902, an application was made, by an Inspector of Police, to the Acting Stationary Second-class Magistrate of Walluvanad, for sanction to prosecute Mahadevapandal Variath Eroma Variar and Chakkunkuth Veeran, for an offence under section 211, Indian Penal Code. The Magistrate refused to accord sanction. The Inspector of Police then appealed to the Special Assistant Magistrate of Malabar, who set aside the order of the Sub-Magistrate and granted sanction.

In Criminal Revision Case No. 251 of 1902, Kovilakathillath Krishnan Thangal applied to the Stationary Second-class Magistrate of Kottayam Kasba for sanction to prosecute Kunnath Agnisarman *alias* Kunhumbu Potuval and others under sections 211, 195 and 196 of the Indian Penal Code. The Magistrate refused to accord sanction. An appeal was preferred to the Acting Joint Magistrate of Tellicherry, who accorded sanction.

Against both of these orders, the persons whose prosecution had been sanctioned filed these petitions.

Mr. *P. K. Nambyar* for petitioners in Criminal Revision Case No. 539 of 1902.

The Public Prosecutor for the Crown.

J. L. Rosario for petitioners in Criminal Revision Case No. 251 of 1902.

Mr. *T. Richmond* for the counter-petitioner.

---

* Criminal Revision Case No. 539 of 1902.

Digitized by Google

A ground (among others) upon which revision was asked was that the joint Magistrate (in Criminal Revision Case No. 251 of 1902) had no jurisdiction to admit and hear the appeal and grant the sanction as the Stationary Second-class Magistrate was not subordinate to him whithin the meaning of section 195 of the Code of Criminal Procedure.

The case came first before the Chief Justice and Subrahmania Ayyar J., who made the following.

ORDER OF REFERENCE TO A FULL BENCH.—The respondent has raised a preliminary objection that this revision petition cannot be entertained and he has relied on sub-section (5) of section 439 of the Code of Criminal Procedure. For the purpose of dealing with his preliminary objection we assume an appeal lies under section 195 *(6)* from the order of the Joint Magistrate granting the sanction. Section 439 (5) only provides that revision proceedings shall not be entertained at the instance of the party. It does not preclude the the Court from entertaining such proceedings if, apart from the application, the case is one which appears to require the exercise of revisional jurisdiction.

We refer to a Full Bench the question whether a Magistrate who has been directed and empowered to hear appeals under the provisions of section 407 (2) of the Criminal Procedure Code is "the Court to which appeals . . . . ordinarily lie" within the meaning and for the purposes of section 195 (7) of the Code. The case of *Queen-Empress* v. *Subbaraya Pillai*(1) was decided under the Code of 1882. In the present Code the word "may" has been substituted for "shall" in section 407 (2). The Calcutta High Court has held that a Magistrate authorized to hear appeals under section 407 is not the Court to which appeals "ordinarily lie"—(*Sadhu Lall* v. *Ramchurn Pasi*(2)).

The case came on in due course before the Full Bench constituted as above; when the Court delivered the following opinions:—

Sir ARNOLD WHITE, C.J.—Section 407 *(1)* of the Code of Criminal Procedure provides that "any person . . . . may appeal to the District Magistrate." Sub-section (2) provides that the District Magistrate may direct that any appeal under the section or any class of such appeals (*i.e.*, appeals which by the express words of sub-section (1) are appeals to the District Magistrate) shall be heard by any Magistrate of the first class subordinate to the District Magistrate and empowered by the local Government to hear appeals and thereupon such appeals or class of appeals may be presented to such Subordinate Magistrate, or, if already presented to the District Magistrate, may be transferred to the Subordinate Magistrate. The section also gives power to the District Magistrate to withdraw from the Subordinate Magistrate any appeal or class of appeals which have been presented or transferred. It seems to me that on the true construction of this section the District Magistrate is "the Court to which appeals ordinarily lie" within the meaning and for the purposes of section 195 (7) of the Code. Section 407 (1) in express terms gives a right of appeal to the District Magistrate. The exercise of the power given to the District Magistrate to direct that appeals under the section shall be heard by a Subordinate Magistrate and the power to present an appeal to the Subordinate Magistrate in pursuance of a direction given by the District Magistrate do not constitute the Sub-divisional Magistrate the Court to which appeals under the section "ordinarily lie." The appeal only

[1] I.L.R., 18 Mad., 487. [2] 7 Calc. W. N., 114

Digitized by Google

lies to one Court, viz., the District Magistrate and consequently section 195 (7) (*a*), "where such appeals lie to more than one Court." etc., has no application.

I think the sections in question were rightly construed by the Calcutta High Court in *Sadhu Lall* v. *Ramchurn Pasi* (1). The case of *Queen-Empress* v. *Subbaraya Pillai* (2) may be distinguished on the ground that under the Code of 1882, which was in force when that case was decided, the section ran "such appeal or class of appeals, 'shall' (not, as now, 'may') be presented to such Subordinate Magistrate," etc. It is to be observed that that corresponding section of the Code of 1872 (section 266) gives in express terms a right of appeal either to the District Magistrate or to the Sub-divisional Magistrate. The words giving a right of appeal to the Sub-divisonal Magistrate were omitted in the Code of 1882. Under the Code of 1872 the Sub-divisional Magistrate exercised an independent appellate jurisdiction. Now he merely exercises a delegated jurisdiction in pursuance of directions given by the District Magistrate.

I think the answer to the question which has been referred to us should be that a Magistrate who has been directed and empowered to hear appeals under the provisions of section 407 (2) of the Criminal Procedure Code is *not* "the Court to which appeals ordinarily lie" within the meaning and for the purposes of section 195 (7) of the Code.

DAVIES, J.—I concur with the learned Chief Justice.

BENSON, J.—Under section 407 (1), Criminal Procedure Code, appeals from Second-and Third-class Magistrates lie to the District Magistrate, but, under the second clause of the section, the District Magistrate may direct that any class of such appeals shall be heard by any Magistrate of the first class subordinate to him who has been empowered by the local Government to hear such appeals. The Code of 1882 enacted that when such an order had been made the appeals "shall be presented to such Subordinate Magistrate" and this Court held that such Subordinate Magistrate was the Court to which appeals ordinarily lay for the purposes of section 195 (7), Criminal Procedure Code (*Queen-Empress* v. *Subbaraya Pillai*(2)). In the present Criminal Procedure Code the word "shall" has been altered into "may" be presented, and the question for consideration is whether such Subordinate Magistrate can still be considered to be the Magistrate to whom such appeals "ordinarily lie" for the purposes of section 195 (7), Criminal Procedure Code, or whether the District Magistrate is the Magistrate to whom such appeals ordinarily lie.

I understand that the District Magistrate has, in accordance with the universal or almost universal, practice in this Presidency, issued a general order under section 407 (2), Criminal Procedure Code, that all appeals from Second-and Third-class Magistrates within the local jurisdiction of the Sub-divisional Magistrate shall be heard by that Magistrate. When such an order has been issued the section provides that the appeals may be presented to the Sub-divisional Magistrate and they may also, apparently, the presented to the District Magistrate, who in such case would transfer them to the Sub-divisional Magistrate, unless for some special reason he was willing to hear the appeal himself. The universal, or almost universal, practice in this Presidency has, for the last thirty years, been to present such appeals to the Sub-divisional Magistrate, and the practice has not varied under the Codes of 1872, 1882 and 1898. The language of section 407 is not, it is true, very happy, but when all appeals of a certain class may be, and in practice are,

(1) 7 Calc., W. N., 114. (2) I.L.R., 18 Mad., 487.

Digitized by Google

presented to a certain Court, and must be heard by that Court, I do not think it is a great strain on the language to hold that such appeals may be said ordinarily to lie to such Court.

As to the meaning of the word "presented," it may be noticed that there is no section which authorizes an appeal by Government against an acquittal except section 417, and there the right of appeal is given by simply saying that the Government may direct the Public Prosecutor to "present an appeal"

What the section means is that an appeal by Government against an acquittal shall lie to the High Court and may be presented by the Public Prosecutor, etc., but the section merely says that the Public Prosecutor "may present an appeal to the High Court." The words "may present" are here held to necessarily imply that an appeal "shall lie" to the High Court. Having regard to this language and to the long continued and universal practice in this Presidency, I think that the words "may be presented" in section 407 (2), as in section 417, may be construed to mean "shall lie and may be presented to."

If this interpretation is accepted, then appeals against sentences by Second-and Third-class Magistrates lie to a District Magistrate under section 407 (1), and also lie to the Sub-divisional Magistrate under section 407 (2), provided the District Magistrate has taken action under clause (2). When appeals against convictions lie to more than one Court, then section 195 (7) (*a*) provides that an appeal under section 195 shall lie to the Court of inferior jurisdiction, that is, to the Sub-divisional Magistrate.

I do not think that there is anything in the successive changes made in the language of the Code to militate against this interpretation. The Code of 1872 (section 266) directed that appeals against convictions by Second-and Third-class Magistrates should lie to the District Magistrate or to a Magistrate of the first class who had been specially empowered by Government to hear such appeals. The Code of 1882, as I read it, and as it was interpreted by this Court in *Queen-Empress* v. *Subbaraya Pillai*(1) directed that they should lie to the District Magistrate or to the Sub-divisional First-class Magistrate in cases where, as in this Presidency, the District Magistrate had issued the necessary orders for that end and the Code of 1898, though it altered "shall" into "may" in section 407 (2), and thus provided two alternative Courts of appeal, yet retained the former law for the purposes of section 195 by explaining that an appeal under that section lay to the inferior of the two Courts.

It may be added that this view is supported by strong considerations of convenience. It would be a hardship to oblige all persons appealing under section 195 to have to resort to the District Magistrate instead of the Sub-divisional Magistrate who is near at hand, and delay in the disposal of such cases and administrative inconvenience would result if the District Magistrate were obliged to hear all such appeals himself, or even to receive all such appeals himself and then transfer them, as he would do in partically all cases, to the Sub-divisional Magistrate.

I would answer the reference in the affirmative.

Criminal Revision Case No. 251 of 1902 came on for hearing in due course before the Chief Justice and Subrahmania Ayyar, J., who passed the following.

ORDER.—According to the ruling of the Full Bench, the order granting the sanction must be set aside.

---

[1] I.L.R., 18 Mad., 487.

Digitized by Google

VOL. XXVII.

1903. *March* 3. **I. L. R. 27 Mad. 52.**

Before Mr. Justice Bhashyam Ayyangar.

DORASAMY PILLAI (ACCUSED), PETITIONER, *v.* EMPEROR (COMPLAINANT), RSPONDENT. *

Penal Code—Act XLV of 1860, s. 353—Using criminal force to deter a public servant—Entry by police on premises of suspected person at night—Assault on police.

A police constable, at midnight, entered upon the premises of a person who was regarded by the police as a suspicious character, and knocked at his door to ascertain if he was there, whereupon he came out and abused and pushed the constable and lifted a stick as if he were about to hit the constable with it. On a complaint being preferred under section 353 of using criminal force to deter a public servant in the execution of his duty:

Held, that the offence had not been committed. The constable was not engaged in the execution of his duty as a public servant and was technically guilty of house trespass, and his action was calculated to cause annoyance to the inmates of the house, and was insulting to the accused, who was justified in causing the slight harm which he had inflicted on the constable. The latter could not be regarded, under section 99, as acting in good faith under colour of his office as his action was not authorized by any police circular or order.

CHARGE of using criminal force to deter a public servant from discharging his duty, under section 353, Indian Penal Code. It appeared that the accused was registered in the books of the police as a person of suspicious character, and that the complainant, a police constable, was ordered to check the presence of the accused. In order to comply with this direction, the constable went at midnight, in uniform, with another constable, entered upon the premises of the accused and knocked at his door, to see if he was there. The accused thereupon came out, abused the constable and pushed him, and lifted a stick as if he were going to beat him. The constable's turban fell to the ground. The Stationary Second-class Magistrate convicted the accused and sentenced him to three months' rigorous imprisonment. The conviction and sentence were upheld, on appeal, by the Deputy First-class Magistrate.

The accused filed this criminal revision petition.

T. Rangachariar for petitioner.

The Public Prosecutor in support of the conviction.

JUDGMENT.—It is clear that the conviction of the accused in this case under section 353, Indian Penal Code, is illegal, and cannot be upheld. It is impossible to regard the constable as engaged in the execution of his duty as a public servant when he entered upon the premises of the accused about midnight with another constable and stood knocking at the door of the accused's house to see if he was present. The fact that the accused is a person who is regarded by the police as a suspicious character (K. D.) and as one whose movements ought to be watched does not authorize the complainant to enter upon his premises or knock at his door with a view to ascertaining whether he is present in his house or not. The Police Circular Orders referred to by the Magistrate have not the force of law, but in justice to them I may observe that there is nothing whatever in any of them which warrants the course adopted by the complainant. It is perfectly lawful for officers of the police to watch the movements of suspected characters, and they are properly required to do so by Police Circular Orders. But they can do so only by lawful means and not by trespassing upon their premises or by having recourse to other unlawful means. It is found that the accused came out, abused and pushed the com-

* Criminal Revision Petition No. 589 of 1902.

Digitized by Google

plainant and afterwards brought a stick from inside and lifted it up as if he was going to beat him with it and that the complainant's turban fell on the ground when he was pushed. Under these circumstances, the accused would no doubt be guilty of assault or of using criminal force unless his act could be regarded as done in the exercise of the right of private defence of property. The constable in entering upon the accused's dwelling-house and knocking at his door at midnight with the intention of finding out whether the accused, who is regarded as a suspected character by the police, was in his house, was technically guilty of house trespass under section 442 of the Indian Penal Code. The course adopted by the constable was certainly one which would cause annoyance to the inmates of the house and is also insulting to the accused, and under section 104 the accused was justified in voluntarily causing to the complainant the slight harm which he inflicted on him, and the constable cannot be regarded under section 99, Indian Penal Code, as acting in good faith (*vide* section 52, Indian Penal Code) under colour of his office though his act may not be strictly justifiable by law. No Police Circular Order or any other order has been pointed out which, though not strictly justifiable in law, he can *bona fide* plead in support of the course pursued by him of entering upon the premises of the accused at midnight and knocking at the door. I may also remark that the sentence of three months' rigorous imprisonment which was passed upon the accused is unduly severe under the circumstances of the case even if he were guilty of any offence. I reverse the conviction and sentence and acquit the accused and direct that he be set at liberty, the bail bond being cancelled.

1903. *March.* **I. L. R. 27 Mad. 54.**

Before Mr. Justice Bhashyam Ayyangar.

IN THE MATTER OF KALAGAVA BAPIAH (ACCUSED)§

Criminal Procedure Code—Act V of 1898, ss. 195, 196, 197, 215, 436—Sanction—Notice to accused—Reference to High Court—Revisional powers.

Section 215 of the Code of Criminal Procedure is not applicable to a case in which a commitment in question has not been made under any one of the four sections therein specified, but has been made under the directions of the High Court under section 426 (1) IV. An order of a Sessions Judge or District Magistrate passed under section 436, directing commitment, may be quashed by the High Court in the exercise of its revisional powers, though not under section 215. But an order passed by the High Court itself under section 526 cannot be so revised.

Sanction accorded by Government under section 197 is not null and void for the reason that no notice was given to the accused to show cause why it should not be given. It is a matter left to the discretion of Government whether such opportunity should be given to the person concerned before sanctioning his prosecution.

There is a marked distinction between the classes of offences dealt with in section 195, clauses (*b*) and (*c*), and those dealt with in section 197. A Court granting sanction under section 195 (*b*) and (*c*) does so in connection with offences committed in or in relation to any proceeding in such Court, and the Court therefore Acts in its judicial capacity in grating the sanction on legal evidence. But the Government, in according or withholding sanction, under section 197 (for the prosecution of a public servant in respect of an offence alleged to have been committed by him as such public servant), acts purely in its executive capacity and the sanction need not be based on legal evidence.

The Criminal Procedure Code does not prescribe any particular form for the sanction required by section 197, as it does in the case of a sanction accorded under section 195.

---

§ Criminal Miscellaneous Petition No. 11 of 1903.

Digitized by Google

REFERENCE to the High Court under section 215 of the Code of Criminal Procedure. The accused had been a member of the Municipal Council of Ellore and was charged with having committed an offence under section 168, Indian Penal Code. The accused had been committed to the Sessions Court for trial in pursuance of an order of the High Court On the case being called on, objection was taken to the legality of the sanction, which had been accorded by Government in the following order:—Sanction is accorded to the prosecution of [naming the accused] a member of the Municipal Council of Ellore on a charge of having committed an offence under section 168, Indian Penal Code. The grounds of objection were [1] that no notice had been given to the accused before the sanction had been accorded ; and [2] that the order did not specify with sufficient clearness the offence with which he was charged. The Acting District Judge referred to *Queen-Empress* v. *Sheik Beari*[1] and *Queen-Empress* v. *Samavier* [2] and, in submitting the case for orders, expressed the view that the employment of the word " sanction " by the lagislature imported a judicial element into the act of the executive. On the second objection, he referred to the fact that in the order according sanction no intimation was given as to the nature of the offence under section 168, which the accused was charged with committing, nor as to the place where or the time when it had been committed ; nor was there anything in the order to show whether the facts of the charge eventually preferred were before the Government when the sanction was accorded.

Mr *John Adam* for the accused.

ORDER.—The Acting Sessions Judge of Godavari makes this reference under section 215 of the Criminal Procedure Code for quashing a commitment made to his Court, by the Sub-Divisional Magistrate of Ellore, under an order made by the High Court under section 526, clause [1] IV, Criminal Procedure Code—the points of law urged by him for quashing the commitment being that the Local Government accorded the sanction, under section 197, Criminal Procedure Code, for the prosecution of the accused without giving him previous notice, and that the sanction accorded does not specify with sufficient clearness the offence for which he is to be prosecuted.

In my opinion section 215 of the Criminal Procedure Code under which this reference has been made, is inapplicable to the case inasmuch as the commitment in question is not one made under any one of the four sections therein specified, but is one made under the direction of the High Court under section 526 [1] IV. The case was pending before the Sub-Divisional Magistrate of Ellore, who was trying the case [under Chapter XXI, Criminal Procedure Code] on a charge which had been framed against the accused when the case was pending before the Joint Magistrate of Rajahmundry, before it was transferred by the District Magistrate to Ellore; and on an application made by the accused to the High Court under section 526 of the Criminal Procedure Code for a transfer of the case, the High Court transferred its trial to the Sessions Court of Rajahmundry and directed the Sub-Divisonal Magistrate to commit the accused for trial to that Court.

It will be observed that, under sections 436 and 526 of the Criminal Procedure Code, a commitment may be made without a charge against the accused [*vide* section 226 of the Criminal Procedure Code] and neither of these sessions is specified in section 215. The order of a Sessions Judge or District Magistrate passed under section 436 directing commitment can be

(1) I. L. R., 10., Mad., 232. (2) I. L. R., 16 Mad., 468.

Digitized by Google

quashed by the High Court in the exercise of its revisional powers, though not under section 215; but an order passed by the High Court itself under section 526 cannot be so revised. The case, which has been thus committed to the Sessions Judge for trial, should be disposed of by him according to law and it will of course be competent to him to discharge the accused, if, in his opinion, the points of law urged by him be well founded.

Even if it were competent to the High Court to quash the commitment under section 215 of the Criminal Procedure Code or under any other power I see no sufficient reason to do so, as in my opinion neither of the grounds urged by the Sessions Judge is well founded.

The sanction accorded by Government under section 197 cannot be held to be null and void for the reason that no notice was given to the accused to show cause why such sanction should not be given. It is a matter left entirely to the discretion of Government whether such opportunity should be given to the person concerned before sanctioning his prosecution and the Criminal Court before which he is prosecuted is not an appellate authority over Government in the matter of the sanction. There is a marked distinction between the classes of offences dealt with in section 195, clauses1 [*b*] and [*c*], and those dealt with in section 197. A Court granting sanction under section 195, clauses [*b*] and [*c*], does so in connection with offences committed in or in relation to any proceeding in such Court and the Court therefore acts in its judicial capacity in granting the sanction upon legal evidence. But the Government in according or withholding sanction under section 197—for the prosecution of a public servant in respect of an offence alleged to have been committed by him as such public servant—acts purely in its executive capacity and the sanction need not be based upon legal evidence. The Government is certainly not acting in a judicial capacity nor exercising a judicial function in authorising or sanctioning a prosecution under sections 196 and 197 of the Criminal Procedure Code, and there is nothing in the signification of the word 'sanction' to 'import' as the Sessions Judge supposes "a judicial element into the act of the executive," and the ruling of the Full Bench in *Queen-Empress* v. *Sheik Beari*[1] referred to by the Sessions Judge has no application whatever to the present case.

Nor can it be reasonably held that the sanction accorded by Government to the prosecution of the accused for an offence under section 168 of the Indian Penal Code is not a sanction for prosecuting the accused on the charge specified in the complaint. The offence with which he is charged in the complaint is "that during the term of his office as Municipal Councillor he was a partner in the year 1898 in all the contracts of Mr. Andrews, who had no capital of his own but was trading with the funds supplied to him by the defendant [and] that the said Mr. Andrews had taken up in July 18 8 the contract for the supply of gravel and metal to the Ellore Municipality." The proceedings of the Government of Madras sanctioning the prosecution of the accused for having as a member of the Municipal Council of Ellore, committed an offence punishable under section 168 of the Indian Penal Code, recite that a letter from the Collector, Godavari district, dated 9th January 1902, "submitting report in the matter of the proposed removal, etc., of certain Councillors of the Ellore Municipality" was read and thereupon an order is passed declining to remove from office two of the Municipal Councillors named in the order, but sanctioning the prosecution of the present accused. It is therefore clear that the report of the Collector related to the proposed removal of

[1] I.L.R., 10 Mad., 232.

Digitized by Google

two of the Councillors and to the prosecution of the accused for having, while a Municipal Commissioner, had an interest in contracts with the Municipal Council and that Government after consideration of the facts set fourth in the Collector's report accorded its sanction for the prosecution of the accused and did not delegate its authority to the Collector, as was done by the Board of Revenue in the case of *Queen-Empress* v. *Samavier*[1] in which it was held that no sanction for prosecution had in law been given by the Board of Revenue, inasmuch as it simply authorised the Colletor to prosecute the accused in that case " on such of the charges set forth in the Deputy Collector's report as he thinks likely to stand investigation by a Criminal Court. " The Criminal Procedure Code does not prescribe any particular form for the sanction required by the section 197, though in the caae of a sanction accorded under section 195, sub-section [4] thereof prescribes that the sanction " shall, as fas as practicable, specify the place in which and the occasion on which the offence was committed. "

Tbe complaint lodged against the accused in the present case is definite and specific and the complainant praduced the above proceedings of the Government as according sanction for the prosecution instituted by him and it is simply a captious objection on the part of the accused—raised apparently for the first time before the Sessions Court—to say that the sanction accorded by Government does not disclose the particular contracts in respect of which his prosocution has been sanctioned. The sanction of Government to prosecute him, as a Municipal Councillor of Ellore under section 168 of the Indian Penal Code, can only be in respect of his alleged interest in some municipal contracts and it is not pretended or suggested that the sanction might relate to some contract or contracts other than that referred to in the complaint. If the letter of the Collector read in the proceedings of the Government and thus incorporated therewith had been produced before the Magistrate or were even now produced before the Sessions Court by the Public Prosecutor, there would be no room for such quibble and captious objection on the part of the accused.

For the above reasons the commitment made to the Sessions Court will stand and the Sessions Judge will proceed to try and dispose of the case according to law.

1903. February 18. **I. L. R. 27 Mad. 59.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

IN THE MATTER OF TAMMI REDDI [COMPLAINANT] ‡

Criminal Procedure Code—Act V of 1898, s. 250—Order for compensation.

The question whether the discretion given by section 250 of the Code of Criminal Procedure has been rightly exercised, must always depend upon the facts of the particular case. If the false charge is of such a nature that a prosecution is necessary on grounds of public policy, it may well be that a magistrate would exercise his discretion wrongly if, instead of sanctioning a prosecution, he awarded compensation. If the false charge is one which does not render it necessary on grounds of public policy that a prosecution should be sanctioned, a magistrate who makes an order for compensation cannot be said to exercise his discretion wrongly.

ORDER for compensation under section 250 of the Code of Criminal Procedure. The case was referred to the High Court for orders, under circum-

(1) I.L.R., 16 Mad., 468 ‡ Case referred no. 157 of 1902.

Digitized by Google

stances which are set out in the following letter of reference:—" The Deputy Magistrate has followed the view of the law exressed by the Calcutta High Court in *Kina Karmakar* v. *Preo Nath Dutt* (1) (quoted by him) and also in *Parsi Hajra* v. *Bandhi Dhanuk* (2). With all due deference to the Calcutta High Court I prefer to accept the interpretation put on section 250 of the Criminal the Procedure Code by the Madras High Court in the case of *Adikkan* v. *Alagan* (3). It appears to me that it is impossible in the present case to hold that the complaint was not vexatious. It is certainly vexatious to be accused of stealing one's own property. It follows that the order of the Sub-Magistrate was not illegal. The Calcutta High Court would, however, say that in passing such an order, the Magistrate did not exercise a proper discretion. On the other hand, the Madras High Court observed, in the case above quoted, as follows in connection with a false charge of theft:—' The sanction to prosecute for making a false charge is granted on grounds of public policy for an offence against public justice. The compensation is granted partly in order to deter complainants from making vexatious and frivolous complaints, and partly in order to compensate the accused for the trouble and expense to which he has been put by reason of the false complaint. We can see no ground in law or reason why compensation should not be granted in a case in which the Magistrate also directs a prosecution for making a false charge. ' "

Dr. *S. Swaminadhan* for complainant.

JUDGMENT.—The question before us is not whether a sanction to prosecute under section 211 of the Indian Penal Code can be validly granted after an order for compensation under section 250 of the Code of Criminal Procedure has been made, but whether the second-class Magistrate exercised a wrong discretion in making an order for compensation. The question whether the discretion given by section 250 has been rightly exercised must always depend upon the facts of the particular case. It the false charge is of such a nature that a prosecution is necessary on grounds of public policy it may well be that a Magistrate would exercise his discretion wrongly if, instead of sanctioning a prosecution, he awarded compensation. If the false charge is one which does not render it necessary, on grounds of public policy that a prosecution should be sanctioned, a Magistrate who makes an order for compensation cannot be said to exercise discretion wrongly.

These are the considerations to be borne in mind in making an order section 250 of the Code of Criminal Procedure. We therefore set aside the order of the Deputy Magistrate and direct the appeal to be heard and disposed of in the light of the above observations.

1903. *July* 27. **I. L. R. 27 Mad. 61.**

Before Sir Arnold White, *Chief Justice, and Mr. Justice Moore.*

BANGARU ASARI, APPELLANT, *v.* EMPEROR, RESPONDENT.*

Criminal Procedure Code—Act V of 1898, ss. 199, 238—Charge of kidnapping and conviction for enticing married woman—No complaint by husband—Legality.

The provision in section 199 of the Code of Criminal Procedure that no court shall take cognizance of an offence under section 498 of the Indian Penal Code except upon a complaint made by the husband of the woman, means a complaint by the husband of an offence under section 498, not any complaint made by the husband.

(1) I.L.R. 29 Calc., 479. (2) I.L.R., 28 Calc., 251. (3) I.L.R., 21 Mad., 237.

* Criminal Appeal No. 238 of 1903.

Digitized by Google

An accused was charged with kidnapping or abducting a woman under section 366, Indian Penal Code, but the Sessions Judge, holding that the prosecution had failed to prove either kidnapping or abduction, convicted the accused, on the evidence, of an offence under section 498. In doing so he purported to act under section 238 of the Code of Criminal Procedure. The complaint before the court had been made by the husband, but was only general in terms:

Held, that the conviction was bad.

Empress v. Kallu, (I.L.R., 5 All., 233), followed and approved.

CHARGE of kidnapping a woman under section 366 of the Indian Penal Code. The Sessions Judge held that the prosecution had failed to prove either kidnapping or abduction, but on the evidence, he convicted the accused of having enticed away a married woman, under section 498. A complaint had been preferred by the woman's husband, in general terms, in which he stated that his wife had been missed, that he searched for and found her in the backyard of the accused who subsequently brought the girl out and locked himself in his house. The complaint concluded by stating that the woman had informed the complainant that the accused had carried her into her house and gagged her mouth and confined her in a room and threatened to stab her if she cried out. The accused was charged under section 366, Indian Penal Code, with the result that has already been stated.

The accused preferred this appeal.

T. Venkatasubba Ayyar and *Narayana Sastri* for appellant.

The Public Prosecutor in suppert of the conviction.

JUDGMENT.—In this case the accused was charged with an offence under section 366 of the Indian Penal Code. The Sessions Judge held that the prosecution had failed to prove either kidnapping or abduction but on the evidence he convicted the accused of and offence under section 498. In so doing he purported to act under section 238 of the Code of Criminal Procedure. Sub-section (3) of this section provides that nothing in the section shall be deemed to authorise a conviction of any offence referred to in section 199 when no complaint has been made as required by that section. Section 199 says no court shall take cognizance of an offence under section 498 of the Indian Penal Code except upon a complaint made by the husband of the woman We think this means a conplaint made by the husband of an offence under section 498, not *any* complaint made by the husband.

This is the view adopted by the Allahabad High Court in *Empress* v. *Kallu*(1). The Calcutta High Court has taken a different view—see *Jutra Shekh* v. *Reazat Shekh*(2). We agree with the reasoning, and with the conclusion of the Allahbad High Court. The conviction is bad and must be set aside on the ground that, there being no complaint by the husband of an offence under section 498, the Court had no jurisdiction to convict.

The prisoner must be set at liberty.

1903. *July* 16. **I. L. R. 27 Mad. 124.**

Before Mr. Justice Bhashyam Ayyangar.

IN THE MATTER OF SUBBAMMA, ACCUSED.*

Criminal Procedure Code—Act V of 1898, s. 195 (b)—Power of superior Court to revoke sanction after complaint lodged.

P obtained sanction from a Stationary Sub-Magistrate to prosecute S for offences under sections 211 and 193, Indian Penal Code, alleged to have been committed before that Magis-

(1) I.L.R., 5 All., 233. (2) I.L.R., 20 Calc., 483.

* Case referred No. 52 of 1903.

Digitized by Google

trate. P did not prefer any complaint in pursuance of the sanction, but the police, relying on it, preferred a charge sheet to the Joint Magistrate against the accused in respect of the alleged offence under section 211. The Joint Magistrate struck the case off his file, giving as his reason for so doing that he *suo motu* quashed the Sub-Magistrate's sanction under section 195 (b) of the Code of Criminal Procedure :

Held, that the Joint Magistrate's action in striking the case off his file was legal and proper, though the reason given by him for so doing was erroneous and his act in quashing the sanction *ultra vires*. A Joint Magistrate, though authorized under section 407 (2) to entertain appeals preferred by persons convicted on a trial by the Stationary Magistrate is not the Court to which appeals from the Court of the Stationary Magistrate ordinarily lie, withing the meaning of section 195 (7). The Court to which the Court of the Stationary Magistrate is, within the meaning of section 195 (6) and (7), subordinate is that of the District Magistrate. Eroma Variar *v.* Emperor, (I.L.R., 26 Mad., 656, and Sadhu Lall *v.* Ram Churn Pasi, (I L.R., 30 Calc., 394). followed. The Joint Magistrate could not, therefore, revoke the sanction given by the Stationary Sub-Magistrate, the District Magistrate alone having the power to revoke or grant a sanction given or refused by the Stationary Sub-Magistrate. Nor was it competent to a District Magistrate, under section 407, to direct that applications for revoking or granting a sanction given or refused by a Sub-Magistrate may be presented to the Joint Magistrate.

Whether the Court authorized to exercise such a power under sub-section (6) can exercise it *suo motu*, as if it were a Court of revision, where no application has been made to it either to give a sanction which has been refused or to revoke a sanction which has been given.—*Quære.*

The course pursued by the police in sending a police report in respect of the offence was contrary to law ; but whether, on the strength of the sanction accorded to P, a police officer or other stranger might have preferred a complaint against S.—Quære.

The mere fact that a complaint has been made, in pursuance of sanction, will be no bar to a Court competent under sub-section [6] to deal with an application for revoking such sanction, entertaining such application and disposing of it according to law, even if the complaint in pursuance of the sanction has been preferred to itself.

CASE submitted to the High Court for orders under section 438 of the Code of Criminal Procedure. One Subbamma charged one Perumma with theft, but the Stationary Sub-Magistrate discharged the accused on the ground that no case had been made out. Perumma then applied to the Stationary Sub-Magistrate for sanction to prosecute Subbamma for offences under sections 193 and 211, Indian Penal Code. The Magistrate accorded sanction as requested. Thereupon the police, acting on this sanction, laid a complaint against Subbamma in the Joint Magistrate's Court. The Joint Magistrate held this to be irregular, with reference to section 155 (2) of the Code of Criminal Procedure, as the complaint should have been laid by Perumma He read the charge-sheet and staruck the case off his file, the grounds given being (*a*) that the words constituting the offence of perjury were not quoted in the application for sanction, or in the the order according it, and (*b*) that there did not appear to be a strong *primâ facie* case on the false charge and that the Sub-Magistrate did not seem to have been satisfied as to its falsity. Questioned as to the provision of law under which he had struck the case from off his file, the Joint Magistrate replied that he had not acted under any section of the Code of Criminal Procedure unless it was section 195. He said the case should never have come on his file, for he refused to take cognizance of it. But before he had examined the sanction the case had been numbered on his file. There was, in consequence, nothing left for him but to pass a proceeding striking it off the file. He considered that such an order was valid under section 195. The letter of reference stated that section 195 gives a superior Court power to revoke a sanction granted by a subordinate Court, and added that the Joint Magistrate claimed that by virtue of this provision he he had power, *suo motu*, and, upon a mere perusal of the sanction accorded by a subordinate Court to cancel it. The District Magistrate, while upholding this view, considered it doubtful whether that power continued after a complaint had been lodged or after the police had put in a charge-sheet. He raised that question in the reference.

Digitized by Google

JUDGMENT.—In this case one Perumma was accorded sanction by the Stationary Sub-Magistrate, Ongole, Nellore district, under section 195, Criminal Procedure Code, to prosecute the accused for offences under sections 211 and 193, Indian Penal Code, alleged to have been committed before the said Magistrate. Perumma did not prefer any complaint in pursuance of the sanction obtained by her. But the police, relying upon the sanction accorded by the Sub-Magistrate, preferred a charge-sheet to the Joint Magistrate, Ongole, against the accused in respect of the alleged offence under section 211, Indian Penal Code, notwithstanding that an offence under that section is not cognizable by the police. It is clear that the course pursued by the police in sending a police report in respect of this offence is contrary to law. It does not appear that any police officer preferred any complaint on oath in the ordinary way to the Joint Magistrate. It is therefore unnecessary to consider whether, on the strength of the sanction accorded to Perumma, a police officer or other stranger may prefer a complaint against the accused. Under these circumstances the Joint Magistrate's action in striking the case off his file is legal and proper, though the reasons given by him for so doing, viz., that *suo motu* he quashed the Sub-Magistrate's sanction under sub-section (6) of section 195 is unsound in law. The question referred to this Court by the District Magistrate is whether a superior Court which has power, under section 195 (*b*), to revoke the sanction loses that power in respect of a sanction under which a prosecution has been already instituted before itself. The District Magistrate has evidently assumed that the Joint Magistrate, who presumably has been authorized under section 407 (2) to entertain appeals preferred by persons convicted on a trial by the Stationary Magistrate, is the Court to which appeals from the Court of the Stationary Magistrate ordinarily lie within the meaning of section 195 (7). This view is erroneous and within the meaning of sub-sections 6 and 7 of section 195 the Court to which the Court of the Stationary Magistrate is subordinate is that of the District Magistrate (*vide* Full Bench dicision in *Eroma Variar* v. *Emperor* (1) and *Sadhu Lall* v. *Ram Churn Pasi* (2)). The Joint Magistrate of Ongole is therefore not the authority which can revoke under sub-section 6, the sanction given by the Stationary Sub-Magistrate, and it is the District Magistrate alone that can revoke or grant a sanction given or refused by the Stationary Sub-Magistrate of Ongole, nor is it even competent to a District Magistrate, under section 407, to direct that applications for revoking or granting a sanction given or refused by the Sub-Magistrate may be presented to the Joint Magistrate. The action of the Joint Magistrate in quashing the sanction being therefore *ultra vires* it is unnecessary to consider whether the Court authorized to exercise such a power under sub-section (*b*) can exercise the same *suo motu* as if it were a Court of revision when no application has been made to it either to give a sanction which has been refused or to revoke a sanction which has been given.

As regards the question put by the District Magistrate I may observe that the mere fact that a complaint has been made in pursuance of the sanction would be no bar to a Court, competent under sub-section (6) to deal with an application for revoking such sanction, entertaining such application and disposing of it according to law, even if the complaint in pursuance of the sanction has been preferred to itself. The order striking the case off the file being legal for the reasons already stated, it does not require to be revised, but the order of the Joint Magistrate, if any, revoking or quashing the sanction given by the Stationary Magistrate is set aside.

(1) I. L. R., 26 Mad., 656. (2) I. L. R., 30 Calc., 394.

Digitized by Google

1903. *March* 20. I. L. R. 27 Mad. 127.

Before Sir Arnold White, Chief Justice.

MALLAPPA REDDI AND ANOTHER (FIRST AND FOURTH ACCUSED), PETITIONERS. *v.* EMPEROR, COUNTER-PETITIONER. *

Penal Code—Act XLV of 1860, s. 211—Preferring false charge—Statement not reduced to writing by Police officer.

A person was convicted, under section 211 of the Indian Penal Code, of having preferred a false charge. It appeared that the accused had stated to a Police officer that certain of the prosecution witnesses had stolen his goats, and that he had made this statement intending to set the criminal law in motion against those persons. The statement had not been reduced to writing in accordance with the requirements of section 154 of the Code of Criminal procedure. On its being contended that there was no evidence of a false charge, within the meaning of section 211 :

Held, (1) that the test is—did the person who makes the charge intend to set the criminal law in motion against the person against whom the charge is made ; (2) that (it being clear from the evidence that the accused did so intend) the fact that the statement made by the accused to the Police officer had not been reduced to writing in accordance with section 154 of the Code of Criminal Procedure did not prevent the statement made from being a false charge within the meaning of that section.

CHARGE, against four accused, of preferring a false complaint, under section 211, Indian Penal Code. Accused Nos. 1 and 4 were convicted and sentenced by the Acting Joint Magistrate to eighteen months' rigorous imprisonment. Accused Nos. 2 and 3 where discharged. The Sessions Judge, on appeal, upheld the conviction and sentence. First accused made his complaint to the police on the night of 29th March, whilst fourth accused made his on the morning of 30th March. It was in consequence of this that it was contended that the accused should not have been jointly charged. It appeared also that the statements made by the first accused to the Police officer where not reduced to writing in accordance with the requirements of section 154 of the Code of Criminal Procedure.

The accused filed this criminal revision petition.

Mr. *J. G. Smith* for petitioner.

JUDGMENT.—Two points have been raised on behalf of the petitioners, first that there was no evidence of a false charge made by the first and fourth accused within the meaning of section 211 of the Penal Code, secondly that the fourth accused ought not to have been tried together with accused Nos. 1 and 3. As regards the first point it has been laid down by this court in a recent case that the test to apply is,—did the person who makes the charge intend to set the criminal law in motion against the person against whom the charge is made. It seems perfectly clear, on the evidence in this case, that the first accused, when he stated to a Police officer that certain of the prosecution witnesses had stolen his goats, intended to set the criminal law in motion against these persons. The fact that the statement made by the accused to the Police officer was not reduced to writing in accordance with the requirements of section 154 of the Criminal Procedure Code, does not, to my mind, prevent the statement made from being a false charge within the meaning of the section. I can find no authority for placing this narrow construction on the words " falsely charged " and on principle I can find no good reason for adopting such a construction.

As regards the fourth accused, the case is much stronger inasmuch as the charge made by him was reduced into writing and signed by him.

* Criminal Revision Petition No. 570 of 1902.

Digitized by Google

I think there was evidence that accused, Nos. 1 and 4 " falsely charged " the prosecution witnesses within the meaning of section 211 of the Code.

As regards the question of misjoinder it is true the false charge of stealing goats was made by the first accused on one day and by the fourth accused on the following day. I think the offence was the same, viz., a false charge that certain perons had stolen certain goats and that the first and fourth accused were properly tried together.

As regards the sentence I think a distinction can be drawn between the case of the first and fourth accused. The fourth accused persisted in the charge. The first withdrew it, or at any rate made up his mind not to proceed with it at a very early stage.

In the case of the first accused I reduce the sentence of eighteen months' rigorous imprisonment to nine months' rigorous imprisonment.

As regards the fourth accused the petition is dismissed.

1903. February 27. **I. L. R. 27 Mad. 129.**

Before Mr. Justice Benson and Mr. Bhashyam Ayyangar.

CHENNA MALLI GOWDA (ACCUSED), APPELLANT, *v.* EMPEROR, RESPONDENT.*

Penal Code—Act XLV of 1860, s. 211—Preferring a false charge—" Charge made to Village Magistrate—Sustainability.

An accusation of murder made to a Village Magistrate (who, under section 13 of Regulation XI of 1816, has authority to arrest any person whom he suspects of having committed the murder of a person whose body is found within his jurisdiction) is a " charge " whithin the meaning of section 211 of the Indian Penal Code, even though it does not amount to the institution of criminal proceedings and even though no criminal proceedings follow it owing to the police referring it as false on investigation.

CHARGE of preferring a false chage of murder, under section 211, Indian Penal Code. The charge was made by the accused in the first instance to the Village Magistrate. The Sessions Judge convicted and sentenced the accused.

The accused preferred this appeal.

Mr. *D. Chamier* for accused.

Mr. *J. G. Smith* for the Public Prosecutor.

JUDGMENT.—There can be no reasonable doubt that the appellant falsely accused three men of having murdered his brother and that he knew the accusation to be false. The accusation was made, in the first instance, to the Village Magistrate who, under section 13, Regulation XI of 1816, has authority to arrest any person whom he suspects of having committed the murder of a person, whose body is found, as it was in this case, within his jurisdiction.

Such an accusation made to a Village Magistrate is, we think, a " charge " within the meaning of section 211, Indian Penal Code, even though it does not amount to the institution of criminal proceedings and even though no criminal proceedings follow it owing to the police on investigation referring the charge as false.

On this ground, we think the conviction is right, and it is not necessary to consider the subsequent complaint made to the Subordinate Magistrate, which complaint was substantially, though, perhaps not technically, dismissed.

We dismiss the appeal.

---

* Criminal Appeal No. 782 of 1902.

Digitized by Google

1903. *September* 15. **I. L. R. 27 Mad. 237.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

BANDANU ATCHAYYA AND OTHERS (ACCUSED), APPELLANTS, *v.* EMPEROR, RESPONDENTS.*

Criminal Procedure Code—Act V of 1898, ss. 366, 367—Mode of delivering judgment and its contents—Judgment written and delivered after conviction of prisoners—Defect vitiating conviction.

Where a judgment, in a criminal trial, was written and delivered some days after the prisoners were convicted and sentenced :

Held, that this was a violation of sections 366 and 367 of the Code of Criminal Procedure and was more than an irregularity. It was a defect which vitiated the convictions and sentences.

Queen-Empress v. Hargobind Singh, (I. L. R., 14 All., 242), approved.

CHARGE of murder. Three persons were charged with murder before a Sessions Judge and assessors. The assessors expressed the opinion that the accused were not guilty. The Sessions Judge found the first accused guilty of murder and passed the extreme sentence on him. He found the other two accused guilty of abetment of murder and sentenced them to transportation for life. The judgment was (as is found in the judgment of the High Court), written and delivered some days after the prisoners wer convicted and sentenced.

The accused appealed.

V. Krishnaswami Ayyar and *V. Ramesam* for accused.

The Public Prosecutor in support of the conviction.

JUDGMENT.—In this case the judgment was written and delivered some days after the prisoners were convicted and sentenced. This is a violation of the provisions of sections 366 and 367 of the Code of Criminal Procedure. In our opinion it is more than an irregularity. It is a defect which vitiates the convictions and sentences. As to this we take the same view as that adopted by the Allahabad High Court in the case of *Queen-Empress* v. *Hargobind Singh*(1). In all the circumstances we think the proper course is to set aside the convictions and sentences and to direct that the accused be retried. The retrial will be held at the November Sessions of the Vizagapatam Court.

1903. *August* 25. **I. L. R. 27 Mad. 238.**

Before Sir Arnold White, Chief Justice.

MOHIDEEN ABDUL KADIR AND OTHERS (ACCUSED), PETITIONERS, *v.* EMPEROR, RESPONDENTS.†

Criminal Procedure Code—Act V of 1898, s. 342—Examination of accused—Filling gap in prosecution evidence by questioning accused—Charge of defamation—Failure to prove making and publication—Irregularity.

Eight persons were charged with defamation by making and publishing a certain petition regarding the conduct of the complainant. Though other evidence was adduced by the prosecution, it was not proved that the accused made and published the matter which was alleged to be defamatory. The Magistrate, however, asked the accused if they had signed the petition,

* Referred Trial No. 36 of 1903.

(1) I.L.R. 14 All. 242.

† Criminal Revision Case No. 141 of 1903.

Digitized by Google

and accepted their answers as proving that they had and as relieving the prosecution from proving the making and publication of the alleged defamatory matter by the accused. He convicted the accused.

Held, that the convictions must be set aside. A gap in the evidence for the prosecution cannot be filled up by any statement made by the accused in his examination under section 342 of the Code of Criminal Procedure. The omission to prove the making and publication of defamatory matter is more than an irregularity; it is a defect which vitiates the conviction.

CHARGE of defamation. Eight persons were convicted of defamation because in a petition to the Collector of the District of Madura alleged to have been made and published by them, the complainant, a Hospital Assistant, was charged with having (inter alia) refused to give medicine to cholera patients except when the hospital was open. The convictions were upheld, on appeal, by the Sessions Judge, who, however, commented thus on the Magistrate's procedure:—

"I must invite the Magistrate's attention to one grave irregularity that he committed. It is a strict rule of law, that an accused person may not be examined except for the purpose of enabling him to explain any circumstances appearing in the evidence against him. On the 15th July the first four prosecution witnesses were examined. Not one of them proved that the petition that the Collector received had been signed or sent by the accused. So far as I can see there was absolutely no evidence on 15th July that the accused had by words intended to be read made or published any imputation concerning the Hospital Assistant and yet on that very day notwithstanding the provisions of section 342 of the Code of Criminal Procedure, the Magistrate examined all the accused and the first question he put to them was 'did you sign the petition?' A defamation case is a warrant case; it was necessary, therefore, that the prosecution should prove that the accused made or published an imputation regarding the Hospital Assistant and the Magistrate should not have remedied the flaw in the prosecution case by illegally examining the accused about a fact regarding which no evidence had been given. Appellants have not taken exception in their appeal memo, to the Magistrate's procedure. Had they done so, I should have been obliged to order a retrial."

The accused preferred this criminal revision petition.

Mr. *Chamier*, for petitioners, contended that the accused ought to have been acquitted as the prosecution had failed to prove the making and publishing of the libel by the accused. The Magistrate was not entitled to fill a gap in the prosecution evidence by questioning them and recording their statements under section 342 of the Code of Criminal Procedure. This was not a mere irregularity. He cited *Basanta Kumar Ghattak* v. *Queen-Empress*(1).

The Public Prosecutor in support of the conviction.

ORDER.—I enterfere in this case with considerable reluctance having regard to the delay which has taken place, the judgment of the Sessions Judge having been given on 11th December 1902 and the revision petition not having been presented till 20th April 1903.

But notwithstanding the delay in the presentation of the revision petition, I do not think the conviction ought to be allowed to stand.

The Sessions Judge points out that there is no evidence of the making and publishing of the alleged defamatory statements by the accused. I am bound to accept this as true unless it could be shown that the Judge was wrong

(1) I. L. R., 26 Calc., 49.

Digitized by Google

and that there was evidence of making and publishing. The Public Prosecutor is not in a position to show the Judge was wrong and as a matter of fact the record does not show any evidence of making and publishing by the accused. The Head Assistant Magistrate appears to have assumed that certain statements made by the accused in answer to questions put to them under section 342, Criminal Procedure Code, relieved the prosecution from the necessity of proving that the accused made and published the alleged libel. In this he was clearly wrong. If authority be needed, it is to be found in *Basanta Kumar Ghattak* v. *Queen Empress*(1) where it was held that a gap in the evidence for the prosecution cannot be filled up by any statement made by the accused in his examination under section 342, Criminal Procedure Code. The Sessions Judge got over the difficulty by saying that no exception was taken to the "irregularity" in the memorandum of appeal to him. The omission to prove the making and publishing by the accused seems to me more than an irregularity. In my opinion it is a defect which vitiates the conviction.

The conviction and sentences must be set aside and the case must go back to the Head Assistant Magistrate for retrial.

1903. *November* 9, 17, 26, 30. **I. L. R. 27 Mad. 271.**

Before Mr. Justice Bhashyam Ayyangar.

ON REFERENCE FROM

Sir S. Subrahmania Ayyar, Officiating Chief Justice, & Mr. Justice Boddam.

RAMASWAMI GOUNDEN (PRISONER), APPELLANT,

v. EMPEROR, RESPONDENT.*

Evidence Act—I of 1872, s. 114 (b)—Evidence of accomplice—Necessity for corroboration.

The case against an accused, who was tried on a charge of murder, depended entirely upon the evidence of the first witness, who deposed that he had worked for accused prior to and at the date of the murder; that the woman whom accused was charged with murdering had also worked for accused, and had become *enceinte* by him; that she had frequently demanded money of accused and at last threatened to disgrace him if he did not pay her; that on the evening of the murder accused obtained a crow-bar from the witness, and, later on, went to where the deceased was sleeping, when the witness heard a cry, and, on secretly approaching the spot, saw accused strike the deceased on the head with a crow-bar; that witness then ran away; that accused called him; that he went to the spot, and accused asked him to put the body in an empty pit some distance off; that witness refused to help, whereupon accused dragged the body to the pit and threw it in; that next morning accused threatened to murder the witness if he mentioned what had happened; that some fifteen days later, after a quarrel with accused, witness ran away and gave information to the brother of the deceased woman and then to the police, who, with some villagers, were taken by witness to the pit, where the body was found and, subsequently, identified. The witness stated that he had not given information earlier because he was afraid. The only evidence adduced in corroboration of any part of this witness' evidence was that the brother and sister of the deceased had heard of the relations between accused and the deceased, that the body was found in the pit, and that death was shown to have been caused, at about the time and place stated by the first witness, by fracture of the skull, which might have been caused by a blow from a crow-bar.

On its being contended, on behalf of the accused, that the first witness was an accomplice, or, if not an accomplice in the strict sense of the term, that he was no better than an accomplice and that his evidence should therefore be corroborated in material particulars, and that in the absence of such corroboration the accused should not be convicted.

Held (per Sir SUBRAHMANIA AYYAR, Offg. C. J., and per BHASHYAM AYYANGAR, J., on reference), that the witness was not an accomplice in the crime for which the accused was

(1) I. L. R., 26 Calc., 49.

* Referred Trial No. 55 of 1903.

Digitized by Google

charged, inasmuch as he had not been concerned in the perpetration of the murder itself. Even assuming that, after the murder had been committed, the witness had assisted in removing the body to the pit, and that he could have been charged with concealment of the body under section 201 of the Penal Code, that was an offence perfectly independent of the murder, and the witness could not rightly be held to be either a guilty associate with the accused in the crime of murder, or liable to be indicted with him jointly. The witness was therefore not an accomplice and the rule of practice as to corroboration had no application to the case.

Per BODDAM, J.—Even if the witness was not an accomplice, having regard to the fact that he was cognizant of the crime for fifteen days without disclosing it and that had a cause of quarrel with the accused at the time when he did disclose it, it would be most unsafe to act upon his evidence unless it was corroborated in some material particular connecting the accused with the crime.

The rule of practice as to the necessity for corroboration of the evidence of an accomplice discussed.

Queen v. Chando Chandalinee, (24 W. R. (Cr.), 55). Ishan Chandra Chandra v. Queen-Empress, (I. L. R., 21 Calc., 328), and Alimuddin v Queen-Empress, I. L. R., 23 Calc, 361 at p. 365, discussed.

CHARGE of murder. The Sessions Judge, sitting with assessors, convicted the accused. The facts of the case, so far as they relate to the question decided, appear in the head-note, and fully set out in the judgment.

The accused preferred this appeal.

The case first came on for hearing before Sir Subrahmania Ayyar, Offg. C.J., and Boddam, J.

Mr. *Nugent Grant* and *P. Narasimhachariar* for appellant.

The Public Prosecutor in support of the conviction.

Sir SUBRAHMANIA AYYAR, Offg. C.J.—The accused Ramaswami Gounden has been convicted by the Sessions Judge of Coimbatore of the murder of one Angayi and sentenced to death. The case for the prosecution briefly is, that after the deceased Angayi had been deserted by her husband some years ago she used to work as a servant under the accused; that during that time the accused, who was a widower, kept her; that he having since married again broke off the connection with the deceased; that the latter had been in the habit of dunning the accused for money for expenses, which she sometimes got; that on or about the 8th June last she again applied for pecuniary help to the accused, who was then in his field; that on his refusing to comply with her request she would not leave the place but lay down there threatening to disgrace him publicly before his relatives who had come for the festival then about to take place in the adjacent village of Malayampundi; that later on that night the accused struck the deceased, who still persisted in staying in the field, with a crow-bar on the head, killed her and threw her body into a grain-pit 10 or 12 feet deep, some distance off in a field of one of his cousins and covered up the place.

The case thus set up practically rests on the evidence of Velappa Gounden, a boy of about 16 or 18 who was, at the time of the murder, living with, and, under the protection of, the accused and working for him, the accused holding in his hands what little money belonged to the witness. Velappa speaks to the intimacy which had previously existed between the deceased and the accused, to her demanding money from the accused on the occasion in question, to the accused's refusal, to the threat by the woman as aforesaid, to the infliction of the fatal blow by the accused and to the concealment of the body in the pit where it was found upon his giving information some days later. Though the witness did not admit that he assisted the accused in removing the body from the place of murder to

Digitized by Google

the pit and covering it up, yet the Sessions Judge was of opinion that the witness was most likely to have done so. Having regard to the circumstances in which the witness was working under the accused, it is not probable that he would have ventured to disobey if, as is likely, the accused, assuming him to be the murderer, had required him to help in concealing the body. In dealing with this case it is perhaps better to proceed as if Velappa had assisted the accused in the way supposed, though I cannot say I believe he did so assist.

Proceeding on some such assumption, the learned counsel for the appellant contended that Velappa being an accomplice and his evidence being uncorroborated in respect of anything tending to connect the accused with the murder, the Court would, if the case had been tried before a jury, have been bound to direct the jury to acquit the accused, and consequently this Court ought to acquit him; and he more than once invited us to lay down the law on the point, as if the question had not long since passed the stage of controversy and as if the rules on the point required fresh enunciation. But the whole subject of accomplice testimony has been over and over again considered and expatiated upon. As shown in the Indian leading case of *Elahee* v. *Buksh* (1) in which Sir Barnes Peacock went into the whole matter exhaustively, the Indian law on the sabject has been borrowed from the English law and it is not necessary now to do more than to refer to *Rex* v. *Boyes* (2) as containing, so far as I am aware, the practically final statement of the law in England in no uncertain terms.

The third count in the charge, of which alone Boyes was convicted, was that he gave a bribe to Pougher, a voter at an election. He was tried by a jury before Martin, B. Pougher was called as to this count and his evidence was to the effect that, on the morning of the election, he went to a place where the defendant was, saw the defendant and was desired to go into a room and on doing so heard a voice say "two" which was followed by two sovereigns being put into his hands. In the course of the summing up, the learned Judge said (page 34 in Cox's report) "Assume for the purpose of the present discussion that this man was speaking the truth. Is there any law which prohibiits a jury from believing a man who [it must be assumed for the sake of the argument] spoke the truth, simply because he is not corroborated? I know of none. I know of no rule of law myself, but there is a rule of practice which has become so hallowed as to be deserving of respect." After some more observations to the effect that it was doubtful whether the evidence of other witnesses examined in the case, viz., the remaining voters who said they had received in similar circumstances the other sums mentioned in the several counts of the indictment, furnished such corroboration as was contemplated by the rule, the case was left with the jury who returned a verdict of guilty. On a motion for a new trial one of the grounds taken was the absence of corroboration of Pougher's testimony, and counsel for the defendant contended that as the witness was uncorroborated, the Judge ought to have directed the jury not to act upon it. But Cockburn, C.J, observed (page 35, Cox's report): "If he (Martin, B.) told them the practice was generally not to act on the evidence of an accomplice without being confirmed, but if the evidence made out to their minds that he was speaking the truth, they ought to believe him, I think his direction was right. I protest against its being the duty of the Judge to direct the jury to acquit because the evidence of an accomplice is uncorroborated." Wightman, J., added "The law does not of necessity require any corroboration."

(1) 5 Suth. W.R. (Cr.), 80. (2) 9 Cox C.C., 32; S.C. 1 B. & S., 311.

Digitized by Google

In the course of the same argument the Chief Justice after referring to certain passages in Taylor on 'Evidence' bearing on the points as a fair exposition of the practice, added "We think he ought not to have told the jury to acquit if the witness was uncorroborated." However a rule *nisi* was granted on this ground also but it was subsequently discharged, the Court (Wightman, Crompton, Hill and Blackburn, JJ., according to the report in Best and Smith, and Cockburn, C. J., Crompton, Hill and Blackburn, JJ., according to that in Cox), in substance holding that the rule that the evidence of an accomplice requires corroboration, is not a rule of *law* but a rule of general and usual practice, the application of which is for the discretion of the Judge by whom the case is tried.

The substance of the law as laid down by the decided cases has been embodied in the Indian Evidence Act, though, as Mr. Mayne observes, "singularly enough it is necessary to collect it from different parts of the Act." They are section 133, illustration (b) and section 114, and the explanation to that illustration. Neither the language of the said illustration(*b*) nor its position in the Act is perhaps best calculated to put the matter in an altogether unmistakeable light; for the term "presumption" is used in English law so as to include a great variety of incongruous matters, as will be seen from the following quotation which despite its length, I venture to make from the instructive chapter on 'Presumptions' in Thayer's 'Preliminary Treatise on Evidence' at the common law. The author concludes the chapter by observing "It may be remarked that the numberless propositions figuring in our cases under the name of presumptions are quite too heterogeneous and noncomparable in kind, and quite too loosely conceived of and expressed to be used or reasoned about without much circumspection. Many of them are grossly ambiguous, true in one sense and false in any other; some are not really presumptions at all, but only wearing the name, some express merely a natural probability and others, for the sake of having a definite line, establish a mere policy. Very many of them, like the rule about children born in wedlock, lay down a *prima facie* rule of the substantive law and others a rule of general reasoning and of procedure founded on convenience, probability or good sense; like the wide-reaching principle which 'presumes a usual and ordinary state of things rather than a peculiar and exceptional condition . . . . . legality than crime and virtue and morality rather than opposite qualities; which demands a construction of evidence as well as of written language *ut res magis valeat quam pereat.*' Some are maxims, others mere inferences of reason, others rules of pleading, others are variously applied; as the presumption of innocence figures now as a great doctrine of criminal procedure and now as an ordinary principle in legal reasoning or a mere inference from common experience or a rule of the law of evidence. Among things so incongruous as these and so beset with ambiguity there is abundant opportunity for him to stumble and fall who does not pick out his way and walk with caution."

It may be noted that the explanation to illustration (*b*) of section 114 refers to the *presumption* that an accomplice is unworthy of credit unless he is corroborated in material particulars, as a *maxim* and affords, so far as it goes, a striking illustration of the justice of Professor Thayer's remarks and it is evident that some of the misconceptions which attend the question of accomplice-testimony are due to the phraseology adopted in treating of it. If, however, it be remembered, that what is laid down as to the untrustworthiness of uncorroborated accomplice-testimony is not a presumption, in the strictly legitimate sense of the term, in the law of evidence—in other words, is

Digitized by Google

not a rule of law which throws upon the party against whom it works the duty of going forward with the evidence (Thayer's 'Preliminary Treatise on Evidence,' page 339), but is a precept of caution hallowed indeed by constant practice in charging juries and never to be lost sight of in estimating the weight due to such tainted evidence, there is little chance of one going astray in the application of what Judges have always significantly distinguished from a rule of law characterising it as a mere matter of practice. To claim for it greater potency, in the face of section 133 of the Indian Evidence Act would be to introduce an artificial scale of credit; and "nothing can be more absurd" to borrow from the language of Lord Denman in *King* v. *Hurborne*[1] "than that there should be any rigid presumption as to matters of fact where the only questions ought to be what evidence is admissible and what inferences may *fairly* be drawn from it"

With these remarks on the general question raised by the learned counsel, I proceed to consider whether the suggestion that Velappan was an accomplice is well founded. The term "accomplice" signifies a guilty associate in crime (*United States* v. *Neverson*(2)] or, as it is put in another case, "where the witness sustains such a relation to the criminal act that he could be jointly indicted with the defendant, he is an accomplice" (*White* v. *Commonwealth*(3)). Now there can be no hesitation in concluding that Velappa had no manner of concern in the perpetration of the murder itself. His own evidence does not lend the least colour in favour of the view that he had anything to do with the killing of the deceased. Nor is there otherwise any evidence tending to such a supposition, though, as already observed, it is not improbable that, after the murder was committed, the witness assisted in the removal of the dead body from the place of murder to the pit in which it was buried. But this being all the complicity that can be attributed to him it seems to me that that could not make his evidence against the accused that of an accomplice; for though the witness might be indictable under section 201 of the Penal Code for the concealment of the body (while the accused himself could not be, see *Noor Bax Kazi* v. *Empress*(4) and *Queen-Empress* v. *Lalli*(5)), yet such offence on the witness's part being one perfectly independent of the murder, the witness could not rightly be held to be either a guilty associate with the accused in the crime of murder or liable to be indicted with him jointly.

Thus in a prosecution for adultery it appeared that the defendant and O procured two rooms opening into each other, and were visited by two women; and that the defendant and one of the women occupied one of the rooms most of the night and O and the other woman occupied the other room. It was held that O was not an accomplice of the defendant in that though he might have been guilty of a crime himself, he did not assist defendant in the crime of adultery *State* v. *Evan* (6)).

Reference may also be made to Baron Martin's observations in *Rex* v. *Boyes*(7) already cited which go to show that the different voters who were bribed in one and the same place and on one and the same occasion, were not accomplices of each other. The learned Judge said (page 84, Cox C. C.). "This case is distinguishable from that cited by the counsel for the defendant for they were there accessories properly so called and all the persons were con-

[1] 2 A. & E. 540.

(2) 'Century Digest,' Vol. 14, Col. 1779.
(3) 'Century Digest,' Vol. 14, Col. 1780.
(4) I. L. R., 6 Calc., 279.
(5) I. L. R., 7 All., 749.
(6) 'Century Digest' Vol. 14, Col. 1780.
(7) 9 Cox C. C., 32; S. C., 1 B. & S., 311.

Digitized by Google

cerned in the same offence in which they came to give evidence against the man. In this particular case it is not so, because all of these are separately gone into and it is not one and the same offence."

The Judges, however, who discharged the rule, without directly deciding the point, were all of opinion that even if, in a sense, the voters were accomplices of Pougher, their evidence must be held to furnish sufficient corroboration.

Be this as it may, there is no doubt that the authorities draw a clear distinction which is referred to and illustrated in the explanation to illustration (l) of section 114 of the Indian Evidence Act and which is well pointed out in the following observations of Hill, J.: "In the application of the rule much depends on the nature of the crime and the extent of the complicity of the witness in it. If the crime is a very deep one and the witness so far involved in it as to render him apparently unworthy of credit he ought to be corroborated. On the other hand if the offence be a light one as in *Rex* v. *Hargrave*(1) where the nature of the offence and the extent of the complicity could not much shake his credit, it is otherwise" (1 B. & S., 322). In *Rex* v. *Hargrave*[1] referred to here, Patteson, J., ruled that notwithstanding that persons present at, and sanctioning, a prize-fight where one of the combatants is killed are guilty of manslaughter as principals in the second degree, yet they are not such accomplices as to require their evidence to be confirmed if they are called as witnesses against other parties charged with the manslaughter.

Take for instance cases of bribery on the part of public officials not infrequently occurring in this country. Suppose one, where the witness himself has tempted the public servant with the bribe for some unrighteous end of his own and another, where the facts are as in the cases of *Narayanaswami Naidu*, *Aswartha Reddi* and *Krishnaswami* v. *Emperor*(2) where a Police Inspector was held to have extorted money by a threat of falsely implicating the witnesses in a charge of murder and handcuffing and imprisoning them unless they paid money. It is scarcely necessary to say that it would not be good sense to treat the two cases alike. The proper application of the rule be to require corroboration in the one and to dispense with it in the other. This was clearly implied in the judgment of this Court in the said criminal appeals when it was observed "they are more involuntary than voluntary accomplices and in that light their evidence is not tainted as much as it would otherwise be."

In this connection it only remains to observe that Velappan's delay in reporting the perpetration of the murder which he says he saw committed, to which some reference was made in the argument, is quite immaterial and would be so even had he altogether failed to give information and thus brought himself under section 202 of the Penal Code. It would be clear from reasons already stated that would not make him an accomplice.

It follows, therefore, that the rule of practice as to corroboration has no application to the case first, because Velappa was not an accomplice within the meaning of the rule and secondly, because even if he were, his complicity as a youthful tool in the hands of one who stood to him in *loco parentis* is not such as to make it necessary to require corroboration.

The question then resolves itself into one of the credibility of Velappa's evidence, to be decided, no doubt, as in the case of any other witness with reference to the circumstances of the case. Viewing the testimony in this light I agree with the Sessions Judge for much the same reasons as those given

[1] 5 C. & P., 170. [2] Crl. Appeals Nos. 26, 28 and 33 of 1903 [unreported].

Digitized by Google

by him, in holding that his evidence is substantially true and may be acted upon. The strongest point that can be made against the witness is that the disclosure of the crime was not made purely in the interests of public justice, and but for the quarrel between the accused and the witness shortly before the witness gave information to the police, he would not have moved in the matter at all. Considering that the witness is but a lad, that he had long been under the protection of the accused, that the whole of the money which was all his property was held by the accused, it was not unnatural, however culpable it may have been, that the witness did not report the crime of his master and guardian until, as he says, he was goaded on to it by the prisoner's subsequent ill-treatment of the witness.

The delay in such circumstances does not to my mind argue that the evidence is false.

I would, therefore, confirm the conviction. As to the sentence, however having regard to the fact that the murder was committed in consequence of the deceased attempting to blackmail the accused, and of her having threatened to disgrace him in the presence of people who were about to assemble on the occasion of the festival at the place, I would commute the sentence to one of transportation for life,

BODDAM, J.—The accused was convicted of murder and sentenced to death subject to the confirmation of that sentence by the High Court. He has appealed against the conviction and the appeal and the referred trial have been heard at the same time. The case against the accused depends entirely upon the evidence of the first witness, a young man of 18, who says he was present when the accused murdered the deceased (a cooly woman named Angayi) on Monday, the 8th June, and saw him dispose of the body by throwing it into a cholam-pit, where it was found some 16 days later upon information given by him 15 days after the murder.

The story told by this witness is that he had been working for the accused for 2½ years before the murder, that the deceased also worked for the accused as sweeper, and that the accused married in Peratasi and as the deceased had become *enceinte* by him, he, in October preceding the murder, had sent her away to Kariyampatti, a village in the Dindigul taluk, whence she was brought back in four or five days by her brother after presumably having procured abortion, as he says she came back much thinner. That the accused again sent her away giving her money to Appayanpatti, but when she had spent that money she returned and used to came frequently to the accused's garden asking for money and would remain and not leave unless money was given to her. That on Monday in Vyasi at noon she came to the accused's garden and asked the accused for money and threatened to complain to the Pattagar and his relations and disgrace him if he did not pay her. She then went to lie down between two ricks. In the evening the accused asked the witness for the crow-bar and he gave it to him. He and the accused then went to meals. At night the accused and others made a collection for a festival next day. After the people went to bed the accused came to witness who was at the pen feeding the dogs. He then went to where the woman was lying down leaving the witness feeding the dogs. The witness heard a cry of Ayyo! and thinking the accused was beating the woman he went and hid in the cholam and saw the accused strike the deceased on the head with a crow-bar and being afraid he ran back to the pen. The accused called him and he went to him and the accused then asked to witness to help him to put the dead body

Digitized by Google

into the cholam-pit about 70 yards from where the corpse was, which was then empty and open. The witness says he refused and the accused dragged her alone by the legs to the cholam-pit and threw her in. After that the witness went and slept at the pen and the accused, after closing the cholam-pit went to his house. About cock-crow next morning the accused came to where the witness was lying and threatened that if he disclosed the matter to any one he would not pay him Rs. 40 due to him and would deal with him as with Angayi. Ten days later the witness sold a goat for Rs. 4-12-0 and asked the accused for Rs 5 to buy a cow, when the accused refused and threatened to take the Rs. 4-12-0 from him saying he was not in need of any cow-calf. Afterwards the accused, finding the witness had not gone to the pen, beat him and threatened to throw him into the cholam-pit. Afer this, next morning the witness ran away, met the brother of the deceased woman, told him what had happened to Angayi and on his way home the witness met the Station-House officer in a bandy and told him and took him and some villagers to the cholam-pit. When the stone over the cholam-pit was lifted there was a bad smell and the Station-House officer left a guard. This was on the 23rd June. Next day, in the evening the Sub-Magistrate, Hospital Assistant and others arrived, and the body was taken out of pit and identified. The witness says he did not tell before because he was afraid.

The only evidence given in addition to that of this witness is that of the deceased's brother and sister, a goldsmith whose evidence the Sessions Judge entirely disbelieves, the man in whose house she lived at Kariyampatti the police and the Village Munsif and the *post mortem* certificate.

The only evidence given by the brother is that he heard the deceased was in the accused's keeping and that he brought her back from Kariyampatti to the accused's house. When he brought her back, she appeared to be pregnant and that she must have had a miscarriage after she came back to the accused—in this respect contradicting the first witness.

The sister says 'I was told by people generally and by the deceased that she was living with accused for two or three years.'

The fifth witness merely proves that the deceased came to Kariyampatti and stayed three or four days.

The Station-House officer proves that he received information from the first witness at noon on the 23rd when he met him accidently as he was driving in a bandy about 1½ miles from the accused's house—and the Village Munsif proves that on the 23rd June the Station-House officer sent a Tati to him.

The *post-mortem* certificate shows that death was due to fracture of the skull, there being a fracture 2 inches long through which it was easy to pass a probe into the brain. Death must have occurred at least 2 weeks before.

From the above, it will be seen that the only corroboration of any part of the story of the first witness is that the brother and sister *had heard* that the deceased had been in the accused's keeping; that the body was found in the cholam-pit and that death was caused by fracture of the skull which might have been caused by a blow from a crowbar.

The cholam-pit in which the body was found was common to the accused and his brothers and was not actually on the accused's land though adjacent to it.

Digitized by Google

On behalf of the accused it is urged that to all intents and purposes, though possibly not in strict law, the first witness is an accomplice—and the Sessions Judge has held that he was an accomplice—and that therefore unless his evidence be corroborated by independent testimony proving not only that the deceased came by her death in the manner described, but also directly connecting the accused with the murder—the accused ought not to be convicted and secondly, that even if the accused is not an accomplice and the necessity for such corroboration is not in practice obligatory on evidence such as has been given in this case, no jury would be justified in the finding the accused guilty. So far as the connection of the accused with the crime is concerned there is no evidence at all except that of the first witness who has admittedly a cause of quarrel with the accused and who has never said anything about the crime or the accused's connection with it until he had reason to wish to injure the accused and therefore his evidence is so tainted with suspicion that it should not be relied upon to convict any one of so serious a crime.

The law in England with regard to the necessity for corroborating the evidence of an accomplice is that corroboration of accomplices is not necessary in strict law (*R.* v. *Atwood*(1)), but it is the general practice to require corroboration, and for the prosecution (in order to induce the jury to credit his testimony) to give other evidence confirmatory of at least some of the leading circumstances of his story from which the jury may be able to presume that he has told the truth as to the rest, and for the Judge to tell the jury not to act upon the uncorroborated testimony of an accomplice (*Rex* v. *Rudd*[2], *In re Meunier*[3]). It has been said that if an accomplice be confirmed as to the particulars of the story, he does not require confirmation as to the persons charged, but this doctrine has been rejected in later cases inasmuch as the confirmation as to the circumstances proves only that the accomplice was participient in the felony, not that the particular party charged was his confederate (*Rex* v. *Webb*[4], *Rex* v. *Wilkins*[5], *R.* v. *Birkett*[6], *R.* v. *Stubbs*[7]), and where upon an indictment against principals and accessories, the case against the principal was proved by an accomplice who was confirmed as to the accessories but not as to the principal the jury were directed to acquit the prisoners [*R.* v. *Wells*[8], *Rex* v. *Moores*[9]].

The law is practically the same in this country. In *Queen-Empress* v. *Maganlal & Motilal*(10), a Full Bench case, the law is stated as follows:—"By the law both of India and England the "evidence of an accomplice is "admissible and a conviction is not illegal because it proceeds upon the un-"corroborated testimony of an accomplice (section 133, Indian Evidence Act)." But the presumption allowed by illustration [*b*] of section 144 of the Evidence Act that an accomplice is unworthy of credit unless he is corroborated in material particulars has become a rule of practice of almost universal application. Judges now in their charges usually tell a jury that under ordinary circumstances it is unsafe to convict on such evidence without the substantial corroboration of independent evidence. A Judge who combines the functions of Judge and jury is equally bound to scrutinise accomplice evidence with great care and to consider whether there is any corroborating evidence when the main evidence is of an accomplice character.

(1) 1 Leach, 464. (2) 1 Cowp., 331 at p. 336. (3) L. R., [1894] 2 Q. B., 415.
(4) 6 C. & P., 595. (5) 7 C. & P., 272. (6) R. & R., 73.
(7) D. & P. C. C., 555. (8) 1 M. & M., 326. (9) 7 C. & P., 270.
(10) I. L. R., 14 Bom., 115.

Digitized by Google

Assuming for the moment in this case that the first witness is, as the Sessions Judge considers, an accomplice, there is, as I have said before, absolutely no evidence to corroborate his story except that the body was found in the cholam-pit and that the brother and sister were informed that the accused had kept the deceased. How does that corroborate the accused's story? The woman is murdered, there is no question as to that; the question is how, when and by whom. It is assumed that she was murdered by a blow with a crowbar as her skull was fractured, but what corroboration is there of the first witness's story that a crowbar was in fact the instrument used or that it was used by the accused? It is quite as possible that the first witness was the murderer as the accused, and he has a very good reason for attributing the murder to the accused against whom he has a grievance. Would it in these circumstances be right, in the absence of any independent evidence, to connect the accused with the crime, to find him guilty and hang him merely because the first witness says so. There is clearly no independent evidence to connect the accused with the crime. The fact that he had at one time kept the deceased does not suggest a motive—and even if it did, a motive alone is not sufficient to constitute corroborative evidence of the facts. If therefore the first witness is in law an accomplice I am clearly of opinion that it would be the duty of the Judge to direct the jury that there was not sufficient evidence before them upon which they would be justified in finding the accused guilty.

Now is the first witness an accomplice or should his evidence be treated as the evidence of an accomplice?

According to his own account he was cognizant of the crime and concealed it for 15 days and did not divulge it until he had a cause of quarrel with the accused, and then he accuses him of it not by going straight to the police but first when he accidentally met the brother of the deceased and then to the police when he accidentally met the Station-House officer. He was in any case an accomplice in concealing the body, and his evidence is to that extent at all events the evidence of an accomplice. In *Ishan Chandra Chandra* v. *Queen-Empress*(1), the case against the accused rested mainly upon the testimony of an informer who admitted that, after becoming cognizant of the crime, he kept quiet about it for six days and it was urged on behalf of the accused that even if not an accomplice his evidence ought not to be acted upon except to the extent to which it was corroborated by independent testimony. In dealing with this question in their judgment at page 336 the Judges say "we agree with the learned Sessions Judge that it would "be unsafe in this case to act upon the unsupported evidence of Gooroo "Pershad. We are not prepared to say he is an accomplice. He may have "been one but it is impossible to say in this case that he helped in the "commission of the offence. He was undoubtedly cognizant of it and "omitted to disclose it for six days. From any point of view we do not "think that his testimony is such as to justify a conviction except where "he is corroborated."

These observations exactly apply to the evidence of the first witness in this case and in *Alimuddin* v. *Queen-Empress*(2), the Judges say "we cannot "but regard the evidence of these two witnesses as no better than that of "accomplices. At any rate they took such a part in this transaction as to "make it most unsafe for the Court to rely upon their evidence unless "corroborated in some material respect in convicting the accused."

(1) I. L. R., 21 Calc., 322. (2) I. L. R. 23 Calc., 361.

Digitized by Google

In my opinion even if the first witness was not an accomplice, having regard to the fact that he was cognizant of the crime for 15 days without disclosing it and that he had a cause of quarrel with the accused at the time when he did disclose it, it would be most unsafe to act upon his evidence unless it was corroborated in some material particular connecting the accused with the crime, and as there is no such evidence I think the accused ought to be acquitted.

Even apart from the necessity for corroboration I do not think that in this case the accused ought to be convicted upon the evidence given. I do not think any one could say with confidence that the guilt of the accused is brought home to him or that there is not a reasonable doubt as to his guilt.

I think no one could rely upon the evidence of the first witness even though it did not require corroboration.

I would allow the appeal, and set aside the conviction and sentence and acquit the accused.

The case was referred to Bhashyam Ayyangar, J., under sections 378 and 429 of the Code of Criminal Procedure.

Mr. *Eardley Norton* and *P. Narasimhachari* for appellant.

The Public Prosecutor in support of the conviction.

JUDGMENT.—This case, in which the accused has been sentenced to death on a charge of murder, has been referred to me under sections 378 and 429, Criminal Procedure Code, in consequence of a difference of opinion between the Officiating Chief Justice and Boddam, J. The Sessions Judge treated the principal witness in the case, viz., the first prosecution witness as an 'accomplice' who is unworthy of credit unless he is corroborated in material particulars and in summing up the case to the assessors stated that it would be unsafe to convict the accused upon the evidence of such a person unless in respect of material particulars he was corroborated by independent reliable evidence. Differing from the assessors, he convicted the accused of murder as, in his opinion, the accomplice was corroborated in material particulars by independent reliable evidence notwithstanding that he did not rely upon the evidence of the fourth witness for the prosecution, whose evidence alone, if believed, would corroborate the accomplice in a material particular which would go towards implicating the accused in the murder of the deceased.

I agree with Boddam, J., that the particulars referred to by the Sessions Judge in respect of which the evidence of prosecution witness No. 1 is corroborated by other reliable evidence only go to show that the deceased was murdered at or about the time and place mentioned by the first witness and that she had been for some time in the service of the accused and probably in his keeping but that none of these particulars implicates the accused in the murder. In *Rex* v. *Webb* (1), an accomplice was called to prove the case against the prisoners and he stated that when the robbery was committed, the thieves took a ladder from the premises of Mr. Player. To confirm the accomplice Mr. Player's servant was called to prove that Mr. Player's ladder was taken away on the night on which the felony was committed and counsel for the prosecution also proposed to call other witnesses to confirm the accomplice as to the mode in which the felony was committed. Williams, J., addressing the counsel for the prosecution stated as follows:— "You must show something that goes to bring the matter home to the prisoners.

(1) 6 C. & P., 595.

Digitized by Google

Proving by other witnesses that the robbery was committed in the way described by the accomplice is not such confirmation of him as will entitle his evidence to credit so as to affect other persons. Indeed I think it is really no confirmation at all as every one will give credit to a man who avows himself a principal felon for at least knowing how the felony was committed. It has always been my opinion that confirmation of this kind is of no use whatsoever."

In *Rex* v. *Moores* (1), before Alderson, B., and Williams, J., it was held that if A is charged as a principal and B as a receiver, an accomplice when called to give evidence against B ought to be confirmed as to some matter affecting B and a confirmation as to the guilt of A does not advance the case against B; and in *Rex* v. *Wilkins*(2) Alderson, B, in summing up, stated that there was a great difference between confirmations as to the circumstances of the felony and those which applied to the individuals charged, the former only proving that the accomplice was present at the commission of the offence, the latter showing that the prisoner was connected with it and that this distinction ought always to be attended to. In *R.* v. *Wells*(3), on an indictment against principal and accessories, the case against the principal was proved by the testimony of an accomplice who was confirmed as to the accessories but not as to the principal. Littledale, J, held that there being no confirmation against the principal felon the case failed altogether. In a learned note by the reporter this ruling is criticised but the criticism is really a criticism of the longstanding and 'hallowed' rule of practice of advising the jury not to convict on the testimony of an accomplice unless he is corroborated in material particulars.

If the first witness for the prosecution was really an accomplice and the trial was before a jury I should, in drawing the attention of the jury to this practice, explain that there was no corroboration of the accomplice in a material particular implicating the accused in the murder unless they believed the evidence of the fourth witness for the prosecution, but I should add that even if they did not believe prosecution witness No. 4, the conviction of the accused on the uncorroborated testimony of the accomplice is perfectly legal and that it would be their duty so to convict him if they believed the accomplice and gave credit to his evidence. I am however unable to agree with Boddam, J., that if the first witness was in law an accomplice "it would be the duty of the Judge to direct the jury that there was not sufficient evidence before them upon which they would be justified in finding the accused guilty," and with all respect I should say that this would be a misdirection. In *Rex* v. *Boyes*(4), Cockburn, C.J., adverting to counsel's argument that Martin, B., ought to have directed the jury not to act upon the uncorroborated testimony of an accomplice, protested against it being the duty of the Judge to direct the jury to acquit because the evidence of an accomplice is uncorroborated and added that the Judge ought not to have told the jury to acquit if the witness was uncorroborated. It may be that except under very special circumstances the settled course of practice is not to convict a prisoner upon the sole and uncorroborated testimony of an accomplice and if, in the opinion of the Judge, there are no special circumstances which would induce him to give credit to the evidence of the accomplice and convict the prisoner on his sole uncorroborated testimony he may no doubt, under sub-section 2 of section 298 of the Code of Criminal Procedure, express such opinion to the jury and in that sense advice them to acquit the prisoner.

(1) 7 C. & P., 270. (2) 7 C. & P., 272. (3) 1 M & M., 326.
(4) 9 Cox C. C. 32 at p. 35.

Digitized by Google

Under sub-sections[2] and [3] of section 289 of the Code of Criminal Procedure it is clear that it is only in cases in which the Court considers that there is no evidence, on behalf of the prosecution, that the accused committed the offence, that the jury can be directed to return a verdict of 'not guilty.'

The Sessions Judge's view that the first prosecution witness is an accomplice is however clearly untenable and the learned counsel for the appellant while conceding that the witness is not an 'accomplice' in the strict sense of the term contends on the authority of the cases of *Queen* v. *Chando Chandalinee*[1], *Ishan Chandra Chandra* v. *Queen-Empress*[2], *Alimuddin* v. *Queen-Empress*[3], that the first witness is a quasi-accomplice and no better than an accomplice and that it would be unsafe to convict the accused upon his uncorroborated testimony. The first witness, who is a servant of the accused, was in no way privy to the murder of the deceased. His evidence is that after the accused had murdered the deceased he came to the pen to which the witness had returned after seeing the accused strike the deceased a blow with the crow-bar, and called upon him to come and help him to put the deceased's body in to the cholam-pit, that he refused to do so though he accompained the accused to the spot, that the accused alone dragged the body by the legs the one hundred yards to the cholam-pit and that after putting it in replaced the stone over the opening and covered it over with earth, after which the accused went home and the witness to the pen. The Sessions Judge considers it unlikely that the witness ventured to disobey the accused and says that he has 'little doubt that the witness helped to put the body in the cholam-pit, though he now very naturally disclaims having done so as he is afraid to admit having had any hand in the disposal of the corpse himself.' This is by no means improbable; and assuming that the witness did assist the accused to hide the body with the intention of screening him, his master, from punishment, he would be guilty of an offence under section 201 of the Indian Penal Code. But whether this be so or not, he is guilty of an offence under section 202, Indian Penal Code, as he was legally bound, under section 44 of the Criminal Procedure Code, *forthwith* to give information to the nearest Magistrate or Police Officer, of the commission of the murder of which he was aware and the fact that he gave such information about a fortnight afterwards when he had quarrelled with the accused will not altogether exculpate him. It is unnecessary to repeat the reasons given by the Officiating Chief Justice, in which I fully concur, for holding that witness cannot be regarded as an 'accomplice' in the crime for which the accused is now under trial, and with all deference I am constrained to dissent from the view taken by the learned Judges of the Calcutta High Court in the cases above noted, that the evidence of a witness who, like the first prosecution witness in the present case, has helped the accused to conceal the corpse of the person murdered or has omitted to give information of the murder of which he was aware, should be regarded and tested as that of an accomplice and not acted upon unless corroborated in material particulars. In regard to the testimony of accomplices or *participes criminis*, there is no doubt the maxim that an accomplice is unworthy of credit unless he is corroborated in material particulars and this rests not on any rule of law but only 'on a rule of practice which has become so hallowed as to be deserving of respect.' But there is no authority whatever in English law which warrants the extension of this maxim to persons who are not accomplices, as in the Calcutta cases (referred to); and I do not think it will be in

(1) 24 W. R. (Cr.), 55.

(2) I. L. R., 21 Calc., 328.

(3) I. L. R., 23 Calc., 361 at p. 363.

Digitized by Google

furtherance of justice to regard another class of witnesses as *quasi* accomplices and to extend the maxim to them. It is very doubtful whether even the practice which has become 'hallowed' by time "is not one of the instances in which the law of the country has been subtilised for the protection of individuals (including notably corrupt officials) and not for the furtherance of justice." The rule of law that a conviction upon the uncorroborated testimony of an accomplice is not illegal (*vide* section 133 of the Evidence Act) is practically rendered nugatory by this rule of practice with the further result that there is strong temptation to suborn evidence to corroborate the accomplice on a material particular and when such corroborative evidence is forthcoming it acquires undue importance, and this as well as the evidence of the accomplice are both easily credited.

The learned counsel for the appellant is unable to suggest any reasonable hypothesis as to the murder of the deceased, and believing fully, as I do, that the evidence given by the first witness is trustworthy and substantially true, I must hold that the accused has been rightly convicted of murder. He committed the murder deliberately and with a deadly weapon and I regret that I am unable to see any provocation or other extenuating circumstance which would justify the substitution of the sentence of transportation for life for the sentence of death. I therefore confirm the sentence passed by the Sessions Judge and dismiss the appeal.

1903. *November* 23, 30. **I. L. R. 27 Mad. 510.**

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, & Mr. Justice Russell.

IN THE MATTER OF RAMASAMY CHETTY (PETITIONER), APPELLANT.*

Letters Patent, art. 15—"Criminal Trial"—Appeal--Order to furnish security for keeping the peace—"Judgment."

Petitioner had been ordered by a Head Assistant Magistrate to furnish security for keeping the peace, under section 107 of the Code of Criminal Procedure. The order was confirmed on appeal. An application to the High Court to revise the order came before a single Judge and was rejected. This appeal was filed against the last-mentioned order.

Held, that no appeal lay.

Per THE OFFG. C.J.—The order requiring security was an order in a criminal trial, and, in consequence, the order passed in revision was also an order in a criminal trial.

Per RUSSELL, J.—The order appealed against was not a "judgment" within the meaning of article 15.

Order requiring security for keeping the peace. The only question decided was whether an appeal lay. The facts are sufficiently set out in the judgment.

P. S. Sivaswami Ayyar for appellant.

Sir SUBRAHMANIA AYYAR, OFFG. C. J.—The petitioner was ordered by the Head. Assistant Magistrate of Madura to furnish security for keeping the peace under section 107 of the Criminal Procedure Code. On appeal to the District Magistrate the order was confirmed. The application for revision of the said order came on before Mr. Justice Benson and was rejected, apparently

* Appeal No. 50 of 1903.

Digitized by Google

on the ground that sufficient cause was not shown for the interference of the Court by way of revision. The present petition purports to be an appeal against the order of the learned Judge.

The first question is whether an appeal lies in the matter, and it depends upon whether the order as to security is or is not one in a *criminal trial* within the meaning of article 15 of the Letters Patent. In construing these words, it is scarcely necessary to say that it is not admissible to refer and to rely on the provisions of the Code of Criminal Procedure to which we were referred in the course of the argument. I do not, however, wish it to be understood that if in interpreting the Letters Patent reference to the Code of Criminal Procedure were admissible that would lead to a variation of the conclusion at which I have arrived, independently of the Code. Turning now to the Letters Patent, there is nothing in article 15 or in any other article thereof to show that the words "Criminal" and "trial" are used in any other than their general and ordinary sense as used in law. That the proceedings of the Magistrate, with reference to the security taken from the petitioner, are proceedings in a *criminal* matter or cause admits of no doubt. The very object of the proceeding is the prevention of certain crimes about to be committed with reference to the public peace, and it is the likelihood of a disturbance of public tranquillity that gives the Court jurisdiction. It is obvious that proceedings of this character held before Criminal Courts can be nothing but criminal proceedings.

This was, if I understood Mr. Sivaswami Ayyar rightly, hardly denied. What he strongly contended for was that the investigation in question by the Magistrate was not a trial. Now, that term according to the passage from the Institutes quoted in Wharton's 'Law Lexicon means "the examination of a cause, Civil or Criminal, before a Judge who has jurisdiction over it, according to the laws of the land". The explanation of the same term in 'Stroud' on the authority of the observations of Field J., in *Gath* v. *Howarth* (1) is that it is the "conclusion by a competent tribunal of questions in issue in legal proceedings whether Civil or Criminal." Again in Bonviers' 'Law Dictionary' the term is stated on the authority of a decision in Massachussets to mean, "the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue." These citations express in different words precisely the same idea and testing the present case with reference to it, but one conclusion is possible. The person before whom the proceedings are conducted is a Judge in every sense of the term: they commence by information laid before him, the law prescribes notice thereof to the accused party: evidence has to be recorded in his presence and judgment given; if the security or bail required to be furnished is not forthcoming imprisonment follows as a matter of course; finally an appeal is allowed in the matter. If a proceeding involving these requisites and incidents is not a *trial*, it is impossible to see what it is. I have ho hesitation, therefore, in holding that the order of the Magistrate requiring security was an order in a criminal trial and consequently any order which may be passed on appeal or in revision in connection with such a proceeding is also an order in a criminal trial. I would accordingly reject this appeal.

RUSSELL, J.—I am of opinion there is no "judgment" in this case, and therefore there is no appeal under article 15 of the Letters Patent—*vide* a

(1) 28 S.J., 427., W.N. (84), 99.

Digitized by Google

decision of a Bench of this Court in *Puthukudi Abdu* v. *Puvakka Kunhikutti* (1) following previous reported decisions on the same point.

I express no opinion on the question whether the proceedings in the lower Court were a trial or not.

I think the appeal should be rejected.

1903. December 1. **I. L. R. 27 Mad. 525.**

Before Mr. Justice Benson and Mr. Justice Russell.

EMPEROR *v.* MUTHUKOMARAN.§

Criminal Procedure Code—Act V of 1898, s. 123—Committal to prison for failure to give security to be of good behaviour—"Sentence of imprisonment."

When a person is committed to prison under section 123 of the Code of Criminal Procedure for failure to give security to be of good behaviour, he is not undergoing a "sentence of imprisonment" within the meaning of section 397 of the Code.

(*Note*: This case is R. 6 Bom. L. 1098.)

AN accused was committed to prison for a year for failure to furnish security for good behaviour, and while undergoing imprisonment committed an assault on a warder. He was charged for this offence and convicted and sentenced to undergo rigorous imprisonment for six months, the sentence to "take effect as from the expiry of the sentence which the prisoner was then undergoing." The case was referred to the High Court for considration whether the sentences should not run concurrently.

The Public Prosecutor in support of the reference.

JUDGMENT.—We are of opinion that when a person is committed to prison under section 123, Criminal Procedure Code, for failure to give security to be of good behaviour, he is not undergoing a "sentence of imprisonment" within the meaning of section 397, Criminal Procedure Code. When a person has been convicted of an offence, the code directs that "sentence" shall be passed upon him. The word "sentence" does not occur in section 123, Criminal Procedure Code. The language there is that he shall be "committed" to prison. We direct that the sentence of the Sub-Magistrate shall take effect from this date.

1904. *January* 18, 25. *February* 3. **I. L. R. 27 Mad. 531.**

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Davies, Mr. Justice Benson and Mr. Justice Russell.

SURI VENKATAPPAYYA SASTRI [COMPLAINANT], PETITIONER, *v.* MADULA VENKANNA [ACCUSED], COUNTER-PETITIONER.*

Penal Code—Act XLV of 1860, s. 379—Theft—Dishonestly quarrying and removing stones from land in possession of another.

Stones, when quarried and carried away are "things severed from the earth" (within the meaning of section 378, explanation I of the Indian Penal Code) and are "movable property" (within the meaning of section 22) and as such are capable of being the subject of theft.

---

(1) I.L.R. 27 Mad., 340.

§ Criminal Revision Case No. 393 of 1903.

* Criminal Revision Case No. 385 of 1903.

Digitized by Google

A person who quarries and carries away stones from land in the possession of another commits theft.

Queen-Empress v. Kotayya, (I. L. R., 10 Mad., 255), dissented from.

CHARGE of theft. The alleged theft consisted in the accused having dishonestly quarried and removed stones from land (a hill known as Sobhanadriswamy, at Agripalli) in possession of another. The Magistrate discharged the accused. Against that order of discharge the complainant presented this Criminal Revision Petition. The case first came before Sir S. Subrahmania Ayyar, Officiating C. J., and Russell, J., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—Assuming that the accused in this case quarried and carried away the stones dishonestly from the hill, the property of the temple, the question is whether he could be convicted of theft under section 379 of the Indian Penal Code. The Magistrate, following the decision in *Queen-Empress* v. *Kotayya*[1] is of opinion that the offence of theft has not been committed.

This opinion seems to be at variance with the opinion expressed in *Queen* v. *Tamma Ghantaya*(2).

In the case of *Queen-Empress* v. *Shivram* (3), also, a different view is taken. It was therein held that, " Where a person dishonestly carried away 100 cart-loads of earth from the complainant's land he was guilty of theft." We are of opinion that this is the correct view of the law. We, therefore, refer for the decision of a Full Bench the question whether, on the assumption mentioned above, the accused could be convicted of theft.

The case came on in due course before the Full Bench constituted as above.

C. V. Krishnasami Ayyar (*V. Krishnasamy Ayyar with him*) for petitioner.

S. Kasturiranga Ayyangar [*P. S. Sivaswamy Ayyar with him*] for accused.

The Court expressed the following

OPINION.— In this case the accused was charged with theft in that he dishonestly quarried and carried away stones from land in the possession of another. The Sub-Magistrate discharged the accused on the ground that the stones were not movable property. and so could not be the subject of theft, and he relied on the ruling in *Queen Empress* v. *Kotayya*(1)

The question referred for our decision is whether, assuming that the stones were quarried and carried away dishonesty, the accused could be convicted of theft under section 379, Indian Penal Code.

We have no doubt but that the answer to this question must be in the affirmative. Under section 378, Indian Penal Code, " Whoever intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft. " The only question is whether the stones in this case are " movable property. " Section 22 enacts that these words " are intended to include corporeal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth " and in connection with this definition explanations

[1] I. L. R., 10 Mad., 255. (2) I. L. R., 4 Mad., 228. (3) I. L. R., 15 Bom., 702.

Digitized by Google

I and 2 to section 378 provide that " A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth, " and " A moving effected by the same act which effects the severance may be a theft. "

We have no doubt but that stones when quarried and carried away are " things severed from the earth " and are " movable property " and as such are capable of being the subject of theft. Before they were quarried out they formed part of " the earth, " and as such they were not movable property, but as soon as they were quarried out they were " severed from the earth " and became " movable property. " This was the view taken by this Court in the case of *The Queen* v. *Tamma Ghantaya*(1). There the Court (Turner C. J., and Kernan, J.) referring to salt formed spontaneously in a swamp said " We cannot distinguish this case from theft of wood in a reserved forest, except that salt is actually a part of the soil, while trees are not ; yet things immovable become movable by severance, and this would apply to severed parts of the soil, *e. g.*, stone quarried, minerals, iron or salt collected, as well as timber which has grown, or edifices which have been erected on the land. "

In the case of *Queen-Empress* v. *Kotayya*(2) Collins. C. J., and Kernan J. (Brandt, J, dissented) held that soil dug up by a person not the owner of the land and carried away by him could not be the subject of theft on the ground that such soil was not a thing attached to the earth and then severed from it, but was a part of the earth or land itself, and therefore excepted by section 22 from the corporeal things which were movable property, and they distinguished the case of *The Queen* v. *Tamma Ghantaya*(1) on the ground that the salt in the latter case was a natural efflorescence on the surface of the earth—a natural produce attached to the earth. We think that this decision was erroneous and that the learned Judges were misled by supposing that it was the intention of the framers of the Indian Penal Code to reproduce the English law of larceny. The terms of the section show that this was not their intention, and it is by the terms of the section that the law is determined As recently remarked by the Privy Council in the case of *Gokul Mandar* v. *Pudmanund Singh*[3]. " The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. " Section 22 of the Indian Penal Code does not except " earth and things attached to the earth " but " land and things attached to the earth. " " Land " and " earth " are not synonymous, and there is a wide distinction between " earth " and " the earth ". " Earth " may be severed from " the earth " and attached to it again. When " earth " is severed from " the earth " it becomes movable property. A cart-load of " earth " may be brought any day in the bazaar. Can it be held for a moment that " earth " when thus carted about and sold by one person to another is not movable property, and is incapable of being the subject of theft ? Under the Indian Penal Code it does not matter by whom the severance from " the earth " was made, and the explanation to section 378 expressly provides that " a moving effected by the same act which effects the severance may be theft. " It was on these grounds that the Bombay High Court, in *Queen-Empress* v. *Shivaram*(4) held that " earth " might be the subject of theft,

(1) I. L. R., 4 Mad., 228. (2) I. L. R., 10 Mad., 255. (3) I. L. R., 29 Calc., 707.
(4) I. L. R., 15 Bom., 702.

Digitized by Google

and the same reasoning applies, *a fortiori*, to stones that are quarried from "the earth." We think that the view of Brandt, J., in *Queen-Empress* v. *Kotayya*(1) is correct and we hold that any part of "the earth" whether it be stones or sand or clay or any other component, when severed from "the earth" is movable property, and is capable of being the subject of theft. Our answer to the reference is, therefore, in the affirmative.

1903. *Nov.* 20, *Dec.* 22., 1904. *Janu.* 4, 5, 12. **I. L. R. 27 Mad. 551.**

Before Mr. Justice Benson and Mr. Justice Boddam.

(ON Reference from Sir SUBRAHMANIA AYYAR, Offg. C. J., and RUSSELL, J.)

ANNAKUMARU PILLAI [COMPLAINANT], PETITIONER, *v.* MUTHUPAYAL AND OTHERS (ACCUSED), COUNTER-PETITIONERS.†

Penal Code—Act XLV of 1860, s. 379—Theft—Charge of stealing chanks—Shell-fish taken from beds in sea—Feræ naturæ—"Possession" of complainant—Subject of theft.

"Chanks" [popularly included among shell-fish, but really large molluscs] are found buried in beds of sand or in the sandy crevices of coral reefs in Palk's Bay,—a large bay landlocked by British ominions for eight-ninths of its circumference and containing numerous islands which form part of the districts to which they are adjacent on the shores of India and Ceylon. It was shown by evidence that this bay (as well as parts of the adjacent Gulf of Manaar) had been effectively occupied for centuries by the inhabitants of India and Ceylon, respectively; that the "chanks" found therein had for centuries been the monopoly of the rulers of the country, both in India and Ceylon, and that licenses to gather them had been granted by the sovereign; and that "chank royalty" was one of the heads of revenue on which permanent assessment of an adjacent zamindari was fixed in 1802. Petitioner, who had leased from the Rajah of Ramnad the "chank beds" five miles off the coast of his zamindari, charged the counter-petitioners with having committed the offence of theft of "chanks" from these beds. On the defence being raised that "chanks" were fish, and were *ferae naturae* and that those in question had been taken from beds in the open sea and had therefore not been taken from the possession of the complainant and could not be the subject of theft:

Held, that the "chanks" in question were capable of being the subject of theft.

CHARGE of theft. Complainant was the lessee from the Rajah of Ramnad of chank beds situated five miles off the coast of the zamindari. He charged the accused with theft of chanks from those beds. The Head Assistant Magistrate discharged the accused on the ground that chanks are fish and are *ferae naturae* and that the chanks in question had been taken from beds in the open sea and were therefore not taken from the possession of any one and could not be the subject of theft. The facts are fully set out in the judgments of the High Court. Against the order of discharge the complainant presented this criminal revision petition. The case first came before Sir S. Subrahmania Ayyar, Offg C. J., and Russell, J., who delivered the following judgments:—

THE OFFG. C. J.—The petitioner preferred against the accused a complaint of theft in that the latter had removed a quantity of chanks from a portion of the bed of the sea on the Ramnad coast, it being alleged by the petitioner that he was entitled to them as one claiming under the Rajah of Ramnad, and that the right to all chanks to be found in certain specified localities on the Ramnad coast, inclusive of the portion in question was, from time immemorial, vested exclusively in the holders of the Ramnad Zamindari. The Head Assistant Magistrate of Ramnad, after examining some only of the witnesses cited by the petitioner, dismissed the complaint on the analogy of decisions passed with reference to charges of theft of fishes in open waters.

---

(1) I. L. R., 10 Mad., 255. † Criminal Revision Case No. 313 of 1903.

Digitized by Google

The questions which arise for determination in the present case are—

1. (*a*) Whether live chanks not actually seized but remaining free in their natural habitation the bed of the sea are the subject of property?

(*b*) Whether a taking of them would not constitute *theft* even if they are the subject of property?

(*c*) Is "possession" within the meaning of section 379 of the Indian Penal Code predicable in respect of them, with reference to persons entitled of them.

2. If these questions are to be answered in the affirmative, whether in the circumstances of the present case, the complainant is in law precluded from establishing an exclusive right to such of them as exist beyond a marine league from low water mark?

3. Whether the Courts of this country have jurisdiction to try charges of theft of chanks when the removal of the chanks is from a locality outside the said marine league limit?

It is necessary to preface the discussion of these questions with a few general observations. Chanks are molluses, being species of the genus *Turbinella*. They are found on the coast of the present districts of Madura and Tinnevelly on the one side and of Ceylon on the other [Balfour's Cyclopædia of India', 3rd edition, Vol. I, p. 656). They thrive in sand beds in the sea-bottom, the sand being of a special nature locally called "puchimanal" or sand breeding worms [on which the chanks feed]—' Report on Chank and Pearl Fisheries' by Mr. H. S. Thomas (1884), p. 16, sec 45. Such beds exist all along the above-mentioned coasts in depths of 2 to 10 fathoms or thereabouts [Balfour's 'Cyclopædia', 3rd edition, Vol. I, p. 656, and Dr. Thurston's ' Notes on Pearl and Chank Fisheries and Marine Feuna of the Gulf of Manaar' (1890), pp. 11 and 31]. These beds, as well as the beds of Pearl oysters (oysters unlike chanks affect rocky ground—Mr. Thomas' 'Report', p. 15, sec. 45), the two often lying not far from each other, are to be found at varying distances from the shore, the furthest being 20 miles, though they generally lie much nearer. (Dr. Thurston's 'Notes', pp. 17 and 109, 'Encyclopædia Britannica', 9th edition, Vol. V, p. 364.) The beds are of different sizes, some being of very considerable extent, as for instance, the Muttuwartu Par (5 miles of the coast off Ceylon in Dutch Bay) which is 3 miles by 1½ miles [Dr. Thurston's ' Notes,' p. 103]. The situation of the beds has been mapped out and details thereof recorded by the respective authorities—for Madras Fisheries, see App. B to Mr. Thomas' Report'—and the Ceylon Legislature have in respect of the beds belonging to that colony passed ordinances, the earliest, so far as appears, having been enacted in 1811.

The chanks are not fixed to the localities they are found in, but their power of locomotion is very limited, some experiments showing that they move a foot in 1¾ minutes to 2½ minutes (Mr. Thomas' ' Report,' p. 32, sec. 104), being in this respect similar to pearl oysters (Mr. Thomas' ' Report,' p. 5, sec. 11). Chanks alive are known as green chanks, while shells of dead ones, also to be found in the beds, go by the name of white chanks [Balfour's ' Cyclopædia,' Vol. I, p. 656). They are fished up by divers who, with bags round their necks, dive and grope over the bottom, 20 chanks being reckoned a good haul. The divers never go beyond 12 or 13 fathoms and seldom over 9 (Mr. Thomas' ' Report,' p. 26, sec. 85, and Mr. Emerson Tennent's 'Ceylon,' 5th edition, Vol. II, p. 564).

Digitized by Google

Chank shells have long been used in this country for various purposes. Bracelets are made out of them and are worn largely by women in the Northern parts of India, workmen most skilled in making them being found at Dacca. Another use for them is in connection with Hindu temples and worship, the shells being considered to possess purity, while inferior shells find their use in native homes as vessels for feeding children. It may also be added that native medical men make preparations out of the shells and that the shells are sometimes buried with the bodies of opulent persons. *Valampuri* chanks or shells with the whorl on the right are specially prized and fetch high prices. A chank of this description was among the presents sent by one of the Kings of Ceylon to Asoka in B.C. 306 [Tennent's 'Ceylon,' Vol. I, p. 446]. Naturally therefore there has been a considerable trade in chanks from very remote times, and the allusion to them in the Cosmos Indicopleustes and by Abu Zaid in his Voyages Arabes points to the existence of the trade as early as the 6th century (Balfour's 'Cyclopædia,' V. I, p. 656).

And chanks as well as pearl oysters while still in the beds have always been taken to be the exclusive property of the sovereign, by whom, consequently, they have been conserved; and the fishery operations connected therewith have always been carried on under State control and have formed a source of revenue to the exchequer. The Setupatis of Ramnad appear to have enjoyed both the pearl and the chank fisheries on the Ramnad coast while they were feudatory chiefs, but when they ceased to be such the right to pearl fisheries on the coast was apparently taken away. the right to the chank fisheries alone being continued to them. It has been viewed by some that chank fishery operations tend to injure pearl oysters and this view has led to the discontinuance of chank fisheries on the Ceylon coast. Such a notion, however, has been strongly controverted and has not been acted upon with reference to the fisheries on our coast (Mr. Thomas' 'Report,' page 15, sec. 44). Our chank fisheries are worth to Government from four to five times as much as our pearl fisheries and may, it is said, easily be raised to half the present value of the Ceylon pearl fisheries [Mr. Thomas' 'Report,' page 28, sec. 91]. These latter brought in to the State in a certain year towards the close of the 18th century as much as £140,000 though, under subsequent management, the revenue has never exceeded £87,000 in any one year [Encyclopædia Britannica, Vol. V, p. 364]. According to Dr. Balfour the rents received annually in respect of chank fisheries by the Government of Madras was about £1,000 those received by the Setupatis of Ramnad being £500 [Vol. I, p. 656]. According to the latest information available the average revenue during the 25 years from 1876-77 to 1902-03 [not reckoning 1884-85 in which for some reason not apparent there was no fishery] derived by the Madras Government from the chank fisheries under the control of the Superintendent of Fisheries at Tuticorin amounted to Rs. 12,000 [in round numbers] the maximum derived in any one year being that of 1881-82, viz, Rs. 28,000 [G. O. No. 1025, dated 6th October 1903]. It may not be superfluous to note that artificial culture of pearl oysters is not deemed to be impracticable, though whether that would be remunerative has been doubted [Mr. Thomas' 'Report,' p. 27, sec. 87].

With these observations I shall now proceed to discuss the questions stated above in their order.

Though undoubtedly what may properly be spoken of as fishes in the open sea are *feræ naturæ* and do not form the subject of property until actually seized, yet I am unable to accept the argument of Mr. Sivaswami Ayyar on behalf of the accused that chanks stand on an analogous footing. Certainly

Digitized by Google

there can be no comparison between animals like fishes which roam over the wide expanse of the waters darting about with extreme rapidity and which are endowed with the power of eluding attempts to take them unaided by special contrivances, and such localized slow creatures as chanks which a diver can pick up with the same ease with which he can take pabbles at the sea-bottom. It seems to me that, with reference to the question of property under consideration, there is more analogy between chanks and pearl oysters on the one hand, and, on the other, the ordinary edible oyster which has formed the subject of judicial determination with reference to that question. So far as that is concerned the circumstance that "edible oysters," borrowing the words of Mr. Thomas, " are from the time they are precipitated as spat immovably cemented for life to rock if they chance to fall on rock, or if they fall on mud lie by their weight helplessly on their heavy convex side," while pearl oysters are not so sedentary but can move very slowly about, is immaterial. The observations of Green, C.J., in *State* v. *Taylor*[1] [decided by the Supreme Court of New Jersey] where the prisoner was convicted of theft of oysters, deserve consideration. He said " It is objected that oysters being animals *feræ naturæ* there can be no property in them unless they be dead or reclaimed, or tamed, or in the actual power or possession of the claimant, and that the want of such an averment is a fatal defect in the indictment . . . . The principle as applied to animals 'feræ naturæ' is not questioned. But oysters though usually included iu that description of animals do not come within the reason or operation of the rule. The owner has the same absolute property in them that he has in inanimate things or in domestic animals. Like domestic animals they continue perpetually in his occupation and will not stray from his house or person. Unlike animals *feræ naturæ* they do not require to be reclaimed or made tame by art industry or education, nor to be confined in order to be within the immediate power of the owner. If at liberty they have neither the inclination nor the power to escape. For the purpose of the present enquiry they are obviously more nearly assimillated to tame animals than to wild ones and perhaps more nearly to inanimate objects than to animals of either description" *State* v. *Taylor*[1]. These observations seem to me to be substantially applicable to chanks and pearl oysters which may, therefore with perfect propriety, be treated as standing on a par with *feræ domitæ* and like them the subject of absolute property. Supposing however they should be treated differently from *feræ domitæ*, there ought, having regard to the extremely limited power of locomotion possessed by these creatures, to be no hesitation in holding, as contended for by Mr. Srinivasa Aiyangar for the petitioner, that they are the subject of property *propter impotentiam*. As to the extent of the property, however, the result should be the same, in view of their weakness in the matter of locomotion being, unlike as in the case of the young of birds, to which reference was made in the argument, not a temporary but a permanent condition. If it would be going too far to ascribe absolute property on the said ground they would certainly be the subject of qualified property, *i.e.*, they would belong to him on whose land they exist so long as they do not migrate therefrom and pass away elsewhere, even supposing they are likely to do so. Apart, too, from this view it would be impossible to ignore the fact that for ages in this country, chanks and pearl oysters have been owned and enjoyed by the sovereign as belonging by prerogative right exclusively to him—a fact from which it must, with reference to the Crown and persons having similar right, be held that they *ratione privilegii* are the subject of property absolute

(1) 72 Am. Dec., 347., 3 Dutcher, 117.

Digitized by Google

or qualified according to the view to be taken with reference to the nature and capacity of the animals themselves. If, with reference to such considerations, the animals are only the subject of qualified property the owner of the exclusive right can claim them of course only so long as they do not migrate beyond the limits within which the right is exercisable.

Turning now to branch (*b*) of the question under consideration, the objection that live chanks even if a subject of property are not the subject of larceny would seem to have reference to the rule of English Criminal Law thus stated in Hale's 'Pleas of the Crown'; "Larceny cannot be committed in some things whereof the owner may have a lawful property and such whereupon he may maintain an action of trespass, in respect of the baseness of their nature, as mastiffs, spaniels, grey-hounds, blood hounds, or of some such things wild by nature yet reclaimed by art or industry as bears, foxes-ferrets, etc., or their whelps or calves because, though reclaimed, they serve not for food but pleasure, and so differ from pheasants, swans, etc., made tame, which though wild by nature, serve for food" But surely it would not be right to impute baseness within the meaning of the said rule to creatures like those in question so harmless during life and so useful after death, one description of them leaving what, as already stated, lends itself to so many uses in this country and the other containing what on account of their beauty and rarity have always been among the choicest objects of the jeweller's art. If a place must be found for such members of the animal kingdom in the classification of English Criminal Law, they ought certainly to be treated as animals highly serviceable to man, though otherwise than as food, and such serviceableness must, according to the principle of the authorities, be held to make them the subject of larceny, considering how the law views the case of another animal prized not as food, the rule as to which is expressed quaintly enough thus: "Only of the reclaimed hawk in respect of the nobleness of its nature and use for princes and great men, larceny may be committed" (Hale's 'Pleas of the Crown', p. 512). However this may be, it is scarcely necessary to say that under our own criminal law, subject only to the exception provided for by section 95 of the Indian Penal Code, an animal which is recognised as property is *ipso facto* capable of being stolen.

Now as to the last branch of the question I cannot see what difficulty there can be in holding that chanks and pearl oysters while still in the beds are, within the meaning of section 397 of the Indian Penal Code, in the possession of persons who may show a title thereto. The circumstance that the subjects of His Majesty and others may navigate the waters could not preclude the predicability of possession in the largest sense of the term with regard to beds forming the subject of these fisheries, on the part of those entitled exclusively to carry on the fisheries. The right of such persons being admitted, it follows that so long as chanks and pearl oysters have not actually been manually taken hold of by strangers, the animals, notwithstanding their continuance in their natural habitat, must, on the principle that "property in personal chattels draws after it the possession" (see *State* v. *Taylor*(1)), be held to be in the possession of the owner and of none else. That, here, the thing owned lies buried under the waters of the sea, operates rather as a security of the owner's possession than otherwise, as that in many ways interposes serious obstacles in the way of unobserved intrusion on the rights of the proprietors. The bed of the sea being vested in the Crown the soundness of postulating possession in the Crown in regard to chanks and oysters belonging to it is too obvious to require further discussion.

(1) 72 Am. Dec., 348; 3 Dutcher, 117.

Digitized by Google

As regards the Ramnad proprietor also the same conclusion would follow if he has the immemorial right claimed. Without intending or seeming to introduce into this country the highly technical distinctions peculiar to the law of England connoted by such terms as common fishery, common of fishery, free fishery and several fishery one may admit that there is force in the suggestion made by Mr. Srinivasa Aiyangar that the alleged right of the Ramnad proprietor would not stand on a worse footing than that of a person entitled to a several fishery in England which, it has been held, is a right capable of being vindicated by possessory remedies (*Holford* v. *Bailey*(1) and *Hanbury* v. *Jenkins* (2)). And in favour of the contention that the dishonest removal of chanks even with reference to such a proprietor would constitute theft under the Indian Penal Code, I may cite *Reg* v. *Downing*(3) where a conviction for larceny was sustained by the Court of Criminal Appeal (presided over by Cockburn, C.J., Channell, B., Keating, J., Brett, J., and Cleasby, B.) under 24 and 25 Vict., Cap. 96, which enacted that "whoever shall steal any oyster or oyster brood from any bed laying or fishery being the property of any other person and sufficiently marked out, shall be guilty of a felony", the whole evidence as to the prosecutor's right having been that for a period of 45 years he and his father had, as of right, exercised the right of fishing oysters in the bed from which the prisoner had removed them and which was situated in a tidal navigable river.

Apart from any statute in *State* v. *Taylor* (4) referred to above, dishonest removal of oysters was held to be theft, though the removal was from a sound accessible to the public for navigation and fishing, because the oysters remained the property of the prosecutor, he having planted them in the spot wherefrom they were removed, the common law as understood in that country permitting such planting subject to the liability of the oysters being destroyed or removed if they should prove a nuisance or interfere with the public rights of navigation and fishing. Obviously the fact that the Ramnad proprietor claims the chanks not *per industriam* but by immemorial privilege, referring as it does only to the source of his right, cannot affect the question of possession when once the right is allowed.

Before concluding my observations on the present matter it may not be amiss to draw attention to a provision in one of the several Australian statutes passed for the protection and regulation of the pearl fisheries in Western Australia, as showing the unmistakeable trend of legal thought on the subject. I refer to 50 Vict. No. 14, the 'Shark's Bay Pearl Shell Fishery Act,' 1886 section 8, of which runs thus: "All pearls and pearl shells lying or contained within the limits of any licensed area shall, during the continuance of the license, be deemed to be the absolute property of the licensee for all purposes, civil or criminal; and all and every person or persons who shall gather, collect, or remove any pearl or pearl shells within or from the limits of a licensed area, without the authority of the licensee or his agent, shall be deemed guilty of larceny and shall, on summary conviction of such offence before two or more Justices of the Peace in Petty Sessions, be liable to be imprisoned for any term not exceeding two years with or without hard labour."

As to the cases of *The Queen* v. *Revu Pothadu*[5], *Subba Reddi* v. *Munshoor Ali Saheb*[6], *Horimoti Moddock* v. *Deno Nath Malo*[7], *Bhusun Parui* v. *Denonath Banerjee*[8], *Empress* v. *Charu Nayiah*[9], and *Bhagi-*

(1) 13 Q.B., 426. (2) L.R. (1901), 2 Ch., 401. (3) 11 Cox C.C., 580.
(4) 72 Am. Dec., 347; 3 Dutcher, 317. (5) I.L.R., 5 Mad, 390
(6) I.L.R., 24 Mad., 81 at p. 82. (7) 19 Suth. W.R. (Cr.R.), 47.
(8) 20 Suth. W.R. (Cr. R.), 15. (9) I.L.R., 2 Calc. 354.

Digitized by Google

ram Dome v. *Abar Dome*[1] to which our attention was drawn on behalf of the accused, I take their *ratio decidendi* to be that fishes being *feræ naturæ* and the waters concerned in the particular cases having been unenclosed waters operating in no way to curtail the power of unrestricted movement and escape of the fishes, a taking of them could not amount to theft as, in the circumstances, they were not, until actually caught, the subject of property. These cases have no application here for the reason that live chanks are not *feræ naturæ* properly so called (see the observations of Westbury, L.C., in *Blades* v. *Higgs*(2) and have already been held to be at least the subject of qualified property even in their natural habitat, shells of dead chanks being of course absolute property in every sense.

I pass on to the next question which involves considerations of no small importance. In dealing with it, I wish, before going further, to say that *Queen* v. *Keyn*(3) relied on by Mr. Sivaswami Aiyar is distinguishable from the present case for reasons which would be best stated in the words of Mr. Justice Blatchford who delivered the judgment of the Supreme Court of the United States in *Manchester* v. *Massachussets* (4), viz., that " the question there (in *Queen* v. *Keyn*(3)) was not as to the extent of the dominion of Great Britain over the open sea adjacent to the coast, but only as to the existing jurisdiction of the Court of Admiralty in England over offences committed in the open sea, and the decision had nothing to do with the right of control over fisheries in the open sea or in bays or arms of the sea. " See also *Direct United State's Cable Company* v. *Anglo-American Telegraph Company*(5).

Passing then to the question in hand it is to be observed that having regard to the fact that the rule as to the territorial waters of a country is founded on the principle that a proper margin is absolutely necessary for the safety and convenience of every country bordering on the sea, and having regard to the fact that the limit of a marine league was arrived at with reference to the shooting power of cannons in former times, while those now in use are of a much longer range, doubts have been raised as to the propriety of maintaining this any longer as the proper limit (Hall's ' International Law,' 4th edition, p. 160). " In 1894 the *Institut de droit International* exhaustively discussed the question and there was no division of opinion as to the necessity of giving a grater breadth to the zone—a decided majority favouring a zone 6 miles from low water mark as territorial for all purposes with the right in a neutral state to extend it in time of war to a distance from shore equal to the longest range of modern guns. " (Taylor's ' International Public Law,' p. 294 ; see also Hall's ' International Law,' p. 161, note.) But in the absence of a distinct international concert on the point, the ordinary limit of territorial waters in the open sea should, I presume, be taken to be that referred to above subject perhaps to the qualification, according to the decision of the Supreme Court of the United States in *Manchester* v. *Massachussets*(4) (already referred to), that " all Governments for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit. "

Be this as it may, certain parts of the sea spoken of as gulfs, bays etc. (Taylor's ' International Public Law,' sections 229 and 230; see also p. 138 *ibid.*), though few in number would seem to be recognized as standing on an

(1) I.L.R., 15 Calc. 388. [2] 11 H.L.C, 612 at p. 631 (3)L.R., 2 Ex. D., 63 at pp. 162, 193.
(4) 139 U. S. App., 240 at p. 257. (5) L. R., 2 A. C., 394 at p. 416.

Digitized by Google

exceptional footing, the reason for the exception, as I understand it, being that while in regard to waters truly oceanic exclusive dominion by any particular nation is in the very nature of things, impossible, such is not the case with reference to the parts of the sea referred to. From the instances of such waters occurring in the books, it is to be gathered that an important element in the determination of the question whether particular waters come within the exception, is the position thereof with reference to the territory of the nation or the territories of the nations claiming special right therein; for, it is obvious that if waters are encircled to a great extent by the land of one or more States, that conduces to and facilitates the springing up of exclusive rights. Whether in fact such rights have grown up must, in the absence of treaties and compacts, be a question of user acquiesced in by other nations. The law on this point was fully examined by Lord Blackburn who delivered the judgment of the Judicial Committee in a case which related to Conception Bay in Newfoundland; and I cannot do better than quote his observations (*Direct United State's Cable Company* v. *Anglo-American Telegraph Company*(1)). His Lordship said: "Passing from the Common Law of "England to the general law of nations as indicated by the text writers on "international jurisprudence, we find an universal agreement that harbours, "estuaries and bays landlocked, belong to the territory of the nation which "possesses the shares round them, but no agreement as to what is the rule to "determine what is 'bay' for this purpose.

"It seems generally agreed that where the configuration and dimensions "of the bay are such as to show that the nation occupying the adjoining "coasts also occupies the bay, it is part of the territory; and with this idea "most of the writers on the subject refer to defensibility from the shore as "the test of occupation; some suggesting therefore a width of one cannon "shot from shore to shore or three miles; some, a cannon shot from each shore "or six miles; some an arbitrary distance of ten miles. All of these are rules "which, if adopted, would exclude Conception Bay from the territory of "Newfoundland, but also would have excluded from the territory of Great "Britain that part of the Bristol Channel which in *Reg* v. *Cunningham*(2) "was decided to be in the country of Glamorgan. On the other hand, the "diplomatists of the United States in 1893 claimed a territorial jurisdiction "over much more extensive bays, and Chancellor Lent, in his commentaries, "though by no means giving the weight of his authority to this claim, gives "some reasons for not cosidering it altogether unreasonable.

"It does not appear to their Lordships that jurists and next writers are "agreed what are the rules as to dimensions and configuration which, apart "from other considerations, would lead to the conclusion that a bay is or is "not a part of the territory of the State possessing the adjoining coasts and it "has never, that they can find, been made the ground of any judicial determi-"nation. If it were necessary in this case to lay down a rule, the difficulty "of the task would not deter their Lordships from attempting to fulfil it. "But in their opinion it is not necessary so to do. It seems to them that "in point of fact the British Government has, for a long period, exercised "dominion over this bay and that their claim has been acquiesced in by other "nations so as to show that the bay has been, for a long time, occupied "exclusively by Great Britain; a circumstance which in the tribunal of any "country would be very important."

(1) L. R., 2 A. C., 394 at pp. 416, 419, 420. (2) Bell's Cr. C. 72.

Digitized by Google

Now the question is whether the circumstances of the present case warrant the view that those parts of the sea which contain beds of chank and beds of pearl oyster forming the subject of fishery operations therein, come within the exception already adverted to. The beds referred to lie all along the Indian coast as well as the cost of Ceylon in the Gulf of Manaar. This gulf is no doubt quite open towards the south, but is otherwise almost wholly surrounded by land, *i.e.*, on the west by the Indian mainland, on the east by Ceylon and on the north by Adam's Bridge and its contiguous islands forming one continuous barrier separating the gulf from Palk's Bay. The latter is comparatively much smaller, and is difficult of navigation owing to its shoals, currents and sunken rocks. The passage from the bay into the gulf lying between the mainland and Rameswaram is quite a narrow one, being only 1,350 yards in breadth (Dr. Thurston's 'Bulletin' No. III, p. 82) and 10 to 15 feet deep in low water notwithstanding its having been deepened by our Government some years ago. The gulf itself was similarly deepened by our Government to admit of ships of greater draught. (Balfour's 'Cyclopædia, Vol. I. p. 1263.) The gulf at its widest (between Point Galle in Ceylon and Cape Comorin) is 200 miles, while in its northernmost parts its width is only 17 miles; from north to south the gulf is about 139 miles.

Such being the position and circumstances of the gulf and the surrounding country having, from very early times, been inhabited by comparatively civilized races, the gulf, moreover, being as it were stocked with the already mentioned rich sources of wealth and commerce, the rulers of those races who were shrewd enough to make revenue out of the sea water by making the manufacture of salt a State monopoly, were of course not slow in making revenue out of those sources as well. The fisheries in question were thus established and have been handed down from sovereign to sovereign until, about the end of the 18th or the beginning of the 19th century, they became vested in the British. All this is clearly told by authentic historians and travellers and for the present purpose it is not necessary to make more than a few references.

"Friar Jordanus, a quaint old missionary bishop," says the author of the article on Pearl in Balfour's 'Cyclopædia,' "who was in India in 1330 says that 8,000 boats were engaged in this fishery and that of Ceylon and that the quantity of pearls was astounding and almost incredible. The head-quarters of the fishery was then, and indeed from the days of Ptolemy to the 17th century continued to be, at Chayl or Coil, literally, the temple, on the sandy promontory of Ramnad, which sends off a reef of rocks towards Ceylon known as Adam's Bridge. And Ludovico de Varthema mentions having seen the pearls fished for in the sea near the town of Chayl in about A.D. 1500; and Barbosa, who travelled about the same time, says that the people at Chayl are jewellers who trade in pearls. This place is, as Dr. Vincent has clearly shown, the Koru of Ptolemy, the Kolkhi of the author of Periplus, the Coil or Chayl of the travellers of the middle ages, the Ramanakoil (temple of Rama) of the natives, the same as the sacred promontory of Ramnal and the isle of Rameswaram the head-quarters of the Indian pearl fishery from time immemorial." Though in this passage no express allusion is made to the fisheries being King's monopoly, that undeniable and well-known fact is mentioned elsewhere. For example, Sir James Emerson Tennent in his work on Ceylon observes "Monopolies are to the present day a prominent feature of the Ceylon revenue. The fishery of pearls and chanks has been, from time immemorial, in the hands of the sovereign" (5th Edition, Vol. II, p. 166). That this was also the case with regard to the fisheries on the opposite coast (that of Tinnevelly and

Digitized by Google

Madura) while the country was still in the hands of Hindu rulers and down to a period not long anterior to the accession of the Nawab of the Carnatic to power, will be seen from the following extracts which I make from Nelson's Manual of the Madura Country':—" Another and productive source of revenue was the great pearl fishery which was carried on annually from Cape Comorin to the island of Pamban. A rough idea of its value may be formed from a statement in a Jesuit letter of the year 1700 which describes the fishery, to the effect that the Dutch used to grant licenses to fish for pearls to all applicants at a uniform rate of about 60 Ecus for each vessel employed in the fishery, and that sometimes as many as 6 and 700 vessels were so employed. The net sum realized must, therefore, have been about 36,000 Ecus. And it was realized from the fishery along the Tinnevelly coast only: the Ramnad coast being then fished by the Sethupathi, to whom it belonged " (p. 154, Part III, Nelson's 'Madura Manual '). "They durst not attempt to coerce either the Sethupathi or the King of Madura and they took nothing by an embassy which they sent to the former, together with some valuable presents, for the purpose of inducing him to make over to them all his right and title to the profits of the pearl fishery on his coasts. They had obtained from the King of Madura the monopoly of the fishery of the Tinnevelly coast and draw a considerable revenue from licenses to fish which they granted to all applicants " (p. 227 *ibid*). " And the conch shell fishery must also have produced a considerable revenue if, as seem probable, the king enjoyed the monopoly of it (p, 154 *ibid.*). " The conch shell fishery was also theirs (belonging to the Dutch) within the same limits as the pearl fishery and yielded a considerable profit " (p· 227 *ibid*). It is scarcely necessary to add that it is matter of quite recent history that the fisheries on the said coast of the mainland passed into the hands of the East India Company on the cession to it by Nawab of the Carnatic of the revenues thereof, while the Ceyon fisheries vested in the British Crown on the conquest of Ceylon from the Dutch.

Now, considering that the various European maritime powers, who from about 16th century were contending for supremacy in the Indian seas, raised no question as to the right of the sovereigns for the time being of the Carnatic and Ceylon to their respective fisheries, there can be little doubt that such right was regarded by one and all of them as unassailable. Nor is high authority in terms referring to and recognizing it wanting. Vattel, himself a strong adherent of the doctrine that the open sea is not susceptible of exclusive dominion, while dealing with the question of special appropriation of part of the sea, writes thus in a well-known passage : " The various uses of the sea near its coast render it very susceptible of property. People there fish and draw from thence shells, pearls, amber, etc. Now in all these respects its use is not inexhaustible; so that the nation to whom the coasts belong may appropriate to itself an advantage which it is considered as having taken possession of and make a profit of it in the same manner as it may possess the domain of the land it inhabits. Who can doubt that the pearl fishery of Bahrem and Ceylon may not lawfully be enjoyed as property ? And though a fishery for food appears more inexhaustible, if a nation has a fishery on its coast that is particularly advantageous and of which it may become master, shall it not be permitted to appropriate this natural advantage to itself as a dependence on the country it possesses ? " [Book I, ch. XXIII. sec. 287, p. 115, Translation of 1759].

With so emphatic a pronouncement by such a publicist as to the lawfulness of the exclusive possession of the fisheries in question unbrokenly enjoyed

Digitized by Google

from ancient times and with instances of exclusive occupation which have taken place almost under our own eyes with reference to pearl fisheries in Shark's Bay, etc., in Western Australia and which include pearl banks beyond the marine league limit, one may with confidence lay down that, to say the least, the parts of the sea falling between the respective coasts and the lines opposite each connecting the extreme points seawards of the limits, of the fisheries in question, are British territorial waters. It, therefore, follows that the petitioner is not precluded in law from making out a good title to chanks in the localities specified by him, by the mere fact that they lie beyond the distance of a marine league from low water mark, if he can show that the immemorial right under which he claims extends to such localities.

As regards the last question, in the view I take as to the territorial character of the waters in which the fisheries exist, it would, from *Rey.* v. *Cunningham*(1) where it was held that an offence committed in a part of the Bristol Channel more than 3 miles from the shore was within the jurisdiction of the authorities of the country of Glamorgan, of course, follow that our Courts likewise have jurisdiction over offences committed in the parts of the sea in question, though the spots in which the offences are committed lie beyond a marine league from the shore. I would therefore set aside the order of the Head Assistant Magistrate, direct him to restore the complaint to his file and dispose of it in accordance with law.

RUSSELL, J.—This is a criminal revision petition against the order of discharge by the Head Magistrate of Ramnad.

The question raised is whether "chanks" in the open sea can be the subject of theft.

The Magistrate holds that a chank is a fish is *feræ naturæ* and as it was not shown that the chanks in the present case were removed from an enclosed space or that breeding operations were carried on in regard to them, the conclusion arrived at by the Magistrate was that those chanks cannot be said to be in the possession of any one until they are removed—therefore they were not stolen from the petitioner.

The Sessions Judge, before whom the matter came in revision, declined to interfere, on the ground that the open sea could not be said to belong to the petitioner and chanks caught in the open sea could not be the subject of theft.

The Government Pleader appears in support of the order of the Magistrate and has argued that no exclusive right by prescription as to fishing in the open sea could be acquired by the Rajah of Ramnad—it is as a lessee of the Rajah of Ramnad that the petitioner asserts his rights.

The chank and pearl fishery beds along the coast of Tinnevelly and Madura have all been located and mapped out. It is matter of common knowledge that these fisheries are a source of some revenue to Government, but Government, I take it from the appearance of the Government Pleader in this case, does not take up the position that chanks can be the subject of theft.

My conclusion in this case is based up on three simple propositions—

(1) The Gulf of Manaar is part of the high seas in which the Crown claims no special rights of jurisdiction.

(1) Bell's Cr. C. 72.

Digitized by Google

(2) The Rajah of Ramnad is not the owner of the bed of the sea below low water mark.

(3) Chanks are *feræ naturæ.*

I say the Gulf of Manaar is part of the high seas from its size, configuration and geographical position. In the present case the Crown has not asserted any special rights in respect of any portion of the Gulf; and in this revision case I do not think we are entitled to assume that the Crown would, in fact, under any circumstances, assert, any such right.

As to the ownership of the bed of the sea it may be admitted that the authorities are not uniform on the subject. I, however, accept the reasoning and conclusion of Cockburn, C. J., in *Queen* v. *Keyn*(1) and following pages. This no doubt was a case which applied only to the coasts of Great Britain, but the reasoning and conclusion, I consider, applies equally to this country. I hold that the Crown does not own the bed of the sea below low water mark. The Government Pleader does not now assert that any such ownership vests in the Crown either by right of user or legislation. The argument on behalf of the petitioner is that he is the owner of the "several fishery" in respect of chanks on the Ramnad littoral shores and that this right carries with it the ownership of the soil of the sea. I do not admit the validity of this argument. In this case I do not wish to say anything which might unnecessarily interfere with any civil rights possessed by the petitioner. It is not necessary for me to deny that the petitioner may have a right to fish for chanks, though I may point out that there is authority for the position that a grant of the "several fishery" claimed could not be presumed, as it would be invalid if the soil of the bed of the sea does not vest in the Crown; which is the view I take (Coulson on 'Waters,' 2nd edition, p. 358).

If this view be correct it follows that chanks before they are caught could not be looked upon as being in the possession of the petitioner and, therefore, there is no property in them either absolute or qualified till they are caught. Hence the following cases referred to by Mr. Srinivasa Ayyangar for the petitioner cease to be in point (*Queen* v. *Shickle* (2) and *Blades* v. *Higgs* (3)).

My third proposition is that chanks are in the same category as fishes and are, like the latter, *feræ naturæ.* Chanks are free to move as they like. No doubt their movements are slow but they are probably more difficult to catch than most fish. To catch chanks experienced divers are necessary and even then considerable difficulty must be felt in catching them. The difficulties experienced in catching chanks compared with fish must therefore be a question of degree. I do not see how chanks can be considered as tame creatures.

If the chanks in the present case are to be classed in the same category as fish, as I think they must be, there are decisions without number to the effect that they cannot be the subject of theft as there is no property in them till they are caught.

I have not been able to find any case analogous to the present in which it has been held that a theft has been committed. I may here remark that I think the case of *State* v. *Taylor*(4) is clearly distinguishable from the present one. Taylor was convicted of larceny in respect of oysters. The oysters were bred by the complainant in the sea at a place between high and

(1) L. R., 2 Ex. D., 63 at pp. 162, 193.
(2) L. R., 1 C. C. R., 158.
(3) 11 H. L. C., 621.
(4) 72 Am. Dec., 347., 3 Dutcher 117.

Digitized by Google

low water mark where the public generally had a right to fish. "The jury were instructed that if the same oysters which were planted by Hildreth,"—who was the complainant—" were unlawfully taken by the defendant with the intent to steal them ; if the oysters so planted could be easily distingushable from others oysters that grew in the sound ; if they were planted in a place where oysters did not naturally grow ; if the place where they were planted was marked and identified, so that the defendant and others going into the sound for clams and oysters naturally growing there could readily know that these oysters were planted and held as private property and were not natural oysters, then the oysters were the subject of larceny and the defendant might be convicted." No doubt the decision is an authority for the proposition that oysters under certain circumstances can be the subject of theft ; but it is also an authority for the proposition that if oysters grow naturally in the sea they are not the subject of theft.

Reg v. *Downing*(1) practically turns on the same point as *State* v. *Taylor*(2) and unquestionably decides that oysters can be the subject of theft if dishonestly removed from a private oyster bed. Before, however, these decisions could be applied to the facts of this case, it would have to be found that the chanks were produced by breeding operations—much like oysters—in places in the sea which the petitioner had appropriated for that purpose. There is no suggestion in the present case that the chanks were produced by breeding—they, in fact, are the natural product of the sea. So that it appears to me the cases cited are not all on all fours with the present case. I may assert, therefore, I think, that no case has been brought to notice where a person has been convicted of larceny or theft in respect of an oyster or chank produced naturally in the sea.

The special legislation which has taken place in Australia does not, in my opinion, affect the position. It has there been enacted that, under certain circumstances, a person who removes oysters from the open sea shall "be deemed" to be guilty of larceny. It does not follow therefore that in the absence of such legislation a person who removes chanks has committed theft as defined in the Indian Penal Code.

I might support the general conclusion at which I have arrived by asserting the broad proposition that in the high seas where these chanks have been caught all subjects of the Crown have an equal right to fish; but I do not wish to complicate the discussion unnecessarily. In my view no theft has been committed, because the chanks in the present case are "feræ naturæ," as fish are, and they have been produced naturally in the sea in beds which the Rajah of Ramnad cannot claim to be his in exclusive right.

I agree with my learned colleague in the opinion that if an offence has been committed the Courts have jurisdiction to try it.

I think the petition should be dismissed as no offence has been committed.

(In consequence of this difference of opinion, the case was posted for hearing before Benson, Boddam and Bhashyam Ayyangar, JJ.)

S. Srinivasa Ayyangar for petitioner.

The Public Prosecutor for the Crown.

---

(1) 11 Cox C.C., 580. [2] 72 Am. Dec., 347; 3 Dutcher, 117.

Digitized by Google

T. R. Venkatarama Sastri (P. S. Sivaswami Ayyar with him*)* for the accused.

The Court delivered the following,

JUDGMENT.—In this case the complainant charged certain persons with having committed the offence of theft of chanks from the chank beds leased to him by the Rajah Ramnad off the coast of his zamindari.

The Head Assistant Magistrate discharged the accused on the ground that chanks are fish and are *feræ naturæ* and in this case were taken from beds in the open sea and were therefore not taken from the possession of any person and could not be the subject of theft. The case came up for revision before a Bench of this Court composed of the Offg. C.J. and Russell, J., but, as they were unable to agree, the case was posted before us and our late colleague Sir Bhashyam Ayyangar for argument and disposal. We have no doubt that the grounds on which the accused were discharged are untenable, and that the chanks in question were capable of being the subject of theft.

The offence of theft under the Indian Penal Code is committed if there is a dishonest taking of moveable property out of the possession of another; and the questions for our decision are whether the chanks in question were capable of being regarded in law as the property of the lessee of the chank beds, and of being in his possession before their alleged taking by the accused. We have no doubt that both these questions must be answered in the affirmative. It was agreed before us that the beds from which the chanks were taken are situated in Palk's Bay, not the Gulf of Manaar, as supposed by Russell, J. Palk's Bay is a large stretch of sea water lying between the coasts of India and Ceylon. It is roughly 70 miles long by 50 or 60 broad. It is bounded on the north, west and south by the Indian districts of Tanjor and Ramnad, and on the east by Ceylon. There is a narrow passage, three-fourths of a mile wide, connecting it on the south with the Gulf of Manaar, which also lies between India and Ceylon. This passage is known as the Straits of Pamban and it separates the mainland from the large island of Ramesweram which forms part of the Indian district of Ramnad, and from which a continuous line of coral reefs, known as Adam's Bridge, extends to the island of Ceylon. The passage was deepened some years ago but is even now only 10 to 15 feet in depth. At its north-eastern extremity Palk's Bay opens into the Bay of Bengal by a strait which is not more than one-ninth of the circumference of the bay. It will thus be seen that Palk's Bay is a bay, or arm of the sea, landlocked by His Majesty's dominions for eight-ninths of its circumference, and it also contains a great number of islands which from part of the districts to which they are adjacent on the Indian and Ceylon sides, respectively. There is ample historical evidence, which has been referred to in the judgment of the learned Offg. C.J., and which we need not recapitulate, to show that this bay, and also parts of the adjacent Gulf of Manaar, have been effectively occupied for centuries by the inhabitants of the adjacent districts of India and Ceylon, respectively.

We do not think that Palk's Bay can be regarded as being in any sense the open sea and therefore outside the territorial jurisdiction of His Majesty. We regard it rather as an integral part of His Majesty's dominions, the portions adjacent to India being within the jurisdiction of the Indian authorities, and the portions adjacent to Ceylon being within the jurisdiction of the authorities of that place. That this is the correct view is, we think, clear from the case of

Digitized by Google

Reg v. *Cunningham*(1) in which it was decided that the Bristol Channel, lying between England and Wales, was a part of Great Britain. Cockburn, C.J., in delivering judgment said: "The principle on which we proceed is that the whole of this inland sea, between the counties of Somerset and Glamorgan, is to be considered as within the counties by the shores of which its several parts are respectively bounded." Referring to this judgment Lord Blackburn in delivering the judgment of the Privy Council in the *Conception Bay Case*(2) said "This much was determined, that a place in the sea, out of any river, and where the sea was more than ten miles wide, was within the county of Glamorgan, and consequently in every sense of the words within the territory of Great Britain. It also shows that usage and the manner in which that portion of the sea had been treated as being part of the county was material." His Lordship then proceeded: "Passing from the Common Law of England to the general law of nations, as indicated by the text writers on international jurisprudence, we find an universal agreement that harbours, estuaries and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is "bay" for this purpose. It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay it is part of the territory. He then stated that no precise rule had been laid down or was required to be laid down in the case before their Lordships as "it seemed to them that, in point of fact, the British Government had for a long period exercised jurisdiction over this bay and that their claim had been acquiesced in by other nations so as to show that the bay had been for a long time occupied exculsively by Great Britain, a circumstance which in the tribunals of any country would be very important" and which we may add would be conclusive as against a subject of Great Britain. Applying these considerations to the present case and comparing the configuration and dimensions of Palk's Bay with those of the Bristol Channel and of Conception Bay, and considering the evidence that exists as to occupation of Palk's Bay by the British with the acquiescence of other nations, we have no hesitation in holding that it is just as much an integral part of His Majesty's domimions as are the Bristol Channel and Conception Bay, and that the chank beds where the alleged offence was committed, which are five miles off the coast of Ramnad at Mudiampatnam are part of the territories of British India.

The decision in the case of *The Queen* v, *Keyn* (3) relied on by the respondents, referred to the jurisdiction of the Court of Admiralty in England over offences committed in the open sea, and has no application to such a state of facts as exists in the present case.

Such, then, being the correct view as to the character of the place where the alleged offence was committed we proceed to consider whether chanks taken from it can be the subject of theft.

It is, of course, quite incorrect to regard chanks as, in any sense, fish. No doubt they may be popularly included among "shell fish," but neither zoologically nor legally have they any of the essential characteristics of fish. They are large molluses. The shells in which the living molluse resides is six or seven inches long, and may weigh as much as a couple of pounds. They are found buried in a particular kind of sand bed, or in the sandy crevices of the

(1) Bell's Cr. C., 86. (2) L.R., 2 A.C., 394 at p. 419.

(3) L. R., 2 Ex. D., 63 at pp. 162, 193.

Digitized by Google

coral reefs which abound in the bay. They can crawl slowly, a foot or two in a minute, but they are incapable of rapid motion or of saving themselves from being captured by any one who proceeds to take them. They are gathered by divers, who sometimes collect as many as twenty at a haul. The chank beds on which they lie are all carefully mapped out and full details respecting them are recorded by the authorities. They lie at various depths in the water from 2 to 10 or 12 fathoms. Live chanks are known as green chanks, and the shells of the dead animals are known as white chanks. Both are collected and are articles of very considerable utility and commercial value. The evidence shows that for many hundreds of years they, like the pearl oysters which are generally found in adjacent beds, have been the monopoly of the rulers of the country both in India and Ceylon and that licenses to gather them have been granted by the sovereign. In addition to the facts stated by the Offg. C J. in his judgment we may say that, when it was determined to make a permanent settlement of the revenue of the Ramnad zamindari in 1802, we find the "Chank royalty" named as one of the eight heads of revenue on which the permanent assessment was fixed (Nelson's 'Manual,' part IV, p. 155), and it appears that in 1803 this chank royalty was hypothecated to Government as security for arrears of revenue. In 1874 the chank royalty "in the seaports mentioned in the margin" (which included Mudiampatnam now in question) was attached for arrears of revenue, and so lately as 1899 and 1900 Government itself leased the chank fisheries from the zamindar. A great deal of learned argument has been addressed to us on the subject of animals "feræ naturæ" and the English law of larceny in regard to them. If it were necessary to decide whether chanks should be classed as "feræ naturæ" or as "domitæ naturæ" we should certainly hold that they belong to the latter class. It is not easy to regard a chank as being of a "wild disposition," ('feræ naturæ'). There is no evidence that it ever migrates from the bed in which it is born and its power of locomotion is no small that it is powerless to escape from any one who desires to take it.

It has been judicially held in America that for legal purposes oysters "are obviously more nearly assimilated to tame animals than to wild ones, and perhaps more nearly to inanimate objects than to animals of either description" *State* v. *Taylor*(1). In this view we concur and we think that chanks may properly be placed in the same category with oysters. The fact that fish in a river or in an open and unenclosed tank have been held by the Courts in India not to be the subject of theft is irrelevant, because they are so held by reason of their power to escape up or down the river or out of the tank and cannot therefore be regarded as in the possession of the owner of the tank. But even fish if in an enclosed tank, so as to be under the control of the owner of the tank, are capable of being the subject of theft (*Queen Empress* v. *Shaik Adam Valad Shaik Farid*(2); and even the young of wild birds, such as hawks or herons, if found on a man's land may be the subject of larceny *propter impotentiam* owing to their inability to escape capture, or to pass from the possession of the owner of the land, though the old birds may not be the subject of larceny (Stephen's 'Com.', 13th edition, Vol. 2, p. 6). Even if chanks are in a certain sense *feræ naturæ*, we think that they should still be regarded as in possession of the owner of the chank bed *propter impotentiam* and therefore capable of being the subject of larceny. The Indian Penal Code, however, in dealing with theft has no special provisions regarding animals *feræ* or *domitæ naturæ*. The question in each case is whether the animal is the property of

(1) 72 Am. Dec., 347; 3 Dutcher, 117. (2) I.L.R., 10 Bom., 193.

Digitized by Google

another and was dishonestly taken out of his possession. It seems to us that there is nothing in the nature of a chank, whether it be the dead shell or the living molluse, which prevents it from being the subject of property, and that when it lies in its sand bed under the sea it is as much in the possession of the owner of the sand bed as are the coal that lies buried in the ground and the snail that crawls on the dry land and the worm that burrows in the earth in possession of the owner of the land where they are found. The exclusive property in these chanks has in fact been held by Government from time immemorial and has been leased out for the benefit of the public revenue, and this is in accordance with the common law of the country which recognizes the power of Government to make settlements or grants for purposes of revenue of all unsettled and unappropriated lands whether covered by water or not covered by water and, therefore, of the produce or portions of the produce of such lands *Hori Das Mal* v. *Mahomed Jaki*(1)), *per* Garth, C. J., on behalf of the Full Bench, and *Viresa* v. *Tatayya*(2)).

In our view, then, the chanks which the accused in this case are alleged to have stolen were capable of being the subject of theft and were taken, not from the bed of the high seas, but from an arm of the sea which is part of the territory of British India, which has been in possession of the Crown from time immemorial. It is not denied that the Crown has included the revenue derivable from the chanks in the permanent settlement of the zamindari under Regulation XXV of 1802 and that the Ramnad Zamindar has leased them to the complainant. If the taking of the chanks was dishonest it would be theft.

We must, therefore, set aside the order of discharge and direct the Head Assistant Magistrate to restore the case to his file and dispose of it according to law. In order to prevent misapprehension we may add that if the beds from which the chanks were taken had been off the coast of Ramnad in the Gulf of Mannar (as supposed by the Judges who first heard the petition) instead of in Palk's Bay, our decision would have been the same, since the evidence of effective occupation of the chanks beds in both localities is very similar.

Our learned colleague Sir Bhashyam Ayyangar does not sign this judgment as he is no longer a member of the Court, but he has expressed his concurrence in it.

VOL. XXVIII.

1904. *July*. 13, 19. **I. L. R. 28 Mad. 17.**

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Sankaran Nair.

VENKATRAMA CHETTI (APPELLANT) PETITIONER, *v.* EMPEROR, RESPONDENT.*

District Municipalities Act—(Madras) Act III of 1889, s. 4—Allowing offensive matter to flow into a 'street'—Discharge into drains not forming part of street—Definition of 'street.'

A defendant was charged under section 4 of the Madras District Municipalities Act with allowing offensive matter to flow from his house into a street. The matter flowed into a drain or ditch constructed along the side of the roadway. On the question as to whether any offence had been committed:

(1) I.L.R., 11 Calc. 434 at p. 444 (2) I.L.R., 8 Mad., 467.

* Criminal Revision Case Nos. 64 and 65 of 1904.

Digitized by Google

Held, that a 'street' is any way or road in a city having houses on both sides; and that in consequence this definition excluded the drain or ditch on either side of the roadway; that the drain was not part of the 'street', and that the offence charged had not been committed.

CHARGE of letting offensive matter from a house flow into a street, under section 4 of (Madras) Act III of 1889. The defendant was convicted and ordered to pay a fine of Rs. 2 and in default to undergo simple imprisonment for two days. The conviction and sentence were confirmed on appeal. Defendant preferred this criminal revision petition. The facts are sufficiently set out in the judgment.

K. Narayana Row for petitioner.

The Public Prosecutor in support of the convictions.

ORDER.—In Criminal Revision Case No. 64 of 1904, the petitioner Venkatrama Chetti has been convicted of letting offensive matter from his house flow into a street, under section 4 of Madras Act III of 1889.

He contends that the matter discharged from his house is not offensive matter and has examined a witness who swears that the so-called offensive matter is "the water used for bathing purposes" in his house. He further contends that the water was not discharged into the street but only into a drain by the side of his house and that such drain does not form part of the street within the meaning of Act III of 1889.

It is found by both the lower Courts that the accused has allowed the water to flow into what is called in their judgments a 'drain' or 'ditch' constructed alongside the roadway.

The question therefore for decision is whether this 'drain' or 'ditch' forms part of the street.

The word 'street' is not defined in Act III of 1889, so we must take it to have been used in its ordinary and popular sense. We do not think it necessary to refer to the definitions of the word in other Acts as they do not exclude the ordinary sense of the word but only extend the term so as to include what otherwise would not be covered by it. See *Vestry of St. Mary Islington* v. *Barrett* (1).

What, then, is its ordinary meaning? Jessel, M. R., in *Taylor* v. *Corporation of Oldham* (2) accepts the following definition laid down in the Imperial Dictionary. "A street is properly a paved way or road but in usage any way or road in a city having houses on one or both sides."

This definition excludes what is called in this case the 'drain' or 'ditch' on either side of the roadway and we must hold therefore that this drain is not part of the street.

The accused has therefore not allowed any matter to flow into the 'street.'

On this ground the conviction must be set aside and the fine, if levied, refunded.

Criminal Revision Case No. 65 *of* 1904;—This case follows our order in Criminal Revision Case No. 64 of 1904 and for the like reasons as are recorded in our order therein, we set aside the conviction and direct that the fine, if levied, be refunded.

---

(1) L.R., 9 Q.B., 283. (2) L.R., 4 Ch. D., 395 at p. 408.

Digitized by Google

1904. *April* 18, 21. I. L. R. 28 Mad. 37.

Before Sir Arnold White, Chief Justice, Mr. Justice Davies and Mr. Justice Benson.

IN THE MATTER OF ANUSOORI SANYASI, ACCUSED.*

Criminal Breach of Contract Act—XIII of 1859, s. 2—Complaint against workman of failure to complete work—Completion of work by complainant prior to complaint—Maintainability of charge.

An employer applied for an order under section 2 of Act XIII of 1859, alleging that a workman had received an advance on account of the work and had failed to perform his part of the contract. Prior to lodging the complaint, the employer had completed the work, and he claimed an order for the repayment of the advance.

Held, that no order could be made. The section only applies when the work is uncompleted when the complaint is made. If the work has been completed when the complaint is made, the Magistrate has no jurisdiction under the section, though the employer has a remedy against the workman in the Civil Courts.

High Court Proceedings, dated 29th March 1865 (Weir's 'Law of Offences,' 445), approved.

The offence created by the act is not the neglect or refusal of the workman to perform his contract but the failure of the workman to comply with an order made by the Magistrate that the workman should repay the money advanced or perform the contract.

King Emperor v. Takasi Nukayya, (I. L. R., 24 Mad., 660), approved.

CHARGE by an employer against a workman under Act XIII of 1859. The facts of the case appear from the following judgment of the Stationary Sub-Magistrate:—

"The complaint in this case is that the accused, having contracted with the complainant to cut survey stones and having received an advance for it from him, failed to fulfil the contract completely under section 2 of Act XIII of 1859.

"The complainant, who is the first witness, says that the accused executed a contract bond in his favour on 10th June 1902 binding himself to cut survey stone required by him within a fortnight and received an advance, of Rs. 64 then, that, for this amount of advance, the accused worked and discharged his liability, that after this he again advanced to him on different occasions about Rs. 100 on condition that the accused might do the same work for three months more, but that the accused, having worked only a few days, went home as he fell ill and did not return to work again and that consequently he (complainant) completed his work some five or six months ago. The complainant says that he does not require the accused to work for him now as his work was completed but requires that the accused be ordered to repay him about Rs. 80 of advance still due to him.

"As the work for which this contract was entered into and the money advanced by the complainant was completed long prior to this complaint, this Act does not apply to this case(1).

He acuitted the accused under section 245 of the Code of Criminal Procedure. The Sessions Judge referred the case to the High Court after giving notice to the accused to show cause why it should not be reopened and tried on its merits,

ORDER—Sir ARNOLD WHITE, C. J.—In this case the complainant applied for an order under section 2 of Act XIII of 1859 alleging that the accused had contracted with him to cut stones, had received an advance on account of the work, and had faild to perform his contract. The Magistrate declined

* Case referred No. 16 of 1904.

Digitized by Google

to make an order against the accused on the ground that the work for which the contract was entered into was completed prior to the complaint. I think the Magistrate was right.

Section 2 of the Act empowers the Magistrate, at the option of the complainant, either to order that the money advanced be repaid, or that the work be performed. I think the section only applies when the work is uncompleted when the complaint is made. In my opinion, if the work has been completed when the complaint is made, the Magistrate has no jurisdiction under the section. In other words, an employer, by doing the work himself or employing a third party to do it for him, loses his right to proceed under the section. In such a case the employer's civil remedy is, of course, open to him but he cannot avail himself of the penal enactment. I agree with the ruling of this Court(1). The records in that case show that the work was in fact completed by the party who made the contract but the ground of the decision was that the Act had no application where the work had actually been completed at the date of the complaint. It seems to me that the case *In re Kitter*(2) has no bearing on the present case. I agree that limitation is no bar to a claim which a Magistrate has jurisdiction under the Act to enforce. In the present case there was, in my opinion, no enforceable claim.

Technically the Magistrate was wrong in acquitting the accused. The offence created by the act is not the neglect or refusal of the workman to perform his contract but the failure of the workman to comply with an order made by the Magistrate that the workman repay the money advanced or perform the contract (see *King-Emperor* v. *Takasi Nukayya*(3)). In effect, however, the Magistrate declined to make any order against the accused.

I see no reason to interfere.

DAVIES, J.—I entirely agree with the learned Chief Justice. The plain object of the Act is to provide a speedy remedy when the work is not done. The complainant having got the work done had no ground for invoking the aid of the Magistrate. In other words he has put himself out of Court.

BENSON, J.—I cannot say that the ruling referred to by the Sessions Judge and reported in Weir's 'Law of Offences, p. 455, is not in accordance with the strict letter of the Act. Section 2 presupposes that, at the time when the defaulter is brought before the Magistrate, the complainant has an option either to demand back his advance or to get an order to have the work completed.

But, if the work has been already completed the complainant cannot ask for an order to have it completed. He has therefore no option, and the condition presupposed by section 2 does not exist, and the remedy by the Act cannot be applied.

It is true this view restricts the scope of the Act in a way for which I can see no reasonable ground, and shows that the Act fails to deal effectively with the mischief which the preamble recites that it is intended to remedy but, as the Act is a penal Act, it must be construed strictly and in favour of the subject. The strict interpretation of the words of the Act is that stated above. If the Legislature considers that the Act as at present worded does not give effect to the true intention of the Legislature, the remedy is to amend the wording of the Act.

---

(1) High Court Proceedings, dated 27th March 1865, Weir's 'Law of Offences,' 445.
(2) I. L. R., 11 Mad., 332.
(3) I. L. R., 24 Mad., 660

Digitized by Google

1905. *January 6, 9.* **I. L. R. 28 Mad. 90.**

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar, Mr. Justice Davies, Mr. Justice Benson and Mr. Justice Boddam.

KOTAMRAJU VENKATRAYADU [ACCUSED], PETITIONER,
v. EMPEROR, COUNTER-PETITIONER.*

Indian Penal Code—Act XLV of 1860, ss. 465, 471—Forgery and using as genuine a forged document.

In order to obtain admission to the Matriculation Examination of the Madras University as a private candidate, V was required to produce to the Registrar a certificate signed by the head master of a recognized high school that he was of good character and had attained his twentieth year. V fabricated the headmaster's signature to such a certificate and forwarded it to the Registrar :

Held (SUBRAHMANIA AYYAR and DAVIES, JJ., dissenting that V was guilty of forgery.

Per Sir ARNOLD WHITE, C. J.—The offence of forgery is complete if a document, false in fact, is made with intent to commit a fraud, although it may not have been made with any one of the other intents specified in section 463. It was not necessary having regard to the wording of section 24 that the accused should have intended to cause both wrongful gain to himself and wrongful loss to the University. Both intentions, however, were present in this case. Moreover, the false document had been made with intent to support a " claim or title " within the meaning of those words as used in section 463. A claim to be admitted to a University examination is a "claim" within the meaning of section 463. It was more clearly so in the present case as the accused had a "claim" to be exempted from the production of an attendance certificate, upon satisfying certain conditions precedent. An intended deprivation of property is not an essential element of an intention to defraud.

Per BENSON, J.—Those decisions which proceed on the ground that an act is not fraudulent unless it causes or is intended to cause loss or injury to some one would seem to take too narrow a view of the meaning of the word "fraudulently" as used in the Code. The act of the accused was fraudulent not merely by reason of the advantage which he intended to secure for himself by means of his deceit, but also by reason of the injury which must necessarily result to the University and through it to the public from such acts if unrepressed.

Per SUBRAHMANIA AYYAR.—The document was not made fraudulently within the meaning of sections 464 and 463 of the Code. Deprivation of property, actual or intended. does not constitute an essential element in regard to offences falling under sections 465 and 471 of the Indian Penal Code; but the deception must involve some loss or risk of loss to an individual or to the public. It is not enough to show that the deception was intended to secure an advantage to the deceiver.

Per DAVIES, J.—It had not been shown that the accused in making the document had either of the intentions necessary to constitute it a false document within the meaning of section 464. A mere intention to deceive does not necessarily imply an intention to defraud or to cause wrongful loss to one person or wrongful gain to another. A person to be defrauded must suffer some harm or damage or injury and there was no evidence that the Registrar, as representing the University, had suffered in any of these respects. The University had been deprived of nothing and, on the other hand, had profited by the application by the accused. Moreover the intention of the accused was to subject himself to examination, which could not be deemed a thing of value, if he failed, it ended in nothing, if he passed, he became entitled to a certificate not in consequence of the false writing but on his own merits.

[This case is ref : 28 All. 364]

CHARGES of forgery and using as genuine a forged document, under sections 465 and 471 of the Indian Penal Code. The accused Kotamraju Venkatrayadu was a pupil at the A. E L. M. College, Guntur, and presented himself for the Matriculation examination of the Madras University in 1902, but failed to pass. It appears that, according to the University Regulations, there are three ways in which candidates can obtain admission to the Matriculation examination. A candidate who has attended a recognised school, must apply for examination and support his application by a certificate signed by the headmaster of his school, stating certain facts as to his attendance at school, character, ect. In

* Criminal Revision Case No. 463 of 1904.

Digitized by Google

the case of private candidates, it seems that the Syndicate has power to exempt the candidate altogether from producing a certificate of attendance at school, or if he produces a certificate from the headmaster of a recognized school to the effect that his character is good and that he has compelted his twentieth year, he is exempted from producing a certificate of attendance at a school. The Chief Presidency Magistrate, before whom the case came, said:—" In the present case, it would seem that, after his failure, accused was either unwilling or unable to return to school and therefore resolved to endeavour to secure admission to a second Matriculation examination in 1903 by forwarding an application to the Registrar of the University as a private candidate, stating that his age was 21 in the current year, omitting to mention that he had already appeared for examination, and which embodied a certificate purporting to be signed by the Rev Dr. Wolff, Principal of the A. E, L. M. College, Guntur, stating that Dr. Wolff believed accused would have completed his twentieth year on 15th September 1903 and was of good character. On this application, accused paid the prescribed fee of Rs. 14, and it was received by the Registrar on 14th September 1903. From the evidence of Mr. Patterson it seems that the University is the victim of so many tricks on the part of candidates for examination, that it keeps a regular mal-practice register and is constantly on its guard to frustrate their designs. It was speedily therefore discovered, that the accused had been up for examination in 1902 and had failed; that his previous application for examination had been made by him as a student of Dr. Wolff's College and that in it he had given his age as 17 and date of birth as 1885. Mr. Patterson accordingly wrote to the accused for an explanation, and to Dr. Wolff to enquire whether he had signed accused's second certificate. The accused replied stating he had made a mistake in saying his age was 17 in his first application and that he was really 19 in 1902; he denied any intention of deceiving the University and enclosed his horoscope to prove his alleged age. Dr. Wolff replied that the accused was under age and he could not find he signed his certificate, he therefore asked that accused's application should be sent to him for verification. Subsequently Dr. Wolff wrote to Mr. Patterson that he had seen accused, who had confessed that he had forged Dr. Wolff's name to his second application and begged fer mercy. A complaint was then made by Mr. Patterson on the 16th February 1904, charging the accused with forgery and using a forged document. On this, a warrant was issued and accused was arrested at Bonagiri in the Nizam's territories on 4th September 1904." Dealing with the defence, the Magistrate continued: " To these charges, accused pleads not guilty. He admits signing Dr. Wolff's name to exhibit D without his authority; that he forwarded that document to the Registrar of the University and that he acted as he did to obtain admission to a University examination; he says he is unaware he offended by these acts." On the facts proved and admitted the Chief Presidency Magistrate convicted the accused and sentenced him to four months' rigorous imprisonment. The accused preferred this criminal revision petition.

T. Rungachariar, for the petitioner, contended that the document or certificate was not a false document within the meaning of section 464 of the Indian Penal Code. There was no dishonesty here as there had been no wrongful gain of property to the accused or loss to the University (section 24 of the Indian Penal Code). The only question is whether the certificate was made fraudulently. This certificate would enable the Syndicate to decide

Digitized by Google

whether the applicant should be permitted to appear at the examination. On the other hand, the University gained the amount of his entrance fee. The accused intended to deceive but not defraud. Mere intention to deceive is not an intention to defraud. He cited *Jan Mahomed* v. *Queen-Empress* (1) *Queen-Empress* v. *Appasami* (2) and Blackstone's Commentaries,' Vol IV, p. 463. Section 25 of the Indian Penal Code contemplates an intention to defraud some one of something. The fraud must relate to some property or to some right (*Queen-Empress* v. *Haradhan* (3)), who is defrauded here and of what ? There is a distinction between the word 'fraudulent' in section 464 and the word "fraud" in section 463 of the Indian Penal Code. If the false certificate injured the University in any way then it might be regarded as fraudulent, but the University has not been injured in mind, body, reputation, or property [see section 415 of the Indian Penal Code.] He cited Archibald's Criminal Pleadings,' 672, *Reg* v. *Hodgson* (4), *King-Emperor* v. *Srinivasan* (5), and distinguished *Regina* v. *Toshack*[6], and *Queen-Empress* v. *Abbas Ali*[7], and *Queen-Empress* v. *Soshi Bhushan*[8].

He contended the offence of forgery had not been made out.

The Crown Prosecutor [Mr. John Adam] in support of the conviction cited the following cases : *Queen-Empress* v. *Ganesh Khanderao and Genesh Dault* [9], *Queen-Empress* v. *Appasami*[10], *Empress* v. *Dhunum Kazee*[11], *Queen-Empress* v. *Abbas Ali* [7] *Kedar Nath Chatterjee* v. *King-Emperor* [12], *Queen-Empres Khandusingh* [13].

JUDGEMENT—Sir ARNOLD WHITE, C.J.—In this case one Kotamroju Venkattayadu has been convicted by the Chief Presidency Magistrate of the offence of forgery. He applies to this Court on a revision petition and asks that the conviction may be set aside on the ground that he has committed no offence in law.

The facts are not in dispute. They are fully set out by the Presidency Magistrate. So far as they are material to the question we have to decide, they may be briefly stated as follows:—The petitioner was desirous of being admitted as a candidate for the Matriculation examination of the University of Madras. The regulations of the University which provide for the holding of the examination and the admission of candidates thereto are contained in bye-laws 128 to 134. Bye-law 129 provides that except in certain cases, a candidate for admission must forward to the Registrar what is known as an "attendance certificate." bye-laws, 131, which provides for the excepted cases referred to in bye-law 129, provides that a candidate who produces a certificate from the headmaster of a recognised high school that he is of good character and has completed his twentieth years, shall be exempted from the production of the attendance certificate mentioned in bye-law 129.

In this case, the petitioner forwarded to the Registar of the University a certificate that he was of good character and that he had completed his twentieth year. The certificate purported to be signed by the Rev. Dr. Wolff, who is a headmaster of a recognised high school. The certificate was not signed by Dr. Wolff. It is admitted that the petitioner fabricated the signature of Dr. Wolff, that he forwarded the certificate to the Registrar, and that he did so for the purpose of being admitted to the examination.

(1) I. L. R., 10 Calc., 584. [2] I. L. R., 12 Mad., 151. |3| I. L. R., 19 Calc., 380.
|4| (1856), Dearsley and Bell, 3, |5| I L. R. 25. Mad., 723.
|6| 4 Cox Crl. C., 38 |7| I. L. R., 25 Calc., 512, |8| I. L. R. 15 All, 210.
|9| I. L. R., 13 Bom., 506 at p. 515 |note|. |10| I. L. R., 12 Mad., 151.
(11) I. L. R., 9 Calc., 53 at p. 60. (12) 5 Calc., W. N., 897. (13) I. L. R., 22 Bom., 768.

Digitized by Google

The offence of forgery is defined in sections 463 and 464 of the Indian Penal Code. In order to constitute, the offence, the document must be false in fact, it must have been made dishonestly or fraudulently within the meaning of these words as used in section 464, and it must have been made with one of the intents specified in section 463. There can be no question that the document in this case was false in fact. It has not been contended that it was made "dishonestly," within the meaning of this word as used in section 464. It is only, therefore, necessary to consider the meaning of the word "dishonestly" in so far as it throws light on the meaning of the word "fraudulently," with which, it is used in collocation. By section 24 whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing dishonestly." By section 23 "wrongful gain" is defined as "gain by unlawful means of property to which the person gaining is not legally entitled"; and "wrongful loss" is defined as "the loss by unlawful means of property to which the person losing it is legally entitled" The doing of a thing fraudulently is defined by section 25: "A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise."

Possibly a distinction may be drawn between doing a thing "with intent . . . that fraud may be committed" [section 463] and doing a thing "fraudulently", [section 464]. Such a distinction seems to be recognised in section 239 of the Code. But to my mind no distinction can be drawn between doing a thing "with intent to commit a fraud" [section 463] and doing a thing "fraudulently" [section 464]. Although the words "with intent to commit a fraud" are not expressly defined I think they mean the same thing as "fraudulently", *i.e.*, to say, "with intent to defraud." It follows that if it is established that a person does a thing "with intent to commit a fraud" he does it with one of the intents specified in section 463, and he also does it "fraudulently" within the meaning of section 464. It also follows, as it seems to me, that the offence is complete if a document, false in fact, is made with intent to commit a fraud, although it may not have been made with any one of the other intents specified in section 463.

I am of opinion that in the present case the petitioner made a false document with intent to defraud. I entirely agree with the decision of the Full Bench of the Calcutta High Court in *Queen-Empress* v. *Abbas Ali* [1] where it was held that an intended deprivation of property was not an essential element of an intention to defraud. In this case the earlier Calcutta case of *Queen-Empress* v. *Haradhan* [2] was over-ruled and although the Chief Justice in giving the opinion of the Full Bench does not say so in so many words, I think it is clear that if the Full Bench had had to answer the question whether, on the facts in *Queen-Empress* v. *Haradhan* [2] the accused in that case had acted with intent to defraud, they would have answered it in the affirmative.

Intending to defraud means, of course something more than deceiving. A tells B a lie and B believes him. B is deceived but it does not follow that A intended to defraud B. But, as it seems to me, if A tells B a lie intending that B should do something which A conceives to be to his own benefit or advantage, and which, if done, would be to the loss or detriment of B, A intends to defraud B. Sir James Stephen, in his 'History of the Criminal Law of England,' Vol. II, page 121, observes: "Whenever the words 'fraud,' or

(1) I.L.R., 25 Calc., 512. (2) I.L.R., 19 Calc., 380.

Digitized by Google

'intent to defraud,' or 'fraudulently' occur in the definition of a crime; two elements at least are essential to the commission of the crime; namely, first, deceit or an intention to deceive, or in some cases mere secrecy; and secondly, either actual injury, or possible injury, or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy." "This intent," he adds, "is very seldom the only, or the principal, intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage . . . A practically conclusive test of the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which could not have been had if the truth had been known? If so, it is hardly possible that the advantage should not have had an equivalent in loss or risk of loss to some one else, and, if so, there was fraud." In his judgment in *Queen-Empress* v. *Muhammad Saeed Khan* (1) Banerji, J., after citing the above passage from Sir James Stephen's work, observes: "Where, therefore, there is an intention to deceive and by means of the deceit to obtain an advantage there is fraud, and if a document is fabricated with such intent, it is a forgery," The Bombay High Court, in the case of *Queen-Empress* v. *Vithal Narayan*(2), which was followed by the Calcutta High Court, in *Lolit Mohan Sarkar* v. *Queen-Empress*(3) accepted the interpretation of Le Blanc, J. in *Hayeraft* v. *Creasy* (4) by fraud is meant an intention to deceive whether it be from any expectation of advantage to the party himself or from ill-will is immaterial:"

It is not necessary to decide whether an intention to secure a benefit or advantage to the party deceiving by means of the deceit in itself constitutes an intention to defraud. I may observe, however, in this connection that by section 24 of the Code a person does a thing dishonestly who does it with the intention of causing wrongful gain or wrongful loss. It is not necessary that there should be an intention to cause both. On the analogy of this definition it might be said that either an intention to secure a benefit or advantage on the one hand, or to cause loss or detriment on the other, by means of deceit, is an intent to defraud.

I am of opinion that in the present case both elements are present, viz., an intention to secure a benefit or advantage to the party deceiving and an intention to cause loss or detriment to the other party.

The object which the petitioner had in view in making the false document was to get exemption from the production of an attendance certificate and to be admitted as a candidate for the examination. His intention was to pass the examination (for it cannot be presumed that he intended to fail) and his intention was to secure such advantages as are incidental to the position of a man who has passed the examination.

I do not see why all these intentions may not reasonably be inferred, but even if a narrower view be adopted and the question of intention is limited to the direct result of the act of deceit, the petitioner intended, on the strength of the false document, to secure his registration as a candidate for the examination, and this itself would have been an advantage to him; at any rate, he cannot be heard to say it would not have been. As to the loss or detriment to the University, the University by their bye-laws prescribe certain qualifications for persons who desire to appear for the Matriculation examination. In the case of the candidates to whom bye-law 131 is applicable

(1) I.L.R., 21 All., 113.
(2) I.L.R., 13 Bom., 515 [note].
(3) I.L.R., 22 Calc., 313.
(4) (1801), 2 East, 92.

Digitized by Google

who are known as "private candidates," the University say in effect, "We make it a condition precedent to your obtaining the exemption for which you ask, and being allowed to appear for the examination, that we should have before us a certificate, signed by a responsible person, with means of knowledge, as to your respectability." This of course, is to protect the University against private candidates who are not respectable. If the candidate who fabricated the certificate did so with the intention that the University should take action on it, it seems to me it must be taken that he did so with the intention of causing loss or detriment to the University.

As I have stated, in my view, if a false document is made in fact and there is an intention to defraud, the requirements of the law are satisfied. But I may add that I am of opinion that in this case the petitioner made the false document with intent to support a "claim or title" within the meaning of these words as used in section 463. The University say: "If you satisfy us that you have complied with the requirements of bye-law 131 we will exempt you from the production of an attendance certificate and we will admit you to the examination." The candidate says: "I have complied with these requirements, exempt me and admit me." It is to be observed that, under bye-law 131, there is no discretion as to exemption when the certificate required by the bye-law is produced. The words are "shall be exempted from the production of the certificate of attendance required under bye-law 129." I see no reason for limiting the words "claim," as was the view of Mr. Justice Norris, to a claim with reference to property (see *Queen-Empress* v. *Haradhan*(1)), or, as it was argued on behalf of the petitioner, it ought to be limited to a claim which is enforceable at law. I agree with the view expressed by the Allahabad High Court in *Queen-Empress* v. *Soshi Bhushan*(2), that a claim to be admitted to a University examination is a claim within the meaning of section 463. Assuming, for the sake of argument that the candidate has no claim to be admitted to the examination, it seems to me clear that he has "a claim" to be exempted from the production of the attendance certificate, since the University, by their own bye-law give him the right to be exempted when certain conditions precedent are satisfied.

As regards the question of intent to defraud, the balance of authority appears to me to be in favour of the view which I have indicated. The case (*Queen-Empress* v. *Soshi Bhushan*(2)) may, no doubt, be distinguished on the facts, upon the ground that the false document in that case, if its falsity had not been discovered, would have enabled the party to attend a law class without paying the fees Sir John Edge points this out in considering whether the document was made "dishonestly." In dealing with the question whether it was made "fraudulently" the learned Judge says: "That document was further fraudulently made as having been made with the intention that the prisoner should, by the use of it, deceive a college authority and obtain admission to a second-year law class. Illustration (*k*) to section 464 of the Indian Penal Code shows that if A, without B's authority, write a letter and signs it in B's name, certifying to A's character, intending thereby to obtain employment under Z, A commits forgery, in as much as he intended to deceive Z by the forged certificate and thereby to induce Z to enter into an implied or express contract of service. We can see no difference in principle between the case of a man making a false certificate in order to obtain employment and the case of a man making a false certificate in order

(1) I. L. R., 19 Calc., 380. (2) I. L. R., 15 All., 210.

Digitized by Google

to obtain admission to a law class. In each case the intention is to deceive another person, and thereby to obtain an advantage, or a privilege which, without such deception, could not have been obtained." The Bombay High Court in *Queen-Empress* v. *Ganesh Khanderao and Ganesh Daulat*(1) express the opinion that illustration (*k*) shows that the mere farbrication of a false certificate of character raises a presumption of fraud, and they seem to have been of opinion that the presumption arose independently of the question whether or not the object of the deception was to induce the party deceived to enter into a contract of service. It is not necessary to go as far as this, but as I have already pointed out, if the party who made the false document did so with an intent to defraud, he acted with *one* of those intents specified in section 463 (and that is enough) and also acted fraudulently.

In *Queen-Empress* v. *Abbas Ali*(2) the certificate which was fabricated was a certificate which qualified a man to enter for an examination as a marine engineer.

In the English case of *Regina* v. *Toshack*(3) the certificate which was fabricated was a cetificate which qualified a man to go up for an examination as a master mariner. In both those cases the man who fabricated the certificate was held guilty of forgery.

The Calcutta case cannot be distinguished on the ground that the intent there was an intent "to enter into any express or implied contract" (I assume for the moment this would be a ground of distinction, though for the reasons I have stated I do not think it would be), for this was not the ground on which the decision was based. Again in the English case the indictment does not allege that the act was done with an intention to obtain employment as a master mariner, but with intent to deceive, injure, prejudice and defraud the said Corporation of Trinity House, the Corporation being the examining body in that case.

The argument that there was no intention to defraud in the case before us, because it did not follow that the petitioner would pass the examination would have been equally applicable in the two cases referred to. I do not find that it was ever advanced. I do not think that any valid distinction can be drawn between cases where the interests of the public might have been injuriously affected by the deceit and cases where they could not have been so affected. In the case reported in Weir's Criminal Rulings,' page 332, the Court did not attempt to define what constitutes "an intent to defraud." They contented themselves by saying that it was not shown that the accused in that case acted with intent to defraud. On the facts of that case such an inference seems reasonable. Certain ryots wished to relinquish certain lands which stood in the names of their fathers. They were unable to find the karnam, and the accused in that case offered to prepare the necessary notices for them. In the notices he inserted the names of the fathers and added the countersignature of the karnam and the names of certain persons as attesting witnesses. There was certainly no forgery so far as the insertion of the fathers' names is concerned, since the *pattas* stood in their names. The countersignature of the karnam was no doubt fabricated and the persons whose names were inserted as attesting witnesses had not in fact attested; but the report says that the countersignature of the karnam and the attesting witnesses was usual, but not compulsory. There is nothing to show that the lands could not have been relinquished without the countersignature of the karnam and the attestation of witnesses. The notices were not doubt false,

(1) I.L.R., 13 Bom., 506 at p. 515 (note). (2) I.L.R., 25 Calc., 512. (3) 4 Cox Crl. C. 38.

Digitized by Google

but apparently the man who wrote them did not do so with the intention, on the strength of the false entries, of securing any benefit or advantage to himself or causing any loss or detriment to anybody else.

In the case of *Queen-Empress* v. *Appasami*(1) A falsely represented himself to be B at a University examination, got a hall ticket under B's name, attended the examination, answered the questions set and headed and signed the papers with B's name. A was held to have been rightly convicted of forgery. The Court found that the intent on the part of A was two-fold, (1) to lead the University authorities to believe that the examination papers were answered by B, (2) to procure the grant of a certificate to the effect that B had passed the examination. The Judges do not say that the first and primary intention would not have been enough to meet the requirements of section 463. Supposing it had not been the practice of the Madras University to grant a *testamur* or certificate to those who passed the examination, but contented themselves with keeping a record, I venture to think the decision of Sir Arthur Collins and Mr. Justice Parker would have been the same. Further, if it was a legitimate inference in that case that A, by using B's name, endeavoured to procure the grant of a certificate that B had passed the examination, why should it not be a legitimate inference in the case before us that the petitioner by fabricating Dr. Wolff's name, intended in the event of his passing to procure the grant of a certificate to himself.

As regards the case of *King-Emperor* v. *Srinivasan*(2), the learned Judges would appear to have decided the case rather with reference to the word "dishonestly" than with reference to "fraudulently." With the greatest respect to these learned Judges, I find myself unable to agree with their decision.

I think the conviction was right and should be upheld. As regards the sentence, taking into consideration all the circumstances, I think a less severe sentence than that which the learned Magistrate thought it his duty to pass, will meet the requirements of the case. For the sentence of four months' rigorous imprisonment I would substitute a sentence of six weeks' simple imprisonment.

SUBRAHMANIA AYYAR, J.—The petitioner forwarded in the prescribed form to the Registrar of the Madras University an application to be registered as a candidate for the Matriculation examination that was held in December 1903. The application contained on the face of it a certificate purporting to be signed by the Rev. Dr. Wolff, Principal of the A.E.L.M. College, Guntur, which ran as follows: "I hereby certify that to the best of my knowledge and belief Kotamraju Venkatarayadu will have completed his 20th year before the 15th September 1903, and that he is of good character." That certificate is spurious, the whole of the writing thereof, including the signature, being in the petitioner's hand The petitioner was charged with forgery and using a forged document as genuine and was convicted by the Chief Presidency Magistrate and sentenced to four months' rigorous imprisonment.

In the circumstances of this case the point for determination reduces itself into whether, in concocting this paper, the petitioner acted "fraudulently" within the meaning of the provisions of the Code on the point. It was contended on behalf of the petitioner that that term should be understood as involving something affecting specific property or right only. But in *Queen-Empress* v. *Abbas Ali*(3), it was held by the Full Bench of the Calcutta High Court that deprivation of *property*, actual or intended, did not constitute an essential element in regard to offences falling under sections 465 and 471 of

(1) I.L.R., 12 Mad., 151. (2) I.L.R., 25 Mad., 726. (3) I.L.R., 25 Calc., 512.

Digitized by Google

the Indian Penal Code. This decision, there can be no doubt, is perfectly sound, and the narrow construction suggested cannot be accepted. At the same time it is equally clear to my mind that the view that "fraudulently" implies nothing more than a deception intended to secure an *advantage* to the deceiver goes too far. The observations of Banerjee, J., in *Queen-Empress* v. *Muhammad Saeed Khan*(1), carefully read, lend no support to such a view, and that the learned Judge could not have intended to lay down any such broad proposition is manifest from the reference made by him to certain observations of Sir Fitz-James Stephen, which show, in a way absolutely unmistakeable, that the advantage sought to be gained by the deception should, to make it fraudulent, involve some distinct loss or detriment to another, or the likelihood of such loss or detriment, though, no doubt, it would ordinarily be so when an advantage would accrue to the deceiver. And the same eminent writer when dealing with the offence of forgery, remarks thus: "The meaning of the phrase (with intent to defraud) would be more exactly, though less neatly, expressed if it was with intent to deceive in such a manner as to expose any person to loss or risk of loss" (Stephen's 'History of Criminal Law,' ed. of 1883, Vol. III, page 187). To hold otherwise would be tantamount to saying that every deception effected by a spurious writing is fraudulent, and is therefore, a forgery. Of course, no one has yet been so bold as to suggest such a definition of this well-known offence. It is impossible to conceive why the Legislature should have thought it fit to introduce the word "fraudulently" with such iteration when defining a "false document" in section 464, if it meant really to make every deception by writing that is not genuine, practised with intention to secure an advantage to the deceiver, *ipso facto*, a forgery. To have defined the offence in the latter way would have been far easier, and considering that the phrase "with intent to defraud" had again and again been the subject of discussion and consideration under the English Law, which our Code has followed [though not without improvements] in defining the offence, to accede to the view that a mere advantage to the deceiver amounts to fraud would really be to reject as mere surplusage what constitutes one of the essentials of the offence. I should not have thought it necessary to have so far dwelt upon this point but for the frequency with which the mere spuriousness of a document is confounded with element of fraud required to make the writing the subject of the indictable offence of forgery, in spite of the pains taken by Judges and writers to accentuate the distinction between the two.

Bearing, then, that latter element in view, let us see how the present case stands with reference to the facts. Though the spurious paper referred to the age of the petitioner as well as to the matter of his character, yet the charge on which the petitioner was tried made mention only of the statement as to age, and, curiously enough, this statement was altogether ignored by the Magistrate he having rested the conviction on the statement in the paper as to the petitioner's character alone. The first point for consideration, therefore, is whether having regard to the matter so relied on, it can be held that the deceit intended to be practised by the petitioner was such as to expose the University, at whose instance the prosecution was launched, to "*loss*" or to the "*risk of loss*." It is in relation to this aspect of the matter, I take it, that the Magistrate, in paragraph 10 of his judgment, introduced the words "at the expense of the University of Madras and to its detriment." The Magistrate, however, has not explained what it was in his opinion that constituted the "expense" or the "detriment"; nor did the learned Crown Prose-

(1) I.L.R., 21 All., 113.

Digitized by Google

cutor attempt to throw any light on the subject in the argument before us. We were left to fill up this gap in the prosecution case as we best could. Mr. Patterson, the Registrar, suggested in his evidence that the detriment to the University was the loss of its "prestige," in other words, of its reputation, of which the former is the consequence. Now it was not certainly a case of the University running the risk of being supposed to attach no importance to the character of its examinees, for it has erred at all in the matter, that could only have been in the other direction. Unlike its prototype, the London University, it insists on the production of a certificate even by a candidate for the lowest of its examinations—the Matriculation. It further confines the class of persons from whom the candidates are to produce certificates, to members of the Senate, and heads of recognised educational institutions. Again, instead of following the negative form of certificate prescribed by the Allahabad University, viz, "I know nothing against the character of the above-named candidate which ought to debar him from Matriculation," it requires the grantors of certificates to give a positive pledge as to the character of this class of young and immature persons, imposing thereby a duty not quite easy of fulfilment in strict consistency with the demands of truth and reminding one of the remark reported to have been made by the late Chief Justice of this Court on the occasion of the production of a certificate to the effect that an applicant for enrolment as a vakil—a young man of about 25—was a perfect gentleman, that he, the Chief Justice, should have thought no man of that age could by any one be pronounced with safety to be a perfect gentleman. So far as one can understand Mr. Patterson's suggestion, the risk can only be that the appearance at an examination of a candidate, without good character, as if he were one possessed of it, would tend to detract from the prestige of the University. If Mr. Patterson were right, it might as well be said that a theft or a burglary tends to destroy the reputation of him whose property is, or is attempted to be, stolen. The suggestion, to my mind is altogether fanciful. It follows, therefore, that the conviction cannot be supported on the ground put forward by Mr. Patterson.

If I rightly understood the Crown Prosecutor, reliance was placed by him on *Regina* v. *Toshack* (1), and the similar Calcutta Full Bench case as an alternative ground for supporting the conviction. No doubt, they are instances in which risk of specific injury to specific persons was absent, and the conclusion that the spurious documents amounted to forgeries was, as I understand, the *ratio decidendi* of those cases, on the ground that general interest rendered it proper to hold that the fabrications there in question were indictable as forgeries; that is to say, the fabricator must, from that point of view, be held to have in the eye of the law committed the act with intent to defraud within the meaning of that term in the definition of forgery, as is to be gathered from the reasons assigned by Anderson, B., in the former case. Referring to the examination by the Trinity House the learned Baron says it was "a very important public duty,* important to owners of property of this description and important to the lives of those entrusted to their care, and if inefficient seamen and persons otherwise than of good character and conduct are appointed the unfortunate subordinates of the ship are often subjected to harsh and improper treatment (*Regina* v. *Toshack* (1)). Among the observations of Jardine, J., in *Queen-Empress* v. *Ganesh Khanderao and Ganesh Dault* (2), also relied on in the same connection, those respecting the duty of Courts to attend to the policy of the law in determining whether

(1) 4 Cox Crl. C., 38 at p. 41. (2) I.L.R., 13 Bom., 506 at p. 515 (note).

Digitized by Google

or not particular acts should be held to fall under the category of crimes, have not in the circumstances here a direct bearing on the aspect of the case under discussion. But more in point is *Janson* v. *Driefontein Consolidated Mines, Ltd.* (1), where the House of Lords, after a review of the authorities, lay down that public policy is not a safe or trustworthy ground for legal decision. The Lord Chancellor, in the course of very strong observations on the view of Vaughan Williams, L J., who had rested his decision on what he thought the interests of the State demanded, while fully recognising the propriety of the application by the Judges of established principles to new instances coming within the scope thereof, points out that no Court has power to invent a new head of public policy (see at pages 491 and 496). Bishop in his great work on ' Criminal Law ' points out that the Judges in *Regina* v. *Toshack*(2), in deciding as they did, went to the "verge," 3rd ed., Vol. II, section 503, and it would seem therefore that the principle of that decision ought not to be extended any further. Even if it were otherwise, it is impossible to see any analogy in substance between that and *Queen-Empress* v. *Abbas Ali*(3), on the one hand, and the present case on the other. For the risk of injury to life and property resulting from a person not possessing sufficient skill, training, etc., for exercising the calling of a master mariner, or of an engineer, being in charge of a ship or dangerous machinery, is so manifest and serious that no reasonable man can question its reality or gravity. But, surely, there is no comparison between such risk and the detriment supposed to accrue to the public from a candidate not of good character, appearing for the Matriculation examination as if he were possessed of such character, or from evasion of the conditions prescribed by the University as to pre-Matriculation studies, granting that the system in vogue as to that examination is flawless. How much less ground is there then for importing into the case any consideration of public requirement, having regard to the views authoritatively and quite recently expressed as to the deficiencies of the existing system. That the members of the University Commission condemn it is clear from their report. Its supposed special merit, viz., that the examination qualifies those who pass it for the lower ranks of the Government service, contributing as it does considerably to the finances of the University, is in the opinion of those members its chief defect requiring radical alteration (*vide* sections 160, 169 and 170 of their report), and that part of the system which relates to candidates in the position of the petitioner and known as private candidates, as obtaining in this and in the Bombay University, has been singled out for special animadversion and immediate abandonment (*vide* section 166). The very bye-law under which the petitioner applied for the examination affords an illustration of the justice of the criticism of the Commissioners, inasmuch as the exemption virtually provided for by it from the necessity of undergoing the prior instruction considered essential to fit a candidate for entering on the University course, is a departure dictated by reasons altogether unconnected with the University. Surely few will admit the expediency of enforcing, by the sanction of criminal punishment, rules relating to matters which have apparently not as yet passed the stage of experiment, conducted with not very marked success by bodies themselves in the throes of changes and busy gathering the experience so much needed to enable them to mould, so far as is permitted by the no means favourable circumstances under which they have to work, a fairly good system of University education.

(1) L.R., (1902), A.C., 484. (2) 4 Cox Crl. C., 38 at p. 41.
(3) I.L R., 25 Calc., 512.

Digitized by Google

Apart from all this, there is the consideration that to make the words "fraudulently" or "with intent to commit fraud" cover acts such as this which have come to be spoken of as "examination malpractices" would be to subject youths guilty of such acts, while still juveniles in the strict sense of the term, to the contaminating influences of the prison fit only for hardened offenders. To save persons of such impressionable age from the degradation attendant upon their being brought to trial and punishment in the usual way, it has been found necessary in countries, where the matter has received that attention it deserves, to establish a new tribunal called the "Juvenile Court" (see Reports of the Mosely Education Commission to the United States, October—December, 1903, Truant and Reformatory schools, pages 360 to 375). Referring to this tribunal it is observed in the report cited: "An istitution of scorn at its origin, it is to-day respected as the greatest moral force in nipping the germ of crime and in the promise of reducing the number of penal settlements which form the blight of every nation." One of the features of this tribunal is that the public is not admitted while the Judge sits, a few seats only being provided at the back of the hall for parents of the person under trial and the witnesses in the particular case. The trial itself aims at making the proceeding look like a private meeting for advice and exhortation, severe discipline being enforced only in cases calling for it. In pages 364 and 365 of the same report will be found an instructive account of other methods of such a Court, methods incapable of being brought in a line with the procedure of the ordinary tribunals With such notable signs of the times before us one may well decline to invoke the argument of policy for the purpose of bringing within the clutches of the general criminal law the class of juvenile offenders referred to, in connection with delinquencies, the effect of which on the well-being of the community is so intangible.

I hold that the spurious document in question was not made fraudulently within the meaning of sections 464 and 463 of the Indian Penal Code. This conclusion is not, in my opinion, inconsistent with the actual decisions in the cases relied on by the prosecution. In *Queen-Empress* v. *Soshi Bhushan*(1) the facts established a *dishonest* intention within the meaning of the Code and the conviction was, therefore, right. In *Queen-Empress* v. *Muhammad Saeed Khan*(2), if the assumption there made by Banerjee, J., that the falsification of the character and the service roll to which the charge related would have effected other public servants injuriously be right, that certainly would distinguish that case from the present, since the suggestion of anything analogous to it in respect of other candidates could not be made here without resorting to extravagant fiction totally inadmissible, at least in the administration of the Criminal law. In *Queen-Empress* v. *Ghanesh Khanderao and Ganesh Dault*(3), the charge was under the latter part of section 182 of the Indian Penal Code and the decision proceeds directly and expressly on the ground that no question of injury arose in the case. *Queen-Empress* v. *Vithal Narayan*[4], considered in the light of the comments made thereon by Jardine, J., should be understood as capable of being rested on the ground that the entertainment of the party referred to in the case as Karkoon was so detrimental to public interests as to make the act fraudulent on the principle of *Regina* v. *Toshack*[5]. In *Queen-Empress* v. *Appasami*[6] the risk of loss was risk of loss of

(1) I.L.R., 15 All., 210.
(2) I.L.R., 21 All., 113.
(3) I.L.R., 13 Bom., 506 at p. 515 [note].
(4) I.L.R., 13 Bom., 515 [note].
(5) 4 Cox Crl. C., 38 at p. 41.
(6) I.L.R., 12 Mad., 151.

Digitized by Google

the property of the University, viz., the certificate to which the learned Judges in terms refer. Unlike this last case no intention as to what would have happened had the petitioner been registered, that is to say, as to whether he would have actually appeared at the examination, and if he did, as to what further advantage it would have been possible for him to seek or obtain, can rightly be attributed to the petitioner; and with reference to the rule that a man must be taken to intend the natural consequences of his act, all that can properly be said in regard to the petitioner is that in making the false certificate he only intended to be placed in a position that would enable him to appear at the examination, everything beyond it being too remote to be treated as the natural consequence of his act. The passage cited from Mayne's 'Criminal Law (edition 3, page 821) was, it appears to me, clearly not intended by the learned author to apply to such a case as the present. Were it otherwise, I must with all deference say I could not agree with him in the absence of any thing in the passage to enable one to gather what could be the loss or the risk of loss in a case such as this.

I would, therefore, allow the petition, set aside the conviction and sentence, and direct the petitioner to be discharged.

DAVIES, J.—The accused, in order to obtain admission as a candidate at the Matriculation examination of the Madras University in 1903, forwarded with his application to the Registrar a certificate regarding his character and age without which he would not have been admitted to the examination. That certificate purported to be signed by the Rev. Dr. Wolff. But it was not signed by that gentleman. The accused himself had written Dr. Wolff's signature. For this act and for nothing else (because it is not proved that the statements made in the certificate were in themselves false) the accused has been convicted of the offence of forgery as defined in section 463 of the Indian Penal Code. It is needless to say that to convict a person of a crime it must be strictly proved that it has been committed in law. It is not enough to show that he has been guilty of immoral or sinful conduct. Now the essential element in the crime of forgery is the making of a "false document." To constitute a document a "false document" within the meaning of section 464 of the Penal Code, it must be shown that it was made with such an intention as is implied in the term "fraudulently" or in the term "dishonestly." These terms are defined, the former as implying an intention to defraud, and the latter as implying an intention to cause wrongful gain to one person or wrongful loss to another.

It is not shown that the accused had either of these intentions. His intention was, no doubt, to deceive the Registrar of the University into the belief that a certain gentleman had certified that he was a fit candidate for admission to the Matriculation examination. But mere intention to deceive does not necessarily imply an intention to defraud or to cause wrongful loss to one person or wrongful gain to another. It was not alleged by the prosecution, and it was not found by the Chief Presidency Magistrate, that the accused had acted with the intention of causing wrongful loss to one person or wrongful gain to another, so that the accused did not act "dishonestly." So the only question is: Did the accused act "fraudulently," that is, with intent to defraud? Neither the chief Presidency Magistrate in his judgment, nor the Crown Prosecutor in his argument before us, has shown in what way the accused intended to defraud, or in fact did defraud the University. A person to be defrauded must suffer some harm or damage or injury, and there is not a tittle of evidence that the Registrar as repre-

Digitized by Google

senting the University has suffered in any of these respects. The chief Presidency Magistrate has found that the act of the accused was to the "detriment" of the University; he does not explain of what that "detriment" consisted. I find it impossible to see in what way the University of Madras has been injuriously affected by the conduct of the accused. The University has been deprived of nothing. On the other hand, they have confiscated the examination fees of Rs. 14 paid by the accused without going to the expense of examining him and have thereby made a clear profit out of him. It is only the accused who has been damnified. In none of the cases cited before us are the facts on all fours with the facts in this case, except in the one case *of Queen-Empress* v. *Haradhan*(1) where it was held that the offence of forgery had not been committed. That is the view I must take here. I think I am correct in stating that in all the cases where convictions were held, the accused had obtained something that the Court considered to be of value.

The illustration (*k*) to section 464 of the Penal Code sets out the intention as one to "obtain employment." That is, of course, a material or substantial advantage. But in this case the sole intention of the accused was to subject himself to the ordeal of an examination, which can hardly be deemed to be a thing of value and in which, if he had failed, it ended in nothing, and if he had passed, entitled him to a certificate, which certificate he would have obtained, not in consequence, be it observed, of the false writing but upon his own merits as an examinee. I am, therefore, clearly of opinion that the offence of forgery has not been committed and would reverse the conviction. In any case the sentence of rigorous imprisonment for four months should be reduced, as it seems to me unduly severe for a trick played by a youth of twenty who had already been disgraced and punished for his misconduct. I would reduce the term of imprisonment to that already suffered, namely, eleven days.

BENSON, J.—I have no hesitation in agreeing with the learned Chief Justice that the conviction is right and ought to be upheld. It is admitted that the accused himself wrote the certificate, which falsely purported to be signed by the Rev. Dr. Wolff, certifying the accused's age and character. It is also admitted that he sent it to the Registrar of the University, intending thereby to deceive the University authorities into the belief that he was qualified, in accordance with the bye-laws of the University, to appear for the Matriculation examination, whereas, in fact, he was not so qualified. The only question is whether this act of the accused was done "fraudulently" and "with intent to commit fraud" within the meaning of the Indian Penal Code. If the false certificate was written "fraudulently," the accused made a "false document" as defined in section 464 of the Indian Penal Code, and if he made a false document "with intent to commit fraud" he was guilty of forgery as defined in section 463 of the Indian Penal Code, and was rightly convicted. The word "fraudulently" is defined in section 25 of the Code in the following way: "A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise." The word "defraud" is not defined in the Code and the meaning of the word "fraudulently" is thus left open to argument with reference to the meaning of the word "defraud." The framers of the Code, conscious of the infinite diversity of fraud and of the protean forms it could assume, no doubt thought it best to attempt no more explicit definition but to leave it to the judicial consciousness of the Judge to determine in each case

(1) I. L. R., 19 Calc., 830.

Digitized by Google

whether the act alleged was one done with intent to defraud or without such intent. It was argued before us that the word implies that some person has been or is to be deprived of something, and some of the other earlier decisions of the Indian Courts lend support to this view, but it has been unanimously negatived by a Full Bench of five Judges of the Calcutta High Court in the recent case of *Queen-Empress* v. *Abbas Ali*(1) in which all the earlier cases were referred to in the argument. It is there pointed out that the word "defraud" is of double meaning, in that it either may or may not imply deprivation, and that its meaning in the Code must be found by reference to the context in which the word "fraudulently" occurs in the Code. It is pointed out that in the definition of a false document the making of the document must be "dishonestly" or "fraudulently"; that "fraudulently" is therefore something different from "dishonestly," but that "if it be held that fraudulently implies deprivation either actual or intended, then apparently that word would perform no function which would not have been fully performed by the word 'dishonestly' and its use would be mere surplusage" In this connection I would refer to several sections of the Code (*e. g.*, sections 261, 263, 264), in which the expression used is "Whoever fraudulently or with intent to cause loss", etc. In these sections it is clear that "fraudulently" is not to be limited in its application to cases in which loss is caused. The learned Judges then go on to point out that there is even a stronger reason for their conclusions based on the terms of section 463 itself. They say "section 463 defines the offence of forgery, and in so doing prescribes the intent necessary to that offence." The words of the section are as follows: "Whoever makes any false document or part of a document with intent to cause damage or injury to the public, or to any person, to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud, or that fraud may be committed, commits forgery." The "section contemplates two classes of intents, and it is clear (especially if regard be had to the context) that it is not an essential quality of the fraud mentioned in the section that it should result in or aim at the deprivation of property. If this be so it cannot be supposed that the definition of a false document which is but a part of the definition of forgery requires as a condition of criminality an intent different in its quality and its aims from that prescribed by section 463." To this reasoning I would add that a consideration of illustration (*k*) to section 464 necessarily leads to the same conclusion, and, in fact, actually covers the present case. In that illustration it is stated that it is forgery if A, without B's authority, writes a letter and signs it in B's name, certifying to A's character, intending thereby to obtain employment under Z. The obtaining of employment in this way does not necessarily deprive Z of anything or necessarily cause him any loss or injury, yet the Code declares that A's act is forgery. But to constitute forgery there must be a false document as defined in the Code which implies that the document must be made "dishonestly or fraudulently." It follows that the framers of the Code regarded the writing of such a letter as a fraudulent act, though it did not necessarily involve any loss or injury or intended loss or injury to Z.

Those decisions, therefore, which proceed on the ground that an act is not fraudulent unless it causes or is intended to cause loss or injury to some one would seem to take too narrow a view of the meaning of the word "fraudulently" as used in the Code.

(1) I.L.R., 25 Calc., 512.

Digitized by Google

Can it be doubted for a moment that the act of the accused in the present case was at least as fraudulent as that of the person in illustration (*k*) who wrote the false character in order to obtain employment ? To me it seems that it was every whit as fraudulent and even more deserving of repression under the penalties of the criminal law. No doubt a different view was taken by this Court in the case of *King-Emperor* v. *Srinivasan* (1) and in *Queen-Empress* v. *Haradhan*(2), but the latter has been over-ruled in the Full Bench case already referred to, and in the former no authorities are cited to support the view adopted. The decision seems to proceed on the ground that the word " fradulently " bears the narrow construction contended for by the appellant's vakil in this case and which I have shown to be incorrect.

The act of the accused was undoubtedly fraudulent and a forgery in the popular acceptance of these terms and also in my opinion according to the strict letter and intention of the Indian Penal Code. The accused intended to deceive the University authorities into the belief that he was entitled in accordance with their bye-laws to appear for the Matriculation examination when, in fact, he was not so entitled, and thereby to gain an advantage for himself, viz., leave to appear for the examination, an advantage which he valued and would have purchased for a sum far above, let us say, Rs. 10. As Mr. Mayne remarks in dealing with similar cases:—" If then, it would have been an undoubted forgery if the document had been fabricated for the purpose of obtaining Rs. 10, how can it be less a forgery, because the object sought was something not measurable by money but of far greater value." (Criminal Law of India, 1896 ed., page 757.)

I am of opinion that the act was fraudulent not merely by reason of the advantage which the accused intended to secure for himself by means of his deceit, but also by reason of the injury which must necessarily result to the University, and through it to the public from such acts if unrepressed. The University is injured, if, through the evasion of its bye-laws, it is induced to declare that certain persons have fulfilled the conditions prescribed for Matriculation and are entitled to the benefits of Matriculation, when, in fact, they have not fulfilled those conditions, for the value of its examinations is depreciated in the eyes of the public if it is found that the certificate of the University that they have passed its examinations is no longer any guarantee that they have in truth fulfilled the conditions on which alone the University professes to certify them as passed, and to admit them to the benefits of Matriculation. It must not be forgotton that the Matriculation examination is one that qualifies those who pass it for a great number of appointments in the public service, and the public are liable to the gravest injury if, through deceit, the regulations made by Government and the University to secure a certain standard of qualifications in the servants of the State are rendered nugatory and futile. In the English case of *Regina* v. *Toshack*(3) the certificate fabricated was one which enabled a man to go for an examination as a master mariner, and the indictment alleged that the act was done with intent " to deceive, injure, prejudice and defraud the said Corporation of Trinity House," which was the examining body in that case as the University is in this. In the Full Bench case of *Queen-Empress* v. *Abbas Ali*(4) the spurious certificate was one regarding service and character which was required as a qualification precedent to the accused being admitted to an examination

(1) I.L.R., 25 Mad., 726.
(2) I.L.R., 19 Calc., 380.
(3) 4 Cox Crl. C., 38 at p. 41.
(4) I.L.R., 25 Calc., 512.

Digitized by Google

for a certificate of competency as an engine-driver of ocean-going steamers. In both these cases the accused was convicted of forgery, and I do not think that any valid distinction can be drawn between those cases and the present. If the validity of the conviction requires that there should be a risk of injury to the public in consequence of the accused being improperly admitted to the examination, it can hardly be contended that the risk of injury to the public from the introduction of men of no character into the public service is less than from admitting such men to be master mariners and engine-drivers. The extent to which malpractices like the present prevail may be indicated by the fact that in a single recent issue of the *Fort St. George Gazette* a notification was published in which over fifty candidates were prohibited for a longer or shorter time from appearing for the University examination in consequence of having been found guilty of sending in false certificates, or of making false statements, in order to induce the University to accept them as qualified candidates. Such a state of things indicates a standard of morality which if not reprobated by the better men among the educated classes must be fraught with danger to the public welfare. I think it is well that the law does stigmatize acts like that of the accused in this case as offences.

The Courts have ample power to graduate the punishment according to the true requirements of justice in each case. I concur with the learned Chief Justice in holding that in all the circumstances of this case the requirements of justice will be met by the reduced sentence proposed by him in lieu of that imposed by the Magistrate.

BODDAM, J.—As I entirely agree with the learned Chief Justice and with Mr. Justice Benson that the conviction is right and should be confirmed for the reasons stated by them in their respective judgments, it is not necessary that I should go over the same ground again It is clear to me that the accused, by making and sending the spurious certificate, made and sent it with the intention of deceiving the University authorities. He further intended thereby to gain what he conceived to be an advantage to himself to the prejudice of the right of the University authorities to have a genuine and reliable certificate as to his age and character before permitting him to enter for the examination. He did it to support a claim or title to be permitted to enter for the examination, without in fact having any claim or title to do so under bye-laws of the University, intending that the University authorities should be deceived by the belief that the spurious document which he had made and sent was a genuine and reliable certificate as to his age and character and that the requirements of the bye-laws of the University had been fully complied with in his case and the rights of the University thereby duly safeguarded. What he intended in making the document is proved by his sending it to the University authorities for the purpose of supporting his claim or title to enter for the examination. He, therefore, made a false document fraudulently; that is, with intent to commit fraud and not otherwise, and as he made it with intent to support a claim or title and with intent to commit fraud, he was properly convicted of forgery under section 473 of the Indian Penal Code. He also fraudulently used it as genuine and was, therefore, rightly convicted under section 471 of the Indian Penal Code. As regards the sentence I think in the circumstances of this case a sentence of six weeks' simple imprisonment will suffice.

Digitized by Google

1904. *October* 12, 13. **I. L. R. 28 Mad. 255.**

Before Mr. Justice Davies and Mr. Justice Sankaran Nair.

MAHOMED ABDUL MENNAN (ACCUSED), PETITIONER, *v.* PANDURANGA ROW (COMPLAINANT) RESPONDENT. *

Criminal Procedure Code—Act V of 1898, ss. 203, 435, 439—Complaint—Complaint dismissal of—Revival of Proceedings—Illegality.

When an original complaint is dismissed under section 203 of the Code of Criminal Procedure no fresh complaint on the same facts can be entertained so long as the order of dismissal is not set aside by a competent authority.

Mir Ahwad Hossein v. Mahomed Askari, (I. L. R., 29 Calc., 726), differed from.

THIS was a petition to revise the order of the Stationary Sub-Magistrate of Tenali passed in the following circumstances:—

The petitioner was charged with receiving and retaining property in respect of which criminal breach of trust had been committed. After the case for the prosecution had been closed, the petitioner filed a petition stating that a charge, based upon the same set of facts, had been preferred against him by an undivided brother of the complainant and dismissed under section 203 of the Criminal Procedure Code by the Stationary Sub-Magistrate, Bezwada. He objected that the Court had no power to entertain the second complaint until the order of dismissal passed by the Stationary Sub-Magistrate, Bezwada, had been set aside. The Stationary Sub-Magistrate in disposing of the case was of opinion that the two complaints did not relate to the same set of facts, but in discussing the case upon the assumption that the two complaints were identical, held that the Court had power to rehear the case and directed the case to be proceeded with.

Dr. *S. Swaminadhan* for petitioner.

Acting Public Prosecutor and the Hon. Mr. *P. S. Sivaswami Ayyar* for respondent.

The following order was passed :—

ORDER.—As against the petitioner, the first accused, the present complaint is exactly on the same facts as the previous complaints which were dismissed under section 203 of the Code of Criminal Procedure on the ground that *primâ facie* no criminal offence was disclosed. On revision the District Magistrate refused to interfere with the Magistrate's order and in our opinion that order was right. On the merits therefore we think that this complaint against the petitioner should not have been entertained, and we are further of opinion that, in law, the Magistrate was not competent to entertain it. We are unable to agree with the decision of the majority of the learned Judges of the Calcutta High Court in the case of *Mir Ahwad Hussein* v. *Mahomed Askari*(1) and we concur in the previous decisions of the same Court in *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee*(2) and *Komal Chandra Pal* v. *Gour Chund Audhikari*(3).

The Allahabad High Court and this Court have taken the same view (see *Queen-Empress* v. *Adam Khan*(4) and the rulings of the Court referred to in Weir's 'Criminal Rulings,' pp. 874 and 875).

The order of the Magistrate dated the 31st of May last directing that the trial be proceeded with on the new complaint is accordingly set aside so far as the petitioner, the first accused, therein is concerned, and the complaint as against him is dismissed.

---

* Criminal Revision Case No. 232 of 1904.

(1) I.L.R., 29 Calc., 726. (2) I. L. R., 23 Calc., 983. (3) I.L.R., 24 Calc., 286. (4) I.L.R., 22 All., 106.

Digitized by Google

1904. *November* 24, 28. **I. L. R. 28 Mad. 304.**

Before Mr. Justice Benson and Mr. Justice Moore.

ALGARASAWMI TEVAN AND OTHERS (ACCUSED NOS. 1 AND 3 TO 13), PETITIONERS, *v.* EMPEROR, RESPONDENT.*

Indian Penal Code—Act XLV of 1860, s. 379—Theft—Dishonest taking—Bona fide claim of ownership by accused over property in possession of third party—Disputed ownership of land—Possession summarily taken by Revenue authorities—Province of Civil Courts to decide questions of ownership between Government and private persons.

The petitioner was convicted of theft of certain bamboos which he said he cut on his own puttah land, but which the prosecution alleged he cut on Government poramboke land adjacent to his own. Prior to his conviction, disputes had arisen between the Revenue authorities and the petitioner regarding the ownership of the land. The petitioner contended that he bona fide believed the bamboos to be his property at the time he cut and removed them. The magistrate, finding that the Revenue authorities had taken possession of the land at the time the bamboos were removed convicted the petitioner.

Held, that the conviction was wrong. The questions to be considered were, (1) whether the bamboos did in fact belong to the petitioner or to Government; (2) whether if they did not belong to the petitioner he bona fide believed they did.

It is the province of the Civil Courts to decide questions of ownership of land between Government and private parties, and if the Revenue authorities take summary possession of land as in the present case, they become mere tres passers and there is nothing dishonest in the owner taking possession of his own property.

CHARGE of theft. The petitioner with several others was convicted by the Stationary Second-class Magistrate of theft under the following circumstances :—A petition was sent to the Revenue authorities stating that the petitioner was utilising bamboos growing on Government poramboke land. The karnam was accordingly directed to inspect the land, and he reported that certain clumps of bamboos bordering on the petitioner's land were in Government poramboke. The petitioner refused to be present at the karnam's inspection but was informed of results. The Deputy Tahsildar, on receipt of the karnam's report, ordered the bamboo clumps to be watched on behalf of Government. The petitioner shortly afterwards presented a petition to the Collector, stating that the bamboos had been planted by his ancestors for a hedge and setting out the action taken by the authorities thereto. Upon this petition the Revenue Inspector made an inspection and informed the petitioner's servant that certain of the clumps were in Government poramboke. The prosecution alleged, that the petitioner, subsequent to the inspection by the Revenue Inspector, cut these bamboos, and the Revenue Inspector deposed that those clumps were cut which he had pointed out to the petitioner's servants as lying within Government poramboke. The petitioner contended that he was the lawful owner of the bamboos in question. On appeal, the Head Assistant Magistrate in disposing of the petitioner's contention said:—

"The appellants have devoted eight paragaphs of the appeal petition to urging that the first and second appellants are the lawful owners of the bamboos in question. They seem to forget that ownership has little to do with cases of theft, where possession only is the point at issue. Mr. Mayne in paragraph 506 of his 1901 edition has put the matter thus, "it must not however be supposed that even a *bonâ fide* claim of right to property in the possession of another will always be sufficient answer to a charge of theft, if the right claimed cannot be fairly supposed to justify the mode in which it was exercised. If the property was in the possession of the prosecutor in

* Criminal Revision Case No. 350 of 1904.

Digitized by Google

such a way that he had a right to hold it against the prisoner, that is, that the petitioner could not get it without the consent of the prosecutor, then it would be theft if the prisoner dishonestly possessed himself of it with the intention of appropriating it."

The point can be proved by a *reductio ad absurdum*. If every one who believes that he has the right of ownership may take property from the possessor, there would be an end to all legal procedure and every one who could would help himself.

Therefore the facts that the appellant's grandfather planted the bamboos, that they are a hedge, that he has long enjoyment, or that the English maxim '*quicquid inaedificatur solo solo cedit*' finds no place in Indian Law (Madras, XXVII, 211) are all in my opinion beside the point. We want to know not that appellant can establish a right to the bamboos, but that he was in possession of them or thought that he was, when he removed them.

When the accredited officials of Government measure land according to the records and drive in pegs and announce that certain land is Government land and order that it shall be guarded as such and that the forest produce will be sold for Government. I hold that Government has taken possession of that land. Exhibit L shows that first appellant shares my opinion He details the steps taken by the authorities and begs the Collector that the bamboos, etc., may be in his possession as heretofore.

Were the bamboos, being moveable property in the possession of Government, taken dishonestly? Obviously the loss to Government and gain to the appellant is wrongful till a definite right is established by appellant. The fact that he may in the future establish such right does not effect the dishonesty of a removal without the right.

The petitioner filed this criminal revision petition.

R. Subrahmania Ayyar for petitioners.

Public Prosecutor in support of the conviction.

ORDER.—The first petitioner has been convicted of theft of certain bamboos which he says he cut on his own patta land, but which the prosecution alleges he cut on Government poramboke land adjacent to his own patta land.

The first petitioner has claimed a right to these bamboos for a long time past. He says that his grandfather planted them as a hedge and that he has long been enjoying them. The Revenue authorities, however, do not admit the claim. Revenue officers recently measured the lands, and being of opinion that the bamboos claimed by the first petitioner were within the limits of the Government poramboke took possession of the land and informed the first petitioner that they had done so. The first petitioner, however, after this cut and removed some of the bamboos alleging that they belonged to him. Such being the facts, it is obvious that the first petitioner could not be guilty of theft if the bamboos were really his own property for he would be entitled to take them and his act would not be dishonest; nor would his act be dishonest if he *boná fide* believed them to be his even though, in fact, they were not so. The Head Assistant Magistrate in paragraphs 10 to 15 of his judgment shows that he entirely misunderstands the law applicable to cases of this kind. He says that "ownership has little to do with cases of theft, where possession only is the point at issue" and "We want to know not that

Digitized by Google

appellant can establish a right to the bamboos but that he was in possession of them, or thought that he was, when he removed them." The Head Assistant Magistrate found that the Revenue authorities had taken possession of the land, and, therefore confirmed the conviction without trying the question whether the bamboos belonged to the first petitioner or whether he *bonâ fide* believed that they did.

The Head Assistant Magistrate evidently does not understand that the Revenue authorities have no right, as between themselves and the petitioner to decide the question as to who is the owner of the land and the bamboos, nor have they any right to oust the first petitioner from possession. Their position in regard to these matters is the same as that of any private person. It is the province of the civil courts to decide questions of ownership of land between Government and private persons just as much as between two private claimants. If Government officers take summary possession of a man's land otherwise than under the Land Acquisition Act or other legal authority his rights are no more affected by such illegal action than they would be by the illegal seizure of his land by a private person. In such a case the Revenue officers are mere trespassers, and there is nothing dishonest in the owner retaking possession of his property.

The case quoted by the Head Assistant Magistrate from Mayne has no application to such a case as the present, for it presupposes that the offender has no present right to the possession of the property, (for example a man may be guilty of theft if he dishonestly and without the banker's consent takes his own valuable securities out of the possession of a banker who has a lien on them), but in the case before us if the bamboos belong to the first petitioner he has a present right to their immediate possession.

The chief questions then, are (1) whether the bamboos, do, in fact, belong to the first petitioner or to Government; (2) whether if they do not belong to the first petitioner he *bonâ fide* believed that they did. In regard to this the fact that his grandfather planted the trees, (it be a fact) and that he long enjoyed the produce (if he did do so) would be matters of great importance from which to draw an inference as to his honesty. On the other hand, if these are not proved, and if the land is shown not to belong to him, then the fact that he knew that the Revenue authorities had decided against his claim after enquiry and examination of records and had warned him not to interfere with the bamboos would be important in judging of the *bona fides* of his alleged belief.

We set aside the order of the Head Assistant Magistrate confirming the conviction and we direct that the Head Assistant Magistrate to restore the appeal to his file and dispose of it a fresh in accordance with law. He will also reconsider in the light of our observations the petitioner's application for the admission of further evidence. The accused will remain on the same bail pending the disposal of the case by the Head Assistant Magistrate.

1904. *December* 1, **I. L. R. 28 Mad. 308.**

Before Mr. Justice Boddam.

KAMATCHINATHAN CHETTY (ACCUSED), PETITIONER, *v.* EMPEROR (RESPONDENT).*

Indian Penal Code—Act XLV of 1860, s 193—Giving false evidence—Deposition of witness upon which assignment of perjury based not taken in manner required by law—Conviction—Unsustainability of.

---

* Criminal Revision Case No. 368 of 1904.

Digitized by Google

A was convicted of giving false evidence in a judicial proceeding. It was proved that after his evidence had been recorded, his deposition upon which the assignments of perjury were based was read over to him by the Court clerk, in a place where neither the Judge nor vakils were present:

Held, that the conviction could not be sustained. The deposition upon which the prosecution was based not being properly taken in accordance with law, should not have been admitted in evidence.

CHARGE of giving false evidence. The accused, who was the first defendant in Original Suit No. 230 of 1902 in the Munsif's Court, was convicted by the Sub-Divisional Magistrate of Tuticorin, of giving false evidence in that suit. The conviction was confirmed by the District Judge.

Against his conviction the accused preferred a criminal revision petition to the High Court on the following *inter alia* grounds:—

(1) The conviction of the accused is illegal.

(2) The prosecution of the accused for statements alleged to be made in a deposition not taken in accordance with law is unsustainable.

(3) Exhibit A not having been taken down by the Munsif in his own hand as the law directs nor having been interpreted to the accused and certified to be correct in accordance with the provisions of the Code, the lower Courts erred in admitting it in evidence and acting on it.

V. Krishnaswami Ayyar and *S. Srinivasa Ayyar* for the petitioner.

Public Prosecutor in support of the conviction.

ORDER.—I am of opinion that this conviction cannot be sustained. The proper proof of the statement on oath of a witness is his deposition taken in the manner required by the Civil Procedure Code.

In this case that which purports to be the deposition of the accused given in the civil suit and upon which this prosecution is based was not properly taken in accordance with the requirements of the Civil Procedure Code. By the Code it is provided that the evidence given by a witness after being taken down in writing "shall be read over in the presence of the Judge and of the witness and also in the presence of the Judge and of the witness and also in the presence of the parties or their pleaders and the Judge shall, if necessary, correct the same and sign it." In this case it is proved that the witness was taken aside by the clerk and his evidence read over to him in a place where neither the Judge nor the vakils were present and one of the most important safeguards as to the correctness or otherwise of the deposition was omitted. The Judge is required to be present in order that he may correct any inaccuracy or mistake in the deposition and may not depend upon the carelessness, forgetfulness or wilful misrepresentation of another as to whether any and what corrections should be made. The vakils are required to be present that they may call the attention of the witness to any statement appearing in the deposition which may or may not require correction. The document purporting to be a deposition read over and signed without these requirements being complied with is not a deposition and should not have been admitted as such. Without it there is no evidence of the statement on *oath* of the accused upon which the assignments of perjury are based for no oral or secondary evidence was admissible (inasmuch as the actual words purport to have been recorded) as long as the document containing them exists.

In these circumstances the perjury alleged was not proved and the accused should have been acquitted.

I allow this petition and set aside the conviction and sentence passed upon the petitioner and acquit him. The bail must be discharged.

Digitized by Google

1904. *December* 15. **I. L. R. 28 Mad. 310.**

Before Sir Arnold White, Chief Justice.

CHINNATHAMBI MUDALI (COMPLAINANT), PETITIONER, *v.* SALLA GURUSAMY CHETTY (ACCUSED), COUNTER-PETITIONER.*

Criminal Procedure Code—Act V of 1898, s. 259—Complaint—Absence of complainant at hearing—Discharge of accused—Revival of proceedings on fresh complaint—Jurisdiction.

Where an order of discharge under section 259 of the Code of Criminal Procedure has been passed by a Magistrate, such order will not preclude him from proceeding with the case on a fresh complaint.

An order of discharge under section 259 of the Code of Criminal Procedure is not an acquittal nor has it the effect of an acquittal under section 403.

PETITIONER preferred a complaint under section 500 of the Indian Penal Code, against the counter-petitioner, in the Court of the Presidency Magistrate of Madras on the 10th June 1904, which complaint was dismissed on 31st August 1904 owing to the absence of the complainant. The complainant applied to the High Court to revise the order of dismissal, passed by the Magistrate, but the High Court declined to interfere. The complainant thereupon filed a fresh complaint on the 1st October 1904. The Magistrate held that his previous order precluded him from entertaining the fresh complaint.

Against this order petitioner preferred this criminal revision petition.

Mr. *W. Barton* for petitioner.

Mr. *T. Richmond* for counter-petitioner.

ORDER.—In this case, the complainant was absent on the day fixed for the hearing and the Magistrate discharged the accused by an order made under section 259 of the Code of Criminal Procedure. An application was made to me to revise this order, but I declined to interfere since the matter was one for the discretion of the Magistrate and I was not prepared to say he had exercised his discretion on wrong principles. The present application is, by way of petition, against an order made by the Magistrate refusing to proceed with the case on the filing of a fresh complaint by the complainant. The Magistrate dismissed the application of the complainant upon the ground that his order under section 259 could not be revised by him. Assuming this to be so, this does not, as it seems to me, preclude the Magistrate from proceeding with the case on a fresh complaint. It would be otherwise, according to the decisions of this Court, if the case had been disposed of on the merits and the order of discharge had been made under section 203 or section 253. No doubt section 258 applies only to compoundable offences but I do not think this affects the question of the jurisdiction of the Magistrate. I should of course be bound by the decisions of this Court to which my attention has been called, if they covered the present case. But so far as I am aware there is no decision of this Court that a Magistrate, who has made an order of discharge under section 259, has no jurisdiction to rehear the case on a fresh complaint. The order of discharge under section 259 is not an acquittal under section 403 and has not the effect of an acquittal.

In the case of *Mahomed Abdul Mennam* v. *Panduranga Row*(1), this Court expressed their approval of the decisions in *Nilratan Sen* v. *Jogesh Chandra Bhutta Charjee*(2), and *Komal Chandra Lal* v. *Gour Chand Adikari*(3), and disagreed with the decision in *Mir Ahmad Hossein* v.

* Criminal Revision Case No. 477 of 1904.

(1) I.L.R., 28 Mad., 255. (2) I.L.R., 23 Calc., 983. (3) I.L.R., 24 Calc., 286.

Digitized by Google

Mahomed Askari(1). But in all these cases the complaint had been dismissed on the merits, the order having been made under section 203. In the Full Bench decision of the Calcutta High Court in *Dwarka Nath Mundul* v. *Beni Madhal Banerjee*(2), the Court held that the Magistrate had jurisdiction to rehear a warrant case in which he had discharged the accused person by an order made under section 259. I do not find that this Court has ever declined to accept this view. I agree with this Calcutta decision and with the reasoning upon which it is based.

The case must go back to the Magistrate to be dealt with according to law.

1905. *January* 11. **I. L. R. 28 Mad. 454.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

ALINGAL KUNHINAYAN AND ANOTHER (ACCUSED), APPELLANTS, *v.* EMPEROR, RESPONDENT.*

Penal Code, Act XLV of 1860—Right of private defence of body—Extent of right.

The view that a person should not exercise his right of self-defence if by running away he can avoid injury from his assailant, places a greater restriction on the right of private defence of the body than the law requires. The extent to which the exercise of the right will be justified will depend not on the actual danger but on whether there was reasonable apprehension of such danger.

CHARGE of murder. The appellants (with two others who were acquitted) were convicted by the Sessions Judge of South Malabar of the murder of one Raman and of causing grievous hurt to the first witness for the prosecution. It appeared from the evidence for the prosecution that while the first accused was the aggressor inasmuch as he beat the deceased, yet the latter was the first to use a knife with which he inflicted a serious wound upon the first accused; and it was apparently, with the knife which the first accused wrested from the deceased that he stabbed and killed him.

In the Sessions Court, it was contended for the defence that the deceased attacked the accused with a knife and that he had been killed by the accused in exercise of their right of self-defence.

The learned Sessions Judge in dealing with the plea of the accused observed as follows :—" It is urged on behalf of the first accused that he was justified in exercise of his right of private defence of his person in stabbing deceased when he attacked him with a knife. First accused had undoubtedly a right to defend himself but I think it is clear that he exceeded the right of private defence which he possessed. First accused was certainly not justified in wresting the knife from deceased and inflicting a dangerous wound in the chest. There is no reason, I think, to suppose that first accused could not have escaped further injury by resorting to less violence or by running away. It was not necessary for first accused's own preservation that he should have inflicted such grievous bodily harm."

The first and second accused preferred this appeal.

Mr. *T. Richmond* and *M. Govindan Nair* for appellants.

The Public Prosecutor in support of conviction.

---

* Criminal Appeal No. 678 of 1904.

(1) I.L.R., 29 Calc., 726. (2) I.L.R., 28 Calc., 652.

Digitized by Google

JUDGMENT.—In this case, although as the Sessisons Judge points out, the prosecution witnesses Nos. 1–4 were all anxious to make it appear that the accused were the aggressors and that the deceased and his brother Chatu (the first prosecution witness) acted on the defensive, the evidence of these witnesses makes it clear that although the first and second accused began the fray by striking the deceased Raman with their hands, Raman was the first to use the knife, and that he inflicted a very serious wound, which might well have proved fatal, on the first accused, and also wounded the second accused, before he received from the first accused the wound which caused his death. It is also clear that the first prosecution witness Chathu, the brother of the deceased, although he denies it in his evidence, used his knife and stabbed the second accused.

It would seem from the evidence of the prosecution witnesses that both Raman and Chathu used their knives before either the first or second accused used theirs. At any rate, there can be no doubt, from the evidence of the sixth prosecution witness, that Chathu stabbed the second accused before the second accused stabbed Chathu in return.

Further, it seems clear that the fight took place at the house of the fourth accused and not as Chathu stated in exhibit A, at Raman's house. It seems not unlikely that the quarrel, in the first instance, was provoked, by the deceased and his brother Chathu going to the house of the fourth accused.

On the facts of the case, we cannot agree with the view of the law taken by the learned Judge. We do not think it can be said that the first accused exceeded the right of private defence. The learned Judge suggests that the first accused could have escaped further injury by resorting to less violence or running away. But, this is placing a greater restriction on the right of private defence of the body than the law requires. The principle applicable to a case like this is that laid down by Mayne "But a man who is assaulted is not bound to modulate his defence step by step, according to the attack, before there is reason to believe the attack is over. He is entitled to secure his victory, as long as the contest is continued. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable. And, of course, where the assault has once assumed a dangerous form every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool by-stander would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger."

The all important facts in connection with the question whether the first accused exceeded the rights of private defence of his body when he gave the stab with his knife which proved fatal to the deceased, are that the deceased was the first to use the knife and had inflicted a wound on the first accused which might well have proved fatal.

On the facts we are of opinion that the first accused did not exceed the right of private defence and that his conviction under sections 304 and 326 of the Indian Penal Code cannot be upheld.

As regards the second accused the evidence shows that although he no doubt used his knife to Chathu, before he did so, he had been stabbed by Chathu.

Digitized by Google

We are of opinion that the second accused did not exceed his right of private defence and that his conviction under section 326, Indian Penal Code, cannot be upheld.

In the case of both the accused the appeals are allowed and the convictions set aside.

1905. *July* 10. **I. L. R. 28 Mad. 565.**

Before Mr. Justice Boddam and Mr. Justice Moore.

EMPEROR, APPELLANT, *v.* JONNALAGADDA VENKATRAYUDU, RESPONDENT §

Penal Code Act XLV of 1860, s. 182—Criminal Procedure Code, Act V of 1889, ss. 154, 162—False information to a Village Magistrate.

An offence under section 182 of the Penal Code is committed by a person giving false information to a Village Magistrate charging another with having committed an offence. Where such information is given with the view to it being passed on to the Station-house Officer, who, on receiving the information, takes a complaint in writing from such informant, the complaint is one taken under section 154 and not under section 162 of the Criminal Procedure Code.

The Queen *v.* Perriannan and The Queen *v.* Naraina, (I.L.R., 4 Mad., 241), distinguished.

IN this case the accused on the 3rd June 1904 charged one Rukminamma before the Village Magistrate, with having set fire to a straw heap. The Village Magistrate at once sent a report to the police station. A constable was sent to the village next day to make an investigation into the case, and he took a statement in writing from the accused. The information given by the accused was found to be false, and he was prosecuted under section 182 of the Indian Penal Code.

The accused was acquitted by Sub-Magistrate. The material portion of his judgment was as follows :—" The first information was not, in this case, given to the police, and the statement recorded by the witness was evidently, during the course of his investigation, presumably under section 162, Criminal Procedure Code, and not under section 154, Criminal Procedure Code (*The Queen* v. *Periannan* and *The Queen* v. *Naraina*(1)) is clear on this point. The information contemplated under section 154(?), Criminal Procedure Code, was the first information given to the police by the informant. No charge would therefore lie under section 182, Indian Penal Code. The accused is therefore acquitted under section 245, Criminal Procedure Code. "

This appeal was preferred by the Public Prosecutor against the order of acquittal.

The Public Prosecutor for appellant.

Mr. *M. A. Thirunarayana Chariar* for respondent.

JUDGMENT.—We are clearly of opinion that the acquittal of the accused in this case was wrong and must be set aside.

On the 3rd June 1904, the accused gave to a Village Magistrate (a public servant) oral information of an offence having been committed. The Village Magistrate informed the Police Station house Officer, and he went on the 4th June and took a complaint from the accused under section 154, Criminal Pro-

§ Criminal Appeal No. 89 of 1905.

(1) I.L.R., 4 Mad., 241.

Digitized by Google

cedure Code. The information given to the Village Magistrate and the complaint signed by the accused on the 4th were false and the accused was charged under section 182, Indian Penal Code, with having made a false complaint with evil intention, etc. The Second-class Magistrate has acquitted the accused on the ground that giving the information to the Village Magistrate is not an offence within section 182 and the complaint signed by the accused on the 4th was not a complaint within section 182, as the accused had already given information to the Village Magistrate that the complaint to the Station-house Officer was not admissible in evidence having been made under section 162, Criminal Procedure Code, and not under section 154, and further that the case was determined by *The Queen* v. *Periannan* and *The Queen* v. *Naraina*(1).

We are of opinion that *The Queen* v. *Periannan* and *The Queen* v. *Naraina*(1) does not apply. Section 182, Indian Penal Code, has since that decision, been altered and the reasoning of the Judges in that case does not apply to the present case under the altered section.

We are further of opinion that the information given to the Village Magistrate was sufficient to justify a charge under section 182, Indian Penal Code, even if it had not been followed up by the Station-house Officer taking a complaint under section 154, Criminal Procedure Code, and also that the evidence given proved that a complaint was in fact and in law made by the accused on the 4th June to the Station-house Officer under section 154. We agree with Mayne (Mayne's 'Criminal Law,' p. 592) that information given to A [the Village Magistrate] for the purpose of being passed on to B (the Station-house Officer) and which it was his bounden duty so to pass on must be considered as having been given to B so as to justify his taking the complaint in writing from the accused under section 154, Criminal Procedure Code.

We therefore set aside the acquittal and direct that the case be restored to the file of the Second-class Magistrate and disposed of according to law.

VOL. XXIX.

1905. *July* 19. **I. L. R. 29 Mad. 89.**

Before Mr. Justice Boddam and Mr. Justice Moore.

SUPPA TEVAN AND OTHERS (PRISONERS), APPELLANTS, *v.* EMPEROR, RESPONDENT.*

Penal Code—Act XLV of 1860, s. 193—'Judicial Proceedings'—Oaths Act X of 1873, ss. 4, 5—Criminal Procedure Code—Act V of 1898, s. 164—Magistrate empowered to administer oath when taking statements under s. 164 of the Criminal Procedure Code.

A Magistrate taking statements under section 164 of the Code of Criminal Procedure is acting in discharge of duties imposed on him by law and is empowered to administer an oath under sections 4 and 5 of the Oaths Act. An investigation under Chapter XIV of the Code of Criminal Procedure is a stage of a judicial proceeding and a person making on oath a false statement in the course of such investigation commits an offence under section 193 of the Penal Code.

Queen-Empress v. Alagu Kone, (I.L.R., 16 Mad., 421), followed.

IN the course of an investigation under Chapter XIV of the Code of Criminal Procedure, by the Station-house Officer of Bodinayakanur in a case

(1) I.L.R., 4 Mad., 241.

* Criminal Appeals Nos. 142 to 144 and 147 of 1905.

Digitized by Google

of alleged murder, the Sub-Magistrate of Uthamapalayam, under section 164 of the Code of Criminal Procedure, took staements on oath from the accused which implicated the first prosecution witness in the murder. The result of the investigation was that the charge against the first prosecution witness was thrown out as false. Sanction was subsequently given to prosecute the accused for having given false evidence in making statements to the Magistrate that they had seen the first prosecution witness murder the deceased.

The Sessions Judge convicted them of offences under section 193 of the Penal Code.

The accused preferred this appeal.

Mr. *John Adam* and *K.* N. *Ayya* for appellants.

The Public Prosecutor in support of the conviction.

JUDGMENT.—The first ground of appeal is that the Sub-Magistrate of Uthamapalayam when taking down statements under section 164, Criminal Procedure Code, was not authorized to administer an oath to the persons examined by him. Following the decision in *Queen-Empress* v. *Alagu Kone* (1), we hold that he was so entitled. The Sub-Magistrate is a Court and when he took down statements under this section he was acting in discharge of a duty imposed on him by law and was consequently under section 4, Act X of 1873, authorized to adminster an oath. The appellants were persons to whom an oath might be administered, because they were persons who could lawfully be examined by the Sub-Magistrate under section 164, Criminal Procedure Code (*vide* section 5, Oaths Act). It is further urged that the conviction of the appellants under section 193 of the Penal Code was not legal. In the face of the provisions of the explanation attached to that section we cannot accept this contention. An investigation under Chapter XIV of the Criminal Procedure Code is a stage of a judicial proceeding and therefore when the appellants made on oath statements which they knew to be false before the Magistrate conducting that investigation they gave false evidence (*vide* illustration appended to explanation 2) and committed an offence under section 193, Penal Code.

On the merits we are satisfied that the appellants have been rightly convicted. The sentences are not too severe. These appeals are dismissed.

1905. August 29, September 7, 25. **I. L. R. 29 Mad. 91.**

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, Mr. Justice Boddam and Mr. Justice Sankaran Nair.

EMPEROR *v.* CHELLAN AND OTHERS.*

Criminal Procedure Code—Act V of 1898, s. 307—Procedure of High Court on reference under—' Opinion ' of jury, what is.

Where the Sessions Judge disagreeing with the jury, refers a case to the High Court under section 307 of the Code of Criminal Procedure, the High Court is to form its own opinion on the evidence. The ' opinion ' of the jury in section 307 of the Code of Criminal Procedure is the conclusion of the jury, and not the reasons on which that conclusion is based.

Per Sir SUBRAHMANIA AYYAR, Officiating Chief Justice, and BODDAM, J.—In references under section 307 of the Code of Criminal Procedure, although it may be expedient to have before the Court the reasons of the jury for the view taken by them, when any have been given, the circumstance that no such reasons have been ascertained does not warrant this

(1) I.L.R., 16 Mad., 421.

* Criminal Reference No. 7 of 1905.

Digitized by Google

Court to decline to go into the evidence and to arrive at its own judgment, after giving due weight to the views taken by the Judge and the jury as to the guilt or innocence of the accused.

THIS was a reference by the Sessions Judge of Salem under section 307 of the Code of Criminal Procedure. The letter of reference is as follows :—

The jury return an unanimous verdict that accused Nos. 1 to 4 are guilty and the others are not. I agree in and accept the verdict in so far as accused Nos. 1 to 4 are held to be guilty and in so far as the eighth accused is held to be not guilty. As regards the eighth accused in addition to the fact that his village was not named, there may be a doubt as to the possession of the item of cloth by him, and there is the circumstance that prosecution thirteenth witness admits that his niece was taken away by this accused's son from which it may be suspected that he has been identified owing to some enmity. In his case also, therefore, I do not want to differ from the jury, and respecting their opinion, I accept it. But I regret that, as regards accused Nos. 5, 6 and 7, I cannot agree with them. The same witnesses that speak about accused Nos. 1 to 4 speak about these accused also. In fact the fifth and seventh accused are identified by no less than five witnesses while the sixth is identified by at least three. The village of accused Nos 5 and 6 has been named in all the complaints and is close to that of accused Nos. 1 to 4 and to the scene of occurrence. Even bearing in mind the fact that no property was found with fifth accused and even doubting the possession of the *mull* by the sixth accused, I see no reasonable grounds for differentiating the case of accused Nos. 5 and 6 from that of accused Nos. 1 to 4, in so far as the direct evidence goes, except that these were arrested not that very night but subsequently. This difference ought not to count for much. As regards the seventh accused, his own village is no doubt at some distance, but he appears to have no settled abode and he admits having come near the place some days afterwards and further admits being in possession of one of the items which he has not proved to belong to him, and which upon the evidence of prosecution fourth witness I hold to be stolen property. There is no particular reason for foisting on him the female's cloth only of the two items. For these reasons I feel bound to refer to the High Court the case of accused Nos. 5, 6 and 7 who will be on remand till final orders are passed.

I acquit eighth accused and direct his release. I sentence each of accused Nos. 1, 2, 3 and 4 to six years' rigorous imprisonment. Prosecution witness Nos. 1 to 7 were not stray travellers. They were returning from their place of business, and, if robbers are to waylay such persons, trade will be paralyzed and great discomfort and uneasiness to the villagers will be caused. I therefore sentence them for a year in excess of what I used to do in ordinary dacoity cases.

I have to add that the seventh accused has been previously sentenced to three months' rigorous imprisonment by the Second class Magistrate of Pennagaram on 19th October 1904 for offences under sections 457 and 380 of the Indian Penal Code in Calendar Case No. 153 of 1904,

The reference was heard before Davies and Benson, JJ., along with the appeal by the accused Nos. 1 to 4, whom the Sessions Judge, agreeing with the jury, had convicted.

The Public Prosecutor in support of the reference.

BENSON, J.—The appellants are the first four accused in Sessions Case No. 65 of 1905. They have been found guilty by a jury on legal evidence and I can find no misdirection in the Judge's charge to the jury.

Digitized by Google

The jury has acquitted four other persons, who were charged with accused Nos. 1 to 4. The Sessions Judge has accepted the verdict in the case of the eighth accused for reasons stated by him, but he has referred the case of fifth, sixth and seventh accused for the orders of this Court under section 307 of the Criminal Procedure Code, as he disagreed with the finding of the jury that they were not guilty. The Sessions Judge states that he is of opinion that these three accused are guilty of dacoity and has recorded the grounds of his opinion as required by law.

It is therefore necessary for us now to consider the entire evidence and, after giving due weight to the opinions of the Sessions Judge and the jury, to either convict or acquit these accused.

[His Lordship then proceeded to discuss the evidence.]

In this state of the evidence, I agree with the Sessions Judge that the guilt of accused Nos. 5, 6 and 7 is established beyond reasonable doubt. There is no record of the reason or reasons why the jury was of opinion that they were not guilty. The law does not require them to give reasons, though he is empowered to question them in order to ascertain what their actual verdict is, and it is also open to the jury to state their reasons if they desire to do so. In many cases they do this.

It has always, so far as my experience goes been the invariable practice of this Court to accept a reference like the present under section 307 and to deal with the evidence against the accused, treating the so-called verdict of the jury as their 'opinion' referred to in this section. I have examined the records of all the cases referred under section 307 during the past three years. Their number is 73. I find that in 22 of these the reasons for the verdict of the jury have been recorded or are referred to by the Judge in his letter of reference. But in the remaining 51 cases, there is no record of the reasons, and no reference thereto by the Judge. There is nothing but the bare verdict, yet in not one of these cases did the High Court call on the Judge to ascertain the reasons of the jury or refuse to deal with the reference owing to the absence of such reasons. In all these cases the High Court dealt with the reference on the merits and acquitted or convicted the accused. Every Judge now in the High Court and also the Chief Justice, who is on leave and Sir Bhashyam Ayyangar and Russell, JJ. (now retired) took part in one or more of these cases. I am of opinion that the practice is correct.

When the Judge resolves to act under section 307 he is required by law not to record any verdict either of acquittal or conviction. The so-called 'verdict' does not bind him. It becomes for all legal purposes a mere opinion, and this, I take it, is what section 307 refers to when it speaks of the 'opinion' of the jury. In this present case I think that their 'opinion' that the fifth, sixth and seventh accused are not guilty is wrong. I would convict each of these accused Chellan (son of Mari) Karuran, and Venkatraman, and pass on them the same sentence as that passed on the accused Nos. 1 to 4 whom the jury found guilty, viz, six years' rigorous imprisonment.

DAVIES, J.—I agree with my learned colleague that this appeal (Criminal Appeal No. 319 of 1905) should be dismissed.

In this case the jury have unanimously found four out of the eight persons, charged with dacoity, guilty, and the appeal of these persons has been dismissed by us. The jury found the others, viz, four persons not guilty of the dacoity.

Digitized by Google

The Sessions Judge agreed with the jury that one of these four persons was not guilty, but he has dissented from their verdict in regard to the three other men and referred their cases under section 307 of the Code of Criminal Procedure, for our decision.

Our duty under clause 3 of that section is not only to consider the entire evidence, but also to give due weight to the opinions of the Sessions Judge and of the jury. The opinions of the jury cannot mean their verdict, for that is not a mere opinion nor is it styled as such as the opinions of assessors are. The verdict is a final judgment by the jury as to the guilt or otherwise of the persons charged before them, and it is binding on the Judge, while 'opinions' are not so. Besides, it is obvious from the provisions of the Code that the opinions of the jury referred to in clause (3) of section 307 are to be on the same par as those of the Judge, that is, opinions given after the verdict, for the Jury are not enabled to pass opinions before their verdict. It is not until after the verdict is delivered and the Judge disapproves of it, that the jury's opinions are required for submission to this Court to be considered along with the Judge's opinions.

Now, the opinions of the jury in this case are not before us. Apparently the Judge has not taken them, it may be, because no express provision is made to that end. But the legislature in directing that this Court should duly weigh the opinions of the jury gives an implied authority for the taking of such opinions. And the Sessions Judge is advised in future to do so before referring a case under section 307 of the Criminal Procedure Code.

It is now too late to direct such an opinion to be recorded in the case before us. And in the absence of such opinions, we cannot perform the functions, specially cast upon us, of duly considering them. In this particular case, where the Judge agreed with the verdict of the jury as regards five persons out of eight, it requires the most potent arguments to show that their verdict in the case of the other three persons was perverse. I have little doubt that the jury could have given reasons in support of their verdict if they had been asked for them, at least as strong as those given by the Judge against it.

In these circumstances I am not prepared to give any weight to the one-sided opinions of the Judge. And I consider that the verdict of the jury upon the evidence before them should be upheld. The three accused in whose case the reference has been made, that is, the fifth, sixth and seventh prisoners, should therefore be acquitted and their release ordered.

The reference again came on for hearing under the provisions of section 429 of the Code of Criminal Procedure before the Bench constituted above, in consequence of the difference of opinions between Davies and Benson, JJ., the Court delivered the following

JUDGMENT—Sir S. SUBRAHMANIA AYYAR, Offg. C J., and BODDAM, J.—The ordinary dictionary meaning of the word 'opinion' in law is "the formal decision of a Judge, an umpire, a councillor or other party officially called upon to consider and decide upon a difficulty or dispute." The term, so far as we are aware, is not used to denote the *reasons* for the decisions themselves and we see nothing in the language of clause 3 of section 307 of the Criminal Procedure Code, to take the word 'opinions' in it to mean other than the respective conclusions of the jury and the Judge. The use of the word 'opinions' in the clause in preference to the term verdict was probably owing to the conclusion of the jury in the circumstances lacking the effect which would

Digitized by Google

attach to it if there were no difference between the jury and the Judge in the matter. The first paragraph of section 307 itself is practically conclusive in favour of this view, as there, 'opinion' is used in contradistinction to the 'grounds' for such opinion. Section 305 of the Code also supports 'the same view.' It provides *inter alia* for cases of disagreement in trials in High Courts and the expression employed there too is 'opinion.' The context of course precludes the word being understood as meaning the grounds for the conclusion instead of the conclusion itself. Now it is conceded that when the Judge and the jury agree the latter cannot be compelled to give reasons for their decision. And section 303 which permits questions to be put to the jury in order to ascertain what their verdict is, negatives by implication a power on the part of the presiding Judge to question them otherwise. First to assume that the word 'opinion' in section 307, clause 3, means the reasons for the conclusion and next on such assumption to argue that the Code authorises the Judge in such cases to compel the jury to give them is not a legitimate mode of construction. The practice of the Court as shown by a large number of cases in which some or other of all the Judges of this Court have taken part and in which they proceeded to decide the references, though no reasons for the conclusion of the jury were elicited and submitted, is in accordance with the view we are taking. It follows therefore that, expedient as it may be to have before this Court, when any have been given, the reasons of the jury for the view taken by them in a particular case, the circumstance that no such reasons have been ascertained does not warrant this Court to decline to go into the evidence and to arrive at its own judgment after giving due weight to the views taken by the Judge and the jury as to the guilt or innocence of the accused.

[Their Lordships then discussed the evidence.]

Differing from the jury we convict the fifth, sixth and seventh prisoners and sentence them each to six years' rigorous imprisonment.

SANKARAN NAIR, J.—The learned Judges who first heard this reference have differed in their opinion. Mr. Justice Davies holds that it requires powerful reasons to show that the jury's verdict, upheld with reference to five of the accused is perverse with reference to the other three and as their opinion for their conclusion which he considers to be distinct from their verdict is not before us, it is impossible to say they are wrong npon the one-sided opinion of the Judge alone, the Code requiring us to give due weight to the opinion of the jury; Mr. Justice Benson holding that the verdict is their opinion came to the conclusion that on the evidence the accused are guilty. I concur with the Officiating Chief Justice and Boddam, J., in holding that once the case is referred to the High Court under section 307 we have to form our own opinion on the evidence. [After going into the evidence, His Lordship agreed with the jury and acquitted the accused.]

1905. *July* 18. **I. L. R. 29 Mad. 97.**

Before Sir S. Subramania Ayyar, Officiating Chief Justice, and Mr. Justice Sankaran Nair.

ARUNACHELLAM CHETTIAR, PETITIONER, *v.* CHIDAMBARAM CHETTI, RESPONDENT.§

Criminal Procedure Code—Act V of 1898, s. 147—Construction of the words "concerning any land"—Landlord and tenant—Right of tenant to enclose cultivable land by a wall.

§ Criminal Revision Petition No. 75 of 1905.

Digitized by Google

The enclosing by a tenant of cultivable lands by a wall instead of a hedge is not *prima facie*, an interference with the landlord's rights and ought not to be interfered with under section 147 of the Code of Criminal Procedure by a Magistrate, being a matter to be settled by a Civil Court. In such cases, if a breach of the peace is anticipated, security must be taken from the party from whom such breach of the peace is apprehended.

The words "concerning the use of land" in section 147 of the Code of Criminal Procedure cannot be qualified and the section construed as if it contained words that the user to which the dispute relates is a user by a party other than the party in possession.

The Empress *v.* Ganapat Kalwar, (4 C.W.N., 779), not followed.

Subba *v* Trincal, (I.L.R., 7 Mad., 461), referred to and followed.

THE facts necessary for this report are set out in the judgment of the High Court and the proceedings of the Sub-Divisional Magistrate.

On an application by the petitioner (counter-petitioner in the High Court) to the Sub-divisional Magistrate, the Magistrate issued notice to the counter-petitioner under section 147 of the Code of Criminal Procedure and passed the following order:—

" In this case I do not see how proceedings can rightly be initiated under section 147, Criminal Procedure Code. The question is as to the use of a piece of land which one party says that he has a right to build on, while the other party denies, that he (the first party) has such a right. Such a case is clearly not contemplated by section 147 of the Code. Nor are the facts that proceedings can be taken under section 145 as there is no dispute as to the right of possession. No further proceedings will therefore be taken."

The counter-petitioner applied to the High Court to revise the proceedings under sections 435 and 439 of the Code of Criminal Procedure.

The Advocate-General (Hon. Mr. *J. P. Wallis* and *S. Srimirasa Ayyangar* for petitioner.

T. Rungachariar and *K. N. Ayya* for respondent.

ORDER.—The allegation of the petitioner was that the counter-petitioner, who was for the purposes of this petition treated as being in possession of a certain plot of land, was erecting a compound wall in the place of a hedge which existed before; that his consent had not been obtained for the erection and that the object of the counter-petitioner's building a wall was to annex it to his house, while it was cultivable land subject to payment of assessment to him. The contention on the other side was that it was part of the counter-petitioner's property and that he was replacing an old dilapidated wall. The dispute, thus, in truth, is whether the property belongs to the counter-petitioner as alleged by him. If his allegation be true, it would be quite competent to him to raise the wall without any let or hindrance on the part of the petitioner. Even if it were otherwise the fact that a tenant encloses agricultural land in his occupation with a wall instead of a hedge would not *primâ facie* interfere with the landlord's right. In these circumstances the case is one in which we ought not interfere in revision, as the dispute is really a civil dispute between the parties, which ought to be settled by Civil Courts. We accordingly dismiss the petition. In doing so, we do not wish to be understood as concurring in the view expressed by the Magistrate if he meant to decide the general question as to the scope of section 147 of the Criminal Procedure Code, the words concerning the use of any land cannot, we think be altogether qualified and the section construed as if it contained words that the user to which the dispute relates is a user by a party other than the person in possession. We should hesitate before we accept the restricted construction suggested in *The Empress* v. *Ganapat*

Digitized by Google

Kalwar (1) to which our attention has been drawn on behalf of the counter-petitioner. The case of *Hari Mohun Thakur* v. *Kissen Sundari* (2) and the observations in *Subba* v. *Trincal* (3) seem opposed to the view adopted in *The Empress* v. *Ganapat Kalwar* (1) if we understand it rightly. These cases were no doubt decided under the section of the repealed Criminal Procedure Code, the language of which is not identical with that of section 147 of the present Criminal Procedure Code, the alteration in the language seems intended rather to enlarge the scope than restrict it. It is perhaps not superfluous to observe that in cases like the present as pointed out in the case last cited (*Subba* v. *Trincal* (3)), the proper course was for the Magistrate to take security from the party from whom a breach of the peace was apprehended, though it is not illegal for the Magistrate to act under section 147.

1905. *September* 19, 20. **I. L. R. 29 Mad. 100.**

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Boddam.

SURYANARAYANA ROW AND ANOTHER (PETITIONERS IN CRIMINAL REVISION PETITION No. 34 OF 1905),

BALA RAMAYYA (PETITIONER IN CRIMINAL REVISION PETITION No. 35 OF 1905), *v.* EMPEROR (RESPONDENT IN BOTH).†

Criminal Procedure Code Act V of 1898, ss. 476, 435, 439—Power of High Court to interfere in proceedings under s. 476—Madras Act III of 1869, scope of—Judicial Proceedings—Pleader, propriety of imputations made by.

The High Court has power to revise proceedings under section 476 of the Code of Criminal Procedure when such proceedings are null and void for want of jurisdiction.

Eranholi Athan *v.* King Emperor (I.L.R.. 26 Mad., 98), referred to and distinguished. Madras Act III of 1869 does not authorise the issuing of summons in a departmental inquiry for bribery.

The pendency of an appeal by the accused, who had paid the fine imposed on him, would not give any Court authority or power to arrest him or to take recognizances from him for appearing at any further enquiry.

The presenting of a petition imputing improper motives to a Magistrate who is illegally detaining a person to take recognizances from him to enforce his attendance for the foregoing purpose will not justify any action by such Magistrate under section 476 of the Code of Criminal Procedure as the offence is not committed in the course of a *judicial proceeding*, nor is it brought to his notice in the course of such proceeding.

THE facts necessary for this report are fully set out in the judgment.

Dr. *S. Swaminadhan* and *V. Krishanaswami Ayyar* for petitioners.

The public Prosecutor for respondents.

ORDER—In Criminal Revision Cases Nos. 34 and 35 of 1905.—The material facts bearing upon these revision cases are shortly as follow: Bala Ramayya, the petitioner in Criminal Revision Case No. 35 of 1905, had been convicted on a charge of theft and sentenced to pay a fine of Rs. 20 which he paid (see Criminal Revision Case No. 36 of 1905). He preferred an appeal against that decision which was heard by the Deputy Magistrate Mr. P. Nagesa Rao in July 1904. The Deputy Magistrate directed the Sub-Magistrate who tried the case in the first instance to record further evidence. While the matter was thus pending a complaint of bribery in connection

---

† Criminal Revision Petition Nos. 34 and 35 of 1905.

(1) 4 C.W.N., 779. (2) I.L.R., 11 Calc., 52. (3) I.L.R., 7 Mad., 461.

Digitized by Google

with the theft case made by Bala Ramayya against the Sub-Magistrate to the District Magistrate was being enquired into departmentally. Part of the departmental enquiry was being made by Mr. Nagesa Rao. On the 6th October Mr. Nagesa Rao summoned Bala Ramayya to appear before him on the 19th idem in connection with the departmental enquiry. Bala Ramayya did not appear, and Mr. Nagesa Rao thereupon issued a warrant for his arrest. The warrant was not executed as Bala Ramayya was reported to be not forthcoming. On the third December 1904 Bala Ramayya came to the Court of the Deputy Magistrate on some other business. Then Mr. Nagesa Rao directed him to execute two recognizances and pending their execution he was detained by the Deputy Magistrate's peon. One of the recognizances was for Bala Ramayya appearing before the Sub-Magistrate on the 12th in connection with the additional evidence ordered to be taken, and the other for his appearance before Mr. Nagesa Rao himself on the 13th idem. Bala Ramayya at first refused to execute these recognizances protesting that he should not be called upon to do so and in support of his objection he got the petitioners in Criminal Revision Case No. 34 of 1905, one a High Court Vakil and the other a First-grade Pleader, to present a petition in which it was prayed that Bala Ramayya might be released without any security or recognizance being taken from him. As Mr. Nagesa Rao had, before this petition was presented, left Court-house, his work in Court being over, and gone to his residence, the petition was handed to Mr. Nagesa Rao there. As in spite of the petition recognizances were insisted on Bala Ramayya executed them and thereupon these same vakils presented a further petition to Mr. Nagesa Rao (also in his house) in which they repeated their objetions and prayed that the security and recognizances taken should be cancelled and Bala Ramayya released. This request was not complied with. With reference to paragraph 6 of the petition which runs as follows:—

"The petitioner believes that this Court namely M. R. Ry. P. Nagesa "Rao Pantulu Garu is actuated by malice pure and simple against this peti-"tioner in arresting him and detaining him unlawfully in custody from "about 11-30 A. M. till about 4-30 P. M. this day." Mr. Nagesa Rao directed (purporting to act under section 476 of the Criminal Procedure Code) Bala Ramayya's two vakils to be prosecuted before the Divisional Magistrate for an offence under section 228 of the Indian Penal Code, viz. "intentionally offering an insult to a public servant whilst such public ser-"vant was sitting in a stage of a judicial proceeding" and Bala Ramayya for abetting them in committing this offence. The Public Prosecutor took the preliminary objection that these revision petitions did not lie with reference to the Full Bench ruling in *Eranholi Athan* v. *King Emperor*(1). We over-rule the objection inasmuch as in our opinion Mr. Nagesa Rao was acting entirely without jurisdiction in the matter. Now as to the departmental enquiry he was holding it was purely an executive matter. Our attention has not been drawn to any provision of law empowering Mr. Nagesa Rao to compel the attendance of Bala Ramayya before him in connection with the enquiry. Of course it was not a case to which the Act regarding the issue of Revenue Summonses Madras Act III of 1869 applied and it follows that the issue of a warrant for Bala Ramayya's non-attendance in pursuance of the summons was a void proceeding. As regards also the matter of further evidence directed to be taken before the Sub-Magistrate it was not competent to Mr. Nagesa Rao to compel the attendance of Bala Ramayya

(1) I. L. R. 26 Mad. 98.

Digitized by Google

either before the Sub-Magistrate or before himself. As we observed in Criminal Revision Case No. 36 of 1905 it was for Bala Ramayya, if he chose, to appear at the enquiry or not. It is to be remembered that he had been sentenced to pay a fine and the fine had been paid. The pendency of an appeal preferred by him would not give any Court authority or power to arrest him. The only result of the appeal could be either the reversal or confirmation of the sentence already passed. There was no question of enhancement of sentence. Of course to warrant an order under section 476 of the Criminal Procedure Code directing a person to be prosecuted the offence stated to have been committed by him should have been committed before the Court in the course of a judicial proceeding or should have been brought under its notice in the course of such a proceeding. Neither is the case here. For the presentation of the petition in question was in regard to and in the course of the detention of Bala Ramayya and the taking of recognizances from him both of which were, as shown above, absolutely illegal acts.

The Full Bench ruling relied on by the Public Prosecutor cannot possibly be held to apply to a case like the present. It is equally clear that Mr. Nagesa Rao was not at the time the petition was handed to him a public servant *sitting in any stage of a judicial proceeding* and this the Public Prosecutor conceded.

The order of Mr. Nagesa Rao directing the prosecution of the Pleaders and Bala Ramayya is hereby set aside.

We cannot help observing that the conduct of Mr. P. Nagesa Rao in detaining Bala Ramayya under the circumstances and compelling him to find security and execute the recognizances has been throughout so high handed and perverse as almost to justify (if that were possible) the statement in the paragraph of the petition complained of, though we cannot permit any legal practitioner to impute improper motives or corruption to a judicial officer in petitions addressed to him in connection with proceedings pending before him as such officer.

In Referred Case No. 5 of 1905 and Civil Miscellaneous Petition No. 339 of 1905.

As regards Referred Case No. 5 of 1905 and Civil Miscellaneous Petition No. 339 of 1905 it is needless to say that we entirely agree with Mr. Bell that a Pleader cannot be permitted to make imputations on judicial officers in petitions presented to them. The proper procedure in cases where such petitions are presented would be to return them to the Pleader for amendment or to reject them as scandalous. For reasons however given in our judgment in Criminal Revision Nos. 34 and 35 of 1905 these are not cases calling for any further action.

1905. *November* 5, 21. **I. L. R. 29 Mad. 126.**

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar, Mr. Justice Davies, Mr. Justice Benson and Mr. Justice Moore.

EMPEROR *v.* CHINNA KALIAPPA GOUNDEN AND ANOTHER.*

Criminal Procedure Code—Act V of 1898, s. 203—Dismissal of complaint under, no bar to Magistrate rehearing complaint.

* Case Referred No. 89 of 1905 (Criminal Revision Case No. 365 of 1905).

Digitized by Google

On a reference by the Sessions Judge as to whether it was competent to a Magistrate, after dismissing a complaint under section 203 of the Code of Criminal Procedure, to rehear the complaint, when such order of dismissal had not been set aside by a higher Court:

Held, (SUBRAHMANIA AYYAR and DAVIES, JJ., dissenting) that the dismissal of a complaint under section 203 of the Code of Criminal Procedure does not operate as a bar to the rehearing of the complaint by the same Magistrate, even when such order of dismissal has not been set aside by a competent authority.

Mahomed Abdul Mennan *v.* Panduranga Row, (I.L.R., 28 Mad., 256), dissented from.

Dwarka Nath Mondul *v.* Beni Madhab Banerjee, (I.L.R., 28 Calc., 652), approved and followed.

Mir Ahwad Hossein *v.* Mahomed Askari, (I.L.R., 29 Calc., 726), approved and followed.

Per Sir ARNOLD WHITE, C.J.—The power to enquire into an offence must be held to exist in a Magistrate until something has occurred to divest the Magistrate of this jurisdiction. An order under section 203 of the Code of Criminal Procedure is not a judgment to which the provisions of section 369 will apply. The principle of *autrefois acquit* will not apply as there is no trial when the complaint is dismissed under section 203 of the Code of Criminal Procedure.

The provisions of sections 147, 400, 215 and 210 of the Code of Criminal Procedure of 1872 compared with the corresponding sections 203, 403, 253 and 242 of the present Code.

The alterations in the present Code in regard to the sections under consideration were merely drafting alterations and were not intended to effect and did not effect any alteration in the law as laid down by the old Code.

Per BENSON, J.—The decisions in Queen-Empress *v.* Adam Khan [I.L.R., 22 All., 106], Nilratan Sen *v.* Jogesh Chundra Bhuttacharjee [I.L.R., 23 Calc., 983], and Mahomed Abdul Mennan *v.* Panduranga Row [I.L.R., 28 Mad., 255], do not apply, as in those cases it was not the *same* but a *different* Magistrate who proceeded to rehear the complaint.

There is no bar under the Code to the complaint being reheard unless the proceedings have reached such a stage of finality that an acquittal or an order operating as such under the Code is recorded.

Per MOORE, J.—The maxim *nemo bis vexari* has no application to an order under section 203 of the Code of Criminal Procedure, though it may be a good argument, where an accused has been discharged under sections 253 and 259 of the Code.

Per SUBRAHMANIA AYYAR, J.—Although the technical doctrine of *autrefois acquit* will apply only to acquittals, the principle underlying such doctrine, that a person should not, in respect of an offence, be in jeopardy of prosecution more than once, applies to cases where the prosecution failed to reach the stage of acquittal without any fault on the part of the accused, unless its application is precluded by the provisions of the Code.

Acquittal in common law means an acquittal after verdict or sentence. The Legislature having by sections 333, 494 and 248 of the Code of Criminal Procedure given the term a wider significance, the explanation to section 403 was intended to guard against the term being applied to cases where the plea of *autrefois acquit* was not technically applicable and not to bar the application of the aforesaid analogous principle where justice required it. There being thus no legal provision to the contrary, an order dismissing a complaint or discharging the accused, must, on the above principle, operate as a bar to further enquiry into the same matter as long as such order remains in force. Orders under sections 203, 253 and 259 of the Code of Criminal Procedure stand on the same footing as regards the application of this doctrine.

There is no inherent power in a Magistrate to revise his own order of dismissal or discharge.

THE facts are fully set out in the Sessions Judge's letter of reference, which is as follows.

On the 21st July 1905, Chinnayya Gounden presented to the Head Assistant Magistrate, Poollachi, a written complaint against(1) Chinna Kaliappa Gounden, (2) Rangaya Gounden and (3) Subbier, of which a translation is as follows:—

"I bought the land of the first accused a year ago, and on the 26th May 1904 executed a promissory note to him for Rs. 160 the unpaid balance owed to him by me. The first accused allowed his cattle to graze on the

Digitized by Google

land which I bought and which was in my possession after the purchase and caused damage to my crop. I therefore complained to the Stationary Sub-Magistrate, and when the case came on for enquiry, a promissory note was produced by me and another was produced by the accused. When the Magistrate examined the attestor and the writer of the promissory note which I produced, Maniam Ranga Gounden and Subbien, they said that they did not sign and that the signatures were not genuine.

"The accused came to me on 28th January 1905 with a forged promissory note and fraudulently read out the forged note as though it was the note which I executed, and deceived me, and received from me Rs. 178 being the principal and interest due, and made an entry of payment on the forged note and left it with me. I cannot read well. I learnt that it was forged only after I produced it in the Magistrates Court and the case was enquired into. I therefore pray that enquiry may be made about the forgery of the promissory note by the accused, about their cheating me by faudulently reading it and making me believe it, and about their receiving the money from me."

On the same date (21st July) the Magistrate examined the complainant under section 200, Criminal Procedure Code, the substance of the examination being reduced to writing as follows:—"Last year I bought some land from first accused. Last January the accused created a false promissary note for Rs. 160. They showed the promissory note to me and demanded the money. I paid it. I had executed a promissory note to them for Rs. 160 as balance of the price of the land. I presented a complaint before the Stationary Sub-Magistrate, Bollachi, against first accused under the Cattle Trespass Act, last month. He then stated that I owed him Rs. 160. I told the Sub-Magistrate that I had paid Rs. 160 and recovered the promissory note. Then I showed the Sub-Magistrate the promissory note. My complaint is that the accused got Rs. 160 from me. The accused gave me the promissory note in exchange for that. My complaint is that the accused demanded the money in the Sub-Magistrate's Court after I had paid it."

The Magistrate then, on the same date, made the following order: "Complainant states that he executed a promissory note to first accused and paid the amount in January and received back the promissory note and that a month ago in the Stationary Sub-Magistrate's Court the accused stated that he still owed him the money. This is all his complaint. No offence has been committed. The complaint is therefore dismissed under section 203, Criminal Procedure Code."

After this order was made (on the same date) Chinnayya Gounden presented a petition to the Magistrate in which he explained that his complaint was that the accused had forged a document and prayed that the case might be "taken on file and enquired into."

The Magistrate then on the same date, examined him again apparently under section 200 of the Criminal Procedure Code, and three days afterwards 24th July made the following order: The offence complained of falls under section 467 of the Indian Penal Code besides the minor sections 419 and 468, Indian Penal Code, forwarded to the Stationary Sub-Magistrate, Pollachi, for enquiry and committal to the Court of Session if a *prima facie* case is made out."

The Stationary Sub-Magistrate has now committed Chinna Kaliappa Gounden and Subbier to this Court on the charge that Subbier forged a pro-

Digitized by Google

missory note and China Kaliappa Gounden abetted the forgery and that they also committed offences punishable under sections 468, 471 and 420 of the Penal Code.

I think that the commitment should be quashed. The order of the Head Assistant Magistrate dismissing the complaint under section 203 was no doubt wrong and was made because the Magistrate did not apprehend rightly what the complainant was, but having been made, it must be considered to be in force until competent authority (that is to say, the High Court, Court of Session or District Magistrate) sets it aside and orders further enquiry. See *Mahomed Abdul Mennan* v. *Panduranga Row*(1) and *Komal Chandra Pal* v. *Gourchand Authikari*(2). The Head Assistant Magistrate had, I submit, no jurisdiction to revive proceedings, and his order of 24th July referring the case to the Stationary Sub-Magistrate for enquiry was made without jurisdiction and did not give jurisdiction to the Sub-Magistrate.

Public Prosecutor [Mr. *E. B. Powell*] in support of the reference.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami* Ayyar for accused.

T. Rangachariar (amicus curiæ).

JUDGMENT—Sir ARNOLD WHITE, C.J.—The general question argued before us in this case was whether it was open to a Magistrate to hear a complaint which has been dismissed by an order under section 203 of the Criminal Procedure Code, the order of dismissal not having been set aside by a higher Court.

In support of the view that the Magistrate had no such power, it was urged that a power to rehear or revise, like a right of appeal, was the creature of statute and that, in the absence of express statutory provisions conferring such power, the power did not exist. I am not prepared to accept this proposition. It seems to me that the question whether there is a power to rehear must be determined with reference to the enactments which create and regulate the jurisdiction of the Magistrate. The Code confers upon a Magistrate jurisdiction to enquire into an alleged offence. *Prima facie*, therefore, such jurisdiction exists in the case of an alleged offence. It must be held to exist unless it appears that something has been done, or some event has occurred, which has the legal effect of depriving the Magistrate of this jurisdiction.

The question therefore is whether the fact of the dismissal of the complaint by an order made under section 203, operates, so as to deprive the Magistrate of jurisdiction to enquire into the offence alleged in the complaint. The first matter to be considered is—is there any provision of the Code which lays this down in express terms? There is no such provision. I do not think that, in substance, with reference to the question of jurisdiction, any distinction can be drawn between entertaining a fresh complaint and rehearing the original complaint. The argument that the Magistrate, having made the order of dismissal, is *functus officio* applies equally to both cases, and the formality of putting in a fresh complaint cannot be said to create a jurisdiction, which, without such formality a Magistrate would not have possessed.

It was argued that an order under section 203 was a "judgment" to which section 369 applied. Section 369 provides "No Court other than a High Court, when it has signed its judgment, shall alter or review the same except as provided in sections 395 and 434 or to correct a clerical error."

(1) I.L.R., 28 Mad., 255. (2) I.L.R., 24 Calc., 286.

Digitized by Google

The Code does not define "judgment" but section 366 lays down what the language and the contents of a judgment are to be. By section 367, the judgment is to contain the decision and the reasons for the decision. Section 203 enacts that when a Magistrate dismisses a complaint by an order under that section, he shall briefly record his reasons for so doing. If an order under section 203 is a judgment within the meaning of section 369, this provision in section 203 is unnecessary and redundant; or, to put it another way,—the way in which it is put by Prinsep, J., in *Dwarka Nath Mondul* v. *Beni Madhab Banerjee*(1) in the case of an order of discharge as in the case of an order dismissing a complaint, it is expressly required by the law that a Magistrate should state his reasons, and it may be taken that if it had not been so required, it would have been unnecessary for the Magistrate to state any reasons for his order. Consequently in this point of view, the order does not constitute a judgment.

In my opinion an order of dismissal under section 203 is not a judgment within the meaning of section 369. It is to be observed that in *Dwarka Nath Mondul* v. *Beni Madhab Banerjee*(1), Ghose, J., who dissented from the six other Judges on the actual question for determination, was of opinion that the order made in that case, which purported to have been made under section 259 was *not* a judgment. The Judge observes that an order of *discharge* made after an investigation of the merits is a judgment, but he points out that there is, in this respect, a distinction between a summons and a warrant case, and he is careful to limit his observation to a warrant case.

It was further argued, in support of the view that the Magistrate had no jurisdiction to rehear, that even if the order made under section 203, were not a judgment within the meaning of section 369, the general principle was applicable and the order was final unless and until set aside by a superior tribunal. What general principle? I know of no general principle which can be said to be applicable. It cannot be the principle on which the right to plead *autrefois acquit* is based, because section 403 says that for the purpose of the exercise of this right the order is not an acquittal. The argument *ab inconvenienti* is of little weight. A Magistrate who allowed the rehearing of complaints which he had purported to dispose of, to develop into a habit would, no doubt, attract the attention of the higher authorities. The question of jurisdiction, as I have already said, is to be determined by an examination of the provisions of the Code which confer and regulate the jurisdiction. There is no express provision of the Code which in express terms either gives or takes away the jurisdiction to enquire into an alleged offence with regard to which a complaint has been brought and has been dismissed. But in my opinion the Code implicitly, though not directly, gives the jurisdiction. The explanation to section 403 enacts that the dismissal of a complaint is not an acquittal for the purposes of that section. The purpose of the section is to protect the person who has been acquitted from liability to be tried for the same offence. The explanation says that in the case of a dismissal he is not so protected. No doubt the section only applies to the case of a person who has been tried, and in the case of dismissal there has been no trial. Strictly speaking neither the section nor the explanations apply to a dismissal; but it seems to me clear, that what the Legislature meant to lay down was that a dismissal is not a bar to further

(1) I. L. R., 28 Calc., 652 at p. 660.

Digitized by Google

proceedings in respect of the alleged offence, and that the right to take further proceedings is not dependent upon the exercise by the higher Courts of the powers of revision conferred by the Code. If there is no bar to further proceedings, there is jurisdiction to entertain these further proceedings, and if there is this jurisdiction there is nothing in the Code which deprives a Magistrate of jurisdiction by the reason of the fact that he has made an order dismissing the complaint. That this is the true construction of the explanation to section 403 seems to me clear when we read the explanation by the light of the corresponding enactments contained in the Code of 1872 to which Mr. Rangachari, in his able argument, called our attention. Section 147 of the Code of 1872, which corresponds to section 203 of the present Code, contains the provision. "The dismissal of a complaint shall not prevent subsequent proceedings." This provision does not occur in section 203 of the Code, but in section 403 we have explanation that a dismissal is not an acquittal for the purposes of that section. There is nothing in the explanation in section 460 of the Code of 1872, which corresponds to section 403 of the present Code. Again, section 215 of the Code of 1872 which corresponds to section 253 of the present Code contains the explanation "a discharge is not equivalent to an acquittal and does not bar the revival of a prosecution for the same offence." This explanation does not occur in section 253 of the present Code, but in section 403 we have the explanation that the discharge of the accused is not an acquittal for the purposes of that section. There is nothing corresponding to this explanation in section 460 of the Code of 1872. The language of the Code of 1872 in dealing with the effect of a discharge is even stronger than the language of that Code in dealing with the effect of a dismissal. The language in the one case is "does not bar the revival of a prosecution"; in the other "shall not prevent subsequent proceedings." In the case before us we are only concerned with the question of dismissal, but if the legal effect of a discharge, when process has issued to the accused and there has, or may have, been an investigation on the merits, does not operate so as to bar the revival of a prosecution, it follows a *fortiori*, that the legal effect of a dismissal, when no process has issued to the accused, does not operate so as to bar the revival.

Turning once more to the Code of 1872, I find that section 210 which provides for the withdrawal of a complaint contains a provision that a complaint withdrawn under that section shall not again be entertained. The corresponding section of the present Code (section 242) does not contain this express provision, but it provides, in such a case, for the acquittal of the accused. The effect is precisely the same. It seems to me that the alterations effected in the present Code in connection with the matter under consideration were merely drafting alterations and were not intended to effect, and did not effect, any alteration of the law as laid down in the Code of 1872.

I observe that in the course of the argument in *Dwanka Nath Mondul* v. *Beni Madhab Banerjee*(1) it was contended that as there was distinct provision in the Code of 1872 that a discharge was not to bar the revival of a prosecution, and no provision in the same terms in the present Code, the Legislature intended to curtail the power of revival, and Mr. Justice Ghose in his dissenting judgment in that case (see p. 667) and also in his dissenting judgment in *Mir Ahwad Hossein* v. *Mahomed Askari*(2) appears to accede

(1) I.L.R., 28 Calc., 652 at p. 659. (2) I.L.R., 29 Calc., 726 at p. 723.

Digitized by Google

to this argument. The inference which I draw is precisely the opposite to that drawn by the learned Judge. It seems to me that the Legislature did not intend to alter the law as laid down in the Code of 1872 with regard to this question. Assuming, as appears to have been assumed by the learned Judge, that under the Code of 1872, in the case of an order of dismissal or of discharge the Magistrate making the order had jurisdiction to rehear the case, I think the law is the same under the present Code. If the Legislature had intended to alter the substantive law in a matter of jurisdiction they would have done so expressly and directly and not by a side wind. To my mind the alterations in the present Code amount to nothing more than a transposition of sections and, possibly, the adoption of a more scientific terminology. In the cases in which the view has been taken that a Magistrate has no jurisdiction to rehear, the judgments proceed mainly upon the ground that, having regard to the provisions of section 437 which gives power to the higher Courts to make further enquiry into a complaint which has been dismissed, the Legislature cannot have intended that the tribunal which deals with the case in the first instance should have the power to rehear. Now, section 437 is an enabling section enacted for the purpose of powers of control and revision to the higher Courts. I cannot see how the conferring of such powers can be said to operate so as to cut down the jurisdiction of the Court which deals with the case in the first instance.

As regards the authorities, so far as the Calcutta High Court is concerned, Prinsep, J., points out in his judgment in *Dwarka Nath Mondul* v. *Beni Madhab Banerjee*(1) it was frequently held under the Code of 1872 that a Magistrate could rehear a complaint which had been dismissed, though the Calcutta High Court thought proper to restrict the exercise of the power to cases in which fresh evidence was forthcoming. I am bound to say, however, that I feel some doubt as to whether the cases to which the learned Judge refers, viz., *Hari Singh* v. *Danish Mahomed*[2], *Kistoram Mohara* v. *Anis*[3], *Empress* v. *Donnelly*[4], and *In the matter of Dijahur Dutt*[5], altogether support his statement as to the course of practice in Calcutta.

In the case of *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee*(6) the judgment proceeded upon the ground that when the Code lays down a procedure for having an order of dismissal set aside it is reasonable to conclude that the Legislature intended that the order of dismissal should be interfered with only in the manner provided (see judgment of Banerjee, J., on p. 988).

For the reasons which I have stated this view does not seem to me to be sound. In *Komal Chandra Pal* v. *Gour Chand Audhikari*(7), the Court merely followed the decision of the Calcutta High Court of the previous year. In the cases in *Dwarka Nath Mondul* v. *Beni Madhab Banerjee*(8) and *Mir Ahwad Hossein* v. *Mahomed Askari*[9] to which reference has been made a different view was taken by Full Benches and I think that this view was right. As regards the Bombay High Court the only reported case upon the point appears to be *Reg* v. *Devama*[10]. In this case the same view was taken as that adopted in the recent Calcutta decisions. The matter came before the High Court, but the High Court declined to make any order upon the ground that it was open to the Magistrate who had succeeded the Magis-

(1) I.L.R., 28 Calc., 652 at p. 659.
(2) 20 W.R. Cr., 46. (3) 20 W.R. Cr., 47. (4) I.L.R., 2 Calc., 405.
(5) I.L.R., 4 Calc., 647. (6) I.L.R., 23 Calc., 983. (7) I.L.R., 24 Calc., 286.
(8) I.L.R., 28 Calc., 652 at p. 659. [9] I.L.R., 29 Calc., 726 at p. 733.
(10) I.L.R., 1 Bom., 64.

Digitized by Google

trate who made the order of dismissal to rehear the case if he thought fit. The cases of *Queen-Empress* v. *Bhimappa Bin Ramanna*[1] and *In re Harilal Buch*[2] do not appear to me to be in conflict with this decision.

The same view was also taken by the Allahabad High Court in *Queen-Empress* v. *Puran*[3] and I do not think this case can be distinguished from the case in *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee*[4] on the grounds suggested by Banerjee, J., in the latter case [see p. 989].

In *Queen-Empress* v. *Adam Khan*(5) the Allahabad High Court expressly limited their decision to the facts of the case before them. They did not decide that a Magistrate had no jurisdiction to rehear or that the earlier Allahabad case was not good law. They held that when a competent tribunal has dismissed a complaint another tribunal of exactly the same powers cannot reopen the same matter.

With all respect to the learned Judges who decided the case of *Mahomed Abdul Mennan* v. *Panduranga Row*[6] I am unable to agree with that decision or with the ruling referred to in Mr. Weir's 'Criminal Rulings,' pp. 874 and 875.

In *Chinnathambi Mudali* v. *Salla Gurusawmy Chetty*[7] which came before me as a single Judge, I took the view that the decision of this Court in *Mahomed Abdul Mennan* v. *Panduranga Row*[6] did not preclude me from holding (following *Dwarka Nath Mondul* v. *Beni Madhab Banerjee*[8] that a Magistrate had jurisdiction to rehear a case in which he had discharged the accused by an order made under section 259, though I did not decide the case upon that ground since it appeared to me that it was open to the Magistrate to proceed with the case upon the fresh complaint which had been filed in that case. But as I have already stated I do not think that, as regards the question of jurisdiction, the filing of the fresh complaint makes any difference. [I note that I was in error in that case in saying that in *Mahomed Abdul Mennan* v. *Panduranga Row*(6), *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee*(4), *Komal Chandra Pal* v. *Gour Chand Audhikari*(9) and *Mir Ahwad Hossein* v. *Mahomed Askari*(10) the order was made under section 203. It was made under that section in the first three cases. In the last case it was made under section 253.)

The case before us relates only to an order of dismissal under section 203 and for the purposes of the case it is enough to say that in my opinion it is open to a Magistrate to rehear a complaint which he has dismissed by an order of dismissal under section 203, although the order has not been set aside by a higher Court. I may add, however, that, as regards the point which has been under consideration in this case, I do not think that any distinction can be drawn between an order made under section 203 and an order made under section 253 or 259.

The Sessions Judge will be directed to proceed with the trial.

SUBRAHMANIA AYYAR, J.—The question for our determination on this reference, stated in the abstract, is when a Magistrate, having jurisdiction to entertain a complaint, dismisses the complaint under section 203 of the Criminal Procedure Code, or, where he discharges the accused, whether in such cases it is competent to the Magistrate, either at the instance of the com-

(1) I.L.R., 19 Bom., 732. (2) I.L.R., 22 Bom., 949. (3) I.L.R. 9 All., 85.
(4) I.L.R., 23 Calc., 983. (5) I.L.R., 22 All., 107. (6) I.L.R., 28 Mad., 255, 256.
(7) I.L.R., 28 Mad., 310. (8) I.L.R., 28 Calc., 652. [9] I.L.R., 24 Calc., 286.
[10] I.L.R., 29 Calc. 726.

Digitized by Google

plainant or of his own motion, to set aside the dismissal or the discharge and revive the prosecution.

The view, adopted in the decisions cited in the argument, that the Magistrate is competent to do so, seems to rest on two assumptions. One of the assumptions is that because the plea of a previous acquittal is not available for the accused in cases where the complaint is dismissed or where the accused is discharged, therefore, it is competent to renew the prosecution even though the order dismissing the complaint or the order discharging the accused, has not been set aside. On principle this assumption is clearly unsound. Now, of course, the reason for the plea of *autrefois acquit* is that an accused person should not, in respect of an offence, be in jeopardy of prosecution more than once. Though, technically, such a plea cannot be relied on where there has been no trial resulting in an actual acquittal, it would be impossible to contend that the great principle with reference to which the law allows the said plea should be inapplicable to cases where the prosecution failed before it reached that stage without any fault on the part of the accused. If it is justice that a person, prosecuted on a former occasion upon evidence which appeared sufficiently strong to warrant his being put on trial and being called upon for his defence and his evidence, should not be vexed again in the matter when the trial terminates in his favour, it must, *a fortiori*, be so, when the evidence on which his prosecution was initiated was so weak as to justify the trial being concluded earlier and the accused discharged and saved from the necessity of entering upon the vindication of his innocence. Surely it is also but good sense to hold that, when a Magistrate after examining the complainant and taking the stepts authorized by law to satisfy himself as to its being well-founded dismisses it under section 203, the complainant should not be permitted to renew his complaint so long as the order against him stands undisturbed. Were it otherwise, the complainant in such unfounded cases would have the power to vex his opponent and waste public time without limit inasmuch as if it is allowable to a complainant to renew his complaint once it would logically follow he could do so often as he chooses, the authorities being powerless to prevent such action on his part except by recording a judgment of acquittal so as to enable the accused to plead the acquittal in bar of such frivolous proceedings by the complainant. Nor is authority wanting for the view that even where the plea of *autrefois acquit* is not technically available, the principle of it is available for the accused when the interests of justice require its extension in his favour. Bishop, in his Commentaries on the law of Criminal Procedure, after pointing out that according to the better doctrine a person is in legal jeopardy when the jury is empanelled and ready to try him on a valid indictment and there is no latent or patent obstacle in the judicial path to prevent the cause proceeding to the end, observes " then, if, contrary to his rights and without his consent, the cause is suffered to break off before a verdict of acquittal or conviction is reached, there cannot technically be a plea of *autrefois acquit* or *autrefois convict* by reason of this jeopardy, yet the prisoner is entitled in some way to rely upon it afterwards for his protection." (Edition of 1866, volume 1, section 573). The same jurist devotes sections 584 to 587 to the consideration of what he calls the defence of former jeopardy, when neither of the pleas *autrefois acquit* or *autrefois convict* is available, and lays down that a plea *analogous* to the plea of *autrefois acquit* setting out the special facts which show the jeopardy may be brought forward as the proper method of taking the objection and in suggesting a form for this plea, he inserts the clause " and the said A (accused) further saith, that, though no verdict was

Digitized by Google

reached in said case, the failure thereof was not owing to any consent by him the said A made or given, or any interposition of Providence, or any other thing which in law should subject the said A to be again put in jeopardy; and the record of the said former jeopardy still remains, and is in no way reversed or made void."

Such being the necessary deductions from the fundamental principl *nemo bis vexari*, let us see whether there is anything in the provisions of the Criminal Procedure Code which preclude the plea analogous to *autrefois acquit* being set up by a person against whom prosecution is sought to be revived, while the order dismissing the complaint against him or discharging him has not been set aside. In determining the precise scope and effect of section 403 (on the explanation to which so much stress was laid Mr. Rangachariar) the departure made by the framers of the Code in using the term acquittal in a sense different from what is ordinarily attached to it as a term of English law, must be understood. Now it is scarcely necessary to say that the words " conviction " and " acquittal " have meanings of various shades. *Burgess* v. *Bœtefeur*(1) is in point. There Tindal, C. J., observes " undoubtedly ' conviction ' is *verbum equivocum* : it is used sometimes to donote the verdict of the jury, and at other times in its strict legal sense, to denote the judgment of the Court "—at p. 211. Again at p. 212 he observes " So, the word ' acquittal ' is an equivocal expression : in common parlance a party is said to be acquitted by the verdict of the jury finding him not guilty ; but it is only the formal judgment of the Court that in legal intendment satisfies the word acquittal." Turning to the meaning of the latter term as given by lexicographers, according to Webster it is " a setting free, or deliverance from the charge of an offence, by verdict of a jury or setence of a Court." Bouvier in his ' Law Dictionary ' expresses the same in similar words " the absolution of a party accused on a trial before a traverse jury." Another explanation of the term by the latter author is " the absolution of a party charged with a crime or misdemeanor." The distinction between the two meanings of course is that the absolution in the former or the narrower sense takes place when the trial has reached its last or final stage while in the latter case the absolution is at some earlier stage, of the trial. Under the common law the plea of *autrefois acquit* was technically available only where there was an acquittal after verdict or sentence. In the case already cited Tindal, C. J., points this out when he observes " a plea of *autrefois acquit* or *autrefois convict* could only be satisfied by the production of a regular record " that is a judgment following a verdict. Our Criminal Procedure Code however has modified the common law rule in regard to certain instances by special provisions. Thus under section 333 of the Code, a *nolle prosequi* by the Advocate-General operates as an acquittal *if the Judge so directs.* Under section 494 on the withdrawal from prosecution after a charge has been framed or when no charge is required, acquittal follows. Similarly in summons cases under section 248 if the complainant withdraws with the permission of the Magistrate. These are clear instances in which the plea of *autrefois acquit* could not have been raised according to the common law for the reason that there could bo no judgment or verdict in those cases. Thus acquittal as used in section 403 comprises cases which would not be cases of acquittal but for the Code. Having thus altered the strictly legal signification of the term in regard to those instances not by

(1) 8 Scott. N. R., 194.

Digitized by Google

any definition of the term in section 403 but by provisions in other parts of the Code, it was necessary for the Legislature to guard against the term being extended to cases not contemplated to be comprehended by it and to which the plea of *autrefois acquit* was in its strictly technical aspect not applicable. It was for this purpose that the explanation to section 403 seems to have been added, but not, I take it, with the object of barring resort to a plea analogous *autrefois acquit* in cases where such plea ought to be allowed on grounds of justice. But Mr. Rangachariar reads the words "is not an acquittal for the purposes of this section" in explanation to section 403 as equivalent to "in no way bars a fresh prosecution for the same offence" or words to that effect. Is it right to attribute to the Legislature an intention to leave, say, a person discharged by a Magistrate having jurisdiction to be proceeded against a second time, for the same offence, subject to no qualification whatever? That could be right if the maxim *nemo bis vexari* would not be thereby contravened. The observation of Bishop quoted above that legal jeopardy begins when the jury is empanelled and there is no obstacle to the trial of the prisoner being proceeded with has reference to a system where trials are before a jury and the anterior proceedings are in the nature of non-judicial investigations. (*Cf.* Stephen's 'History of the Criminal Law of England,' vol. I, p. 497.) But under our Criminal Procedure Code even in cases committable to a Court of Session the enquiries by a Magistrate are judicial proceedings (section 4 (*m*) of the Criminal Procedure Code) and in cases triable by himself, his enquiries are of course none the less so. Ninety-nine out of a hundred of these cases are triable without jury and therefore the jeopardy in connection with the matter under consideration cannot but be held to attach at all events the moment an accused person appears before a Magistrate whether under a warrant or a summons and the case is ready for the prosecution evidence being taken. It is impossible, therefore, to say that either in fact or in point of law an accused person who has once been discharged and who is put up again before the Magistrate for the same offence is not in jeopardy within the spirit of the *nemo bis vexari* and, consequently, it is unreasonable to suppose that the Legislature implied that an accused person who had been discharged by a Magistrate, having jurisdiction, is not exposed to jeopardy a second time in being proceeded with for the same offence, and therefore meant to lay down that a plea analogous to *autrefois acquit* was unavailable in such cases. That in theory the Legislature looked upon a discharge as standing on an almost equal footing with an acquittal cannot be shown more emphatically than it is by section 250 of the Criminal Procedure Code though that section deals only with offences triable by Magistrates. The provision made thereby that a Magistrate may award compensation to the accused person not only when he is acquitted but likewise when he is discharged is not consistent with any other view. It is impossible to justify such an award if the theory of the Code is that the discharge of an accused is virtually no better than a stay of proceedings which will cease when the complainant or the Magistrate chooses to move in the matter. If it be asked, why then maintain any distinction between "acquittal" and "discharge" with reference to an accused's right to set up former jeopardy, the answer, obviously, is that acquittal, as a decision arrived at after a fuller enquiry than that in which the discharge is ordered ought to carry with it the comparatively important right of enabling the accused to rely on the plea of *autrefois acquit* instead of one in the *nature* of or analogous to such a defence. Cases of dismissal of complaint under section 203 stand more or less on a similar footing to cases of discharge for our present purpose, and the only proper

Digitized by Google

intention to be attributed to the legislature is that it did not permit the commencement of fresh proceedings in respect of the same offence so long as the order of discharge or the order of dismissal remains in force, ample provision having been made in section 437 for setting aside such orders in revision. No doubt the above reasoning will not apply to the other two cases referred to in the explanation to section 403, viz., stay of proceedings under section 249 and entry under section 273. What the preliminaries are for the continuation of proceedings stayed, or renewal of the charge on which entry is made, are matters unprovided for expressly in any part of the Code and on general principles the Magistrate who ordered the stay of proceedings under section 249 may for good reasons remove the stay and proceed further; and as regards the entry under section 273 the High Court may likewise remove the stay and sanction the case to go on. It may not be perhaps out of place to add that the English Criminal Procedure also, though it is less homogenous than the Indian Criminal Procedure Code does not tolerate the anomaly of a complainant renewing his accusation repeatedly inasmuch as a prosecution once launched must proceed until it runs out its course. Sir F. Stephen says: "The unlimited power to institute prosecutions does not carry with it an unlimited control over them when they are instituted. When a charge has been made the maker of it is usually bound over to prosecute, and when a bill has been sent before the grand jury, the matter is entirely out of the original prosecutor's hands and must run its course, unless the Court before which it is to be tried sanctions the withdrawal of the charge, or unless the Attorney-General as the representative of the Crown, the nominal prosecutor, enters a *nolle prosequi*, which operates not as an acquittal, but as a stay of proceedings upon the particular case to which it refers"—'History of the Criminal Law of England,' vol. I. p. 496 [see also *ib.*]

It must be further noted that in the matter of the *conduct* of prosecutions the latitude allowed to a private individual under the Indian law is more limited than that accorded to him in England. Referring to it, the same learned author writes:—"The right to prosecute for criminal offences is not, properly speaking, left in India, as it is in England, in the hands of private persons. A person who wishes to prosecute another may complain to a Magistrate, but there is nobody like a grand jury before which he can send up a bill, and if he does complain and his complaint is admitted he is not entitled without the Magistrate's permission, to conduct the prosecution." ['History of the Criminal Law of England,' vol. III, p. 329]. How then can it be reasonably argued that when the complaint is *not admitted* our Code implies that the complainant has power to set the law in motion again and again, notwithstanding that the order dismissing the complaint remains unreversed.

Passing now to the other assumption on which the view I am controverting rests, viz., that a Magistrate in the circumstances stated in the opening part of this judgment has power to revise his own order dismissing the complaint or discharging the accused with a view to revive the prosecution. Certainly such power is not inherent in a Magistrate. As pointed out by me in *Rajah Parthasarathi Appa Row* v. *Rajah Rengiah Appa Row*(1), inherent power must not be presumed to exist and could not be invoked "except for the limited purpose of preserving and enforcing order, securing efficiency and preventing abuse of process in the exercise of a jurisdiction which the Court otherwise possesses." The passage in *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad*(2) relied on bears upon one of the classes of cases

[1] I.L.R. 27 Mad., 168 at p. 175 (2) 14 M. I. A., 40 at p. 48.

Digitized by Google

referred to above as admitting of the presumption of inherent powers. The case of *In re Samsudin*(1) is an instance where it was properly held that it was competent for the Court to recall its process, for the same having been issued in a case where the requisite sanction had not been obtained, the issue of the process was in a sense without jurisdiction and therefore the recall thereof was necessary as otherwise the process of the Court would be abused. How such precedents help the contention of Mr. Rangachariar in the present case, it is difficult to see. It is clear therefore that no inherent power to revise an order of dismissal or discharge made by a Magistrate in the due exercise of his powers under the Code can be rightly taken to exist and the power if any to revise in such circumstances should be given expressly by statute (see, *e. g.*, *In re Harilal Buch*(2). The Code itself implies this as for instance in section 144, clause 4, and section 489. Surely, if the Magistrate can be said to have inherent power to set aside an order of discharge it cannot be denied that he can revise orders passed under numerous other sections of the Code, viz., 125, 136, 137, 140, 146 (clause 2), 147, 195 250, 488 (clause 1), 517, 519, 522, but that certainly is absurd.

Mr. Rangachariar's argument that an order dismissing the complaint or discharging the accused is not a final order requires no serious notice. The order is as final as a judgment of acquittal is final so long as it is not set aside by an authority competent to do so under the Code. That a prosecution for a false charge under section 211, Indian Penal Code, lies on the dismissal of a complaint or the discharge of an accused is practically conclusive of this view.

It follows therefore whether looked at with reference to the right of the prosecutor or the competency of the Magistrate, an order dismissing a complaint or discharging an accused precludes the same matter from being enquired into so long as such order remains in force. I would therefore set aside the committal in question as contrary to law on the ground that the Head Assistant Magistrate had no power to re-entertain the complaint as he did.

DAVIES, J.—I must express my entire concurrence with the judgment of Mr. Justice Subrahmania Ayyar to which I have nothing to add.

BENSON, J.—In this case the Head Assistant Magistrate dismissed a complaint under section 203, Criminal Procedure Code, on the ground that no offence was disclosed.

This opinion was wrong, and on the complainant explaining this to the Magistrate the same day, the Magistrate proceeded to rehear the complaint and deal with it on the merits.

The Sessions Judge thought he had no power to do so, unless and until the order of dismissal had been set aside by a superior Court under section 437, Criminal Procedure Code. In support of this view he relied on the case in *Mahomed Abdul Mennan* v. *Panduranga Row*[3] which follows the case in Weir, pp. 874—5, *Queen-Empress* v. *Adam Khan*[4] and *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee*[5] and requested that the commitment might be quashed.

The conclusion arrived at by the learned Chief Justice is in accordance with the view which I expressed when proposing a reference to the Full

(1) I.L.R., 22 Bom., 711. (2) I.L.R., 22 Bom., 949.
(3) I.L.R., 28 Mad., 255. (4) I.L.R., 22 All., 106. (5) I.L.R., 23 Calc., 983.

Digitized by Google

Bench, and having now had the advantage of hearing the question fully argued I think that that view is correct.

I then pointed out that in *all* the cases relied on by the Sessions Judge it was a *different* Magistrate of co-ordinate jurisdiction who entertained the second complaint, and that in the Allahabad case the Judges expressly guarded against its being supposed that they ruled that the *same* Magistrate might not re-entertain a complaint on sufficient ground being shown, and expressly refrained from dissenting from a decision of their Court in that sense in *Queen-Empress* v. *Puran*(1). The question was examined at great length by the Full Bench of the Calcutta High Court in the case in *Dwarka Nath Mondul* v. *Beni Madhab Banerjee*(2) (*seven* Judges) as regards Presidency Magistrates and in the case in *Mir Ahwad Hossein* v. *Mahomed Askari*(3) (*five* Judges) as regards mofussil Magistrates, and in these it was decided (only one Judge in each case dissenting) that dismissal by a Magistrate under section 203, Criminal Procedure Code, was no bar to a rehearing by the same Magistrate. They did not decide whether it would bar a rehearing by a different Magistrate.

In the present case it is the *same* Magistrate who reheard the case, and, therefore, the rulings in *Mahomed Abdul Mennan* v. *Pandurunga Row*(4) and in Weir, p. 874 do not apply.

The question must, I think, be determined by a reference to the provisions of the law under which the Magistrate is empowered to take cognizance of offences and entertain complaints. A Magistrate under the Code of Criminal Procedure in India is not a mere Judge whose duty is confined to deciding cases brought before him by contending litigants. Under section 190, Criminal Procedure Code, he has jurisdiction to take cognizance of any offence not only upon a complaint, or upon a police report, but also upon his own knowledge, or information or even suspicion that an offence has been committed.

He has, in fact, jurisdiction to bring offenders to justice for the protection of the public and in the interest of the public and he can exercise that jurisdiction unless any provision of the Code or general principle of the Criminal law restricts its exercise. There is no provision of the Code which declares that the dismissal of a complaint under section 203 shall bar the Magistrate's jurisdiction to bring the offender to justice.

Section 403 only refers to previous acquittals or convictions and is expressly declared in the Code itself not to apply to the dismissal of a complaint and certain other non-final orders; and the only other section that might be supposed to apply, viz., section 437 is an *enabling* section which permits superior Courts to revise and control the exercise of their powers by the Magistrates having original jurisdiction. Such an enabling section cannot in my opinion be held to restrict by implication the exercise by a Magistrate of the powers given to him by the Code.

Section 249 gives a Magistrate power to stop proceedings and to discharge the accused in any case instituted otherwise than upon complaint, and I do not think that it has ever been doubted that the Magistrate can revive proceedings stayed under this section if circumstances justify his doing so. If he has that power in regard to cases not instituted on complaint it is difficult to see why his powers should be less because the case has been instituted on

(1) I.L.R., 9 All., 85. (2) I.L.R., 28 Calc., 652. (3) I.L.R., 29 Calc., 726.
(4) I.L.R., 28 Mad., 255.

Digitized by Google

complaint and has been dismissed, as in this case, for no sufficient reason, but merely because the Magistrate misunderstood what the complaint really was.

No general principle of the criminal law such as *nemo bis vexari*, is infringed, for, in the present case, no process had been issued, and the accused did not even know that a complaint had been made against him.

Moreover, the history of the legislation embodied in section 403 and the corresponding provision of the earlier Codes seems to show, as pointed out in the judgment of the learned Chief Justice, that the Indian Legislature deliberately restricted the application of the doctrine to cases of acquittal or to cases in which the order of the Court is declared by the Code to have the effect of, or to operate as an acquittal.

The principle appears to be that unless the proceedings have reached such a stage of finality that an acquittal is recorded or that an order is made which the Code declares shall operate as an acquittal, there is no bar.

To extend the doctrine, in effect, to all cases in which a complaint has been dismissed under section 203, or an accused has been discharged, is not warranted by the Code, and, in fact, introduces restrictions on the powers with which the Code invests Magistrates in order to bring offenders to justice.

I concur in the judgment of the learned Chief Justice and would direct the Sessions Judge to proceed with the trial.

MOORE, J.—On the 21st July 1905 one Chinnaya Gounden presented a complaint to a Sub-Divisional Magistrate [Head Assistant Magistrate, Coimbatore]. On the same day, the Magistrate examined the complainant under section 200, Criminal Procedure Code, and then and there dismissed the complaint under section 203, Criminal Procedure Code, on the ground that no offence had been committed. Later on the same day Chinnaya presented a petition to the same Magistrate in which he represented that his complaint was that the accused persons had committed forgery and prayed that that complaint might be taken on the file and enquired into. The Magistrate accordingly on the same day a second time examined the complainant under section 200, Criminal Procedure Code, and having, as a result of that examination, ascertained that he had made a mistake in dismissing the complaint under section 203, Criminal Procedure Code, on the 24th July made the following order :—"The offence complained of falls under section 467 of the Indian Penal Code besides the minor sections 419 and 468, Indian Penal Code. Forwarded to the Stationary Sub-Magistrate of Pollachi, for enquiry and commitment to the Court of Session if a *prima facie* case is made out." The Sessions Judge has referred the case to this Court on the ground that the Magistrate had "no jurisdiction to revive the proceedings, and his order of 24th July referring the case to the Stationary Sub-Magistrate for enquiry was made without jurisdiction and did not give jurisdiction to the Sub-Magistrate." I have no hesitation in holding that the procedure adopted by the Magistrate was perfectly legal. I follow the decision in *Dwarka Nath Mondul* v. *Beni Madhab Banerjee*[1] and in *Mir Ahwad Hossein* v. *Mahomed Askari*[2] and dissent from that in *Mahomed Abdul Mennan* v. *Panduranga Row*[3]. I do not consider it necessary to give any reasons for arriving at this conclusion at any length as they are fully set out in the judgment just delivered by the learned Chief Justice with which I, in the main, concur. I wish however to state clearly in order to avoid all possibility of misunder-

(1) I.L.R., 28 Calc., 652. (2) I.L.R., 29 Calc., 726. (3) I.L.R., 23 Mad., 255.

Digitized by Google

standing that the opinion that I have arrived at is with reference to the dismissal of a complaint under section 203, Criminal Procedure Code, and that I avoid giving any opinion as to cases in which accused persons are discharged under section 253 or 259, Criminal Procedure. I will now touch briefly on one or two of the arguments put forward in support of the proposition that the action of the Magistrate was contrary to law. It is pleaded that his procedure offends against the maxim *nemo bis vexari*, etc. This may be a good argument where an accused person has been discharged under section 253, Criminal Procedure Code, or 259, Criminal Procedure Code; but it is clear that it has no application to a case where a complaint is dismissed under section 203, Criminal Procedure Code. The persons against whom Chinnaya Gounden complained were in no way vexed in consequence of the complaint which the Head Assistant Magistrate dismissed under that section on the 21st July. Allusion has also been made to section 250, Criminal Procedure Code. On referring to the wording of that section it will be found that the persons against whom Chinnaya Gounden complained could not have obtained compensation in respect to the complaint dismissed under section 203 as they were not either discharged or acquitted. Another argument that has been advanced is that if it is declared that the action of the Head Assistant Magistrate in the present case was legal there will be nothing to prevent a Magistrate from dismissing a complaint every day for, say, a month under section 203, Criminal Procedure Code, and at the end of that time committing the case to the Court of Sessions. It might be urged with equal force that there is nothing to prevent a Third-class Magistrate in this Presidency from committing every petty case of assault or nuisance that comes before him to the Court of Sessions. To advance arguments such as this is to ignore the main principle on which the Criminal Procedure Code is based, namely, that it is the duty of a District Magistrate to see that all the Magistrates in the district exercise the powers conferred on them not only in accordance with law but also in an equitable and rational manner.

I would answer this reference by informing the Sessions Judge that the committal to his Court of the persons named in his letter of reference is legal and has not been passed without jurisdiction.

1905. *September* 25. **I. L. R. 29 Mad. 149.**

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Boddam.

ISMAL ROWTHER AND OTHERS (ACCUSED), PETITIONERS, *v.* SHUNMUGAVELU NADAN (COMPLAINANT), RESPONDENT.*

Criminal Procedure Code—Act V of 1898, ss. 195, 537—Sanction, want of, only an irregularity and not fatal to the prosecution.

The general provisions of section 195 of the Code of Criminal Procedure ought not to be so construed as to nullify the special provisions of section 537 *(b)*.

The want of sanction required by section 195 of the Code of Criminal Procedure is not fatal to a prosecution unless the accused is prejudiced thereby.

Raj Chunder Mozumdar v. Gour Chunder Mozumdar (I.L.R., 22 Calc., 176), dissented from.

THE charge against the petitioners (accused) was that they by force obstructed a marriage procession which was being carried on with the san-

* Criminal Revision Case No. 234 of 1905.

Digitized by Google

ction and under the superintendence of the police, and compelled the bride and bridegroom to alight from their palanquin and walk to their house. They were convicted of offences under sections 143, 186 and 341 of the Indian Penal Code.

On appeal to the Sub-Divisional Magistrate, the contention of the petitioners that the conviction under section 186 was bad as no sanction had been obtained under section 195 of the Code of Criminal Procedure was overruled and the conviction confirmed.

Petitioners preferred the criminal revision petition.

Mr. *E. Norton* and *P. Duraisawmy Ayyangar* for petitioners.

The Public Prosecutor and Mr. *Joseph Satya Nadar* for complainant.

ORDER —One of the offences for which the petitioners have been convicted is punishable under section 188, Indian Penal Code.

No sanction from the Police officers obstructed was produced in the course of the prosecution but no objection on this ground was taken on behalf of the petitioners at the trial. Mr. Norton has called our attention to *Raj Chunder Mozumdar* v. *Gour Chunder Mozumdar*(1) in support of his contention that the want of sanction was fatal to the prosecution of the prisoners on the charge in respect of the offence referred to. We are unable to agree with the view there taken by the learned Judges as to the construction of section 537, Criminal Procedure Code of 1882, which so far as the question of want of sanction is concerned is identical with section 537 of the present Code (Act V of 1898). Their construction virtually nullifies the provision that want of sanction is merely an irregularity which would not justify the reversal of the decision in a case prosecuted without sanction unless such want of sanction has occasioned a failure of justice. No doubt section 537 begins with the words "subject to the provisions hereinbefore contained," etc., but those words must be taken together with what follows and not read so as to give no meaning to the subsequent clause relating to the want of sanction.

Section 195, provides *generally* for cases in which sanction is necessary while section 537 (*b*) provides for cases of want of or irregularity in the matter of sanction in *particular* cases. The latter as providing for a special case must have effect given to it as qualifying the general provisions in the earlier section. In this view there is nothing to show that the want of sanction caused any prejudice to the accused or occasioned any failure of justice. And no other ground has been shown for interfering with the decision of the lower Courts.

We dismiss the petition.

1905, *October* 9, 16. **I. L. R. 29 Mad. 185.**

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice.

ABU BAKER (ACCUSED), PETITIONER, *v.* THE MUNICIPALITY OF NEGAPATAM, RESPONDENT.*

District Municipalities Act (Madras) IV of 1884, ss. 197, 191—Market, definition of—Use of, as market, what amounts to.

---

* Criminal Revision Case No. 151 of 1905.

(1) I.L.R., 22 Calc., 176.

Digitized by Google

Private property is used as a market when it is used as a public place for buying and selling.

Where a private market had been ordered to be closed, a person using the place for selling fish and flesh after a license had been refused is guilty of an offence under section 197 of the Madras District Municipalities Act, or at any rate, of an offence under section 191.

THE petitioner in this case was charged with having sold mutton without having obtaining a license before the Bench of Magistrates at Negapatam. The place where the accused sold the mutton was originally a market which was closed by order in 1888. The accused applied for a license which was refused.

The accused was convicted under sections 191, 197 and 264 of the Madras District Municipalities Act and the conviction was affirmed on appeal.

The accused preferred this criminal revision petition.

V. Ryru Nambiar for petitioner.

The respondent was not represented.

ORDER.—The convictions in these cases are clearly sustainable. The place where the fish or mutton was sold was originally a recognized market. It was closed under orders in 1888. No license having since been granted for the use of the place as a market, the sales conducted by the accused, in respect of which the charges are made, are punishable under section 197 of the District Municipalities Act, if the use of the place which is private property was as a market, *i.e.*, as a public place for buying and selling, such being the meaning of the term "market" in law (*see* Bouvier's 'Law Dictionary,' volume II, p. 316). Even if it were otherwise, the acused were guilty of an offence under section 191, clause (2) of the Act as they *without license* sold "flesh" or fish " intended for food." The petitions are dismissed.

1905 *October* 10. **I. L. R. 29 Mad. 187.**

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice.

EMPEROR *v.* PALANIAPPAVELAN AND ANOTHER.§

Accused person—Notice to accused person necessary before order in his favour can be set aside.

An order by a Magistrate directing payment of compensation to the accused ought not to be set aside on appeal without notice to the accused. It will also be safer to give notice to the officer appointed by the Local Government referred to in section 422 of the Code of Criminal Procedure.

THE facts necessary for this report are set out in the judgment.

The Public Prosecutor (Mr. *E. B. Powell*) opposed the Reference.

ORDER.—In this case the order awarding compensation to the accused was reversed on the appeal preferred by the complainant, but without notice either to the accused or to the Public Prosecutor There is no express provision directing that notice should be given to the former in such a case. But on the principle *audi alteram partem* the accused should have notice of the appeal in order that they may have an opportunity of supporting the order passed in their favour.

§ Criminal Reference No. 49 of 1905.

Digitized by Google

As regards the view suggested by the Sessions Judge it would seem that, according to the letter of the law, notice to the officer, if any appointed by the local Government referred to in section 422 of the Criminal Procedure Code is necessary even in such cases where the appeal is not summarily rejected though there seems little reason for notice to that officer in a matter in which the accused only are really interested. Though the point is somewhat doubtful it seems to me that the safer course in cases like this is to give notice to both the accused and the officer referred to when the appeal is not summarily rejected. The order of the Appellate Court is set aside and the Criminal Appeal No. 75 of 1905 will be replaced on the file of Sub-divisional First-class Magistrate, Dindigul, and disposed of according to law after notice to the accused and the Public Prosecutor.

1905. *October* 17. **I. L. R. 29 Mad. 188.**

Before Mr. Justice Boddam and Mr. Justice Moore.

EMPEROR *v.* KASUPPANA PILLAI and ANOTHER. *

Criminal Procedure Code, Act V of 1898, s. 423—Order under directing payment of costs not an enhancement of sentence—Court Fees Act VII of 1870.

An order under section 31 of the Court Fees Act directing the accused, on appeal against conviction, to pay the costs of the complainant is not an enhancement of the sentence.

Madan Mandal v. *Haran Ghose*, (I.L.R.,20 Calc.. 687), approved.

Queen-Empress v. *Tangavelu Chetty*, (I.L.R., 22 Mad. 153), dissented from.

THE facts necessary for this report are set out in the letter of reference which is as follows :—

" Under section 438, Criminal Procedure Code, I have the honour to report the result of my examination of the records in Criminal Appeal No. 119 of 1905 on the file of the First-class Sub-Divisional Magistrate, Ramnad Division.

" In Calendar Case No. 132 of 1905, the Sub-Magistrate of Pamban convicted two persons under section 352, Indian Penal Code, and sentenced the first accused to pay a fine of Rs. 5, in default to undergo a week's simple imprisonment, and the second accused to pay a fine of Rs. 2, in default to undergo three days' simple imprisonment and found that, under the circumstances of the case, the complainant was not entitled to either cost or compensation. The Sub-Divisional Magistrate while confirming the Sub-Magistrate's order in appeal, also directed that the accused should pay Rs. 1-8-0 to the complainant, and this order the Sub-Divisional Magistrate has passed under section 31 of the Court Fees Act. Under that section the convicting Court has to make such an order; and the Sub-Magistrate in this case having found that the complainant was not entitled to any cost or compensation, the Sub-Divisional Magistrate's order in appeal directing the accused to pay costs to complainant is illegal as it amounts to an enhancement of the sentence. I submit that the order of the Sub-Divisional Magistrate be set aside."

The Public Prosecutor (Mr. *E. B Powell*) in support of the Reference.

---

* Criminal Reference No. 74 of 1905 (Criminal Revision Case No. 335 of 1905),

Digitized by Google

ORDER.—We think that the Sub-Divisional Magistrate's order in appeal directing the accused to pay the costs of the complainant is not illegal as it does not amount to an enhancement of sentence. The order is made under section 31 of the Court Fees Act, and is entirely irrespective of the penalty or sentence passed under the Indian Penal Code or the Criminal Procedure Code. It has been held in *Madan Mandul* v. *Haran Ghose*(1) that it forms no part of the sentence, and the Court Fees Act itself says that "the Court *shall* in addition to the penalty imposed" order it to be paid. It is not therefore any part of the sentence, and the order of the Sub-Divisional Magistrate in appeal correcting the omission of the Court below to order it to be paid does not amount to an enhancement of the sentence.

We disagree with the decision in *Queen-Empress* v. *Tangavelu Chetti*(2).

1905. *October* 16, 17. **I. L. R. 29 Mad. 190.**

Before Mr. Justice Boddam and Mr. Justice Moore.

MUTHIAH CHETTI AND OTHERS [ACCUSED-APPELLANTS], PETITIONERS, *v.* EMPEROR, RESPONDENT.†

Criminal Procedure Code—Act V of 1898, s. 106—Appellate Court cannot bind over to keep peace when Lower Court not one of the class referred to in the section, and no breach of the peace committed.

An accused person cannot be bound over to keep the peace under section 106 of the Code of Criminal Procedure unless he is convicted of an offence of which a breach of the peace is a necessary ingredient and unless it is found that a breach of the peace has actually occurred.

An Appellate Court cannot exercise the power under the section when the accused has not been convicted by a Court such as is referred to in the section.

THE petitioners in this case were charged with several others, in all numbering 100, with having demolished the roof of a shed belonging to P. W. 13. They were tried before the Second-class Magistrate of Tiruppattur, and their defence was that the land was the property of the first accused and that they had a right to demolish the shed. The Sub-Magistrate convicted the accused of offences under sections 147 and 426 of the Indian Penal Code and passed sentences of fines on them. He found that no force or violence had been used to any person.

On appeal by the petitioners, the conviction under section 426 was set aside and the conviction under section 147 was altered to one under section 143. The sentences were confirmed, and in addition, the first accused was bound over under section 106 of the Code of Criminal Procedure to keep the peace for one year in two sureties of Rs. 500 each, and the rest in two sureties of Rs. 50 each.

The accused preferred this criminal revision petition.

Sir *V. Bhashyam Ayyangar* for first and second petitioners.

Mr. *M. A. Thirunarayana Chariar*, *V. Krishnaswami Ayyar* and *S. Srinivasa Ayyangar* for petitioners Nos. 3 to 6.

The Public Prosecutor (Mr. *Powell*) in support of the conviction.

---

(1) I.L.R., 20 Calc., 687. (2) I.L.R., 22 Mad., 153.

† Criminal Revision Case No. 146 of 1905.

Digitized by Google

JUDGMENT.—The appellants have been convicted of being members of an unlawful assembly and have been fined under section 143, Indian Penal Code. They have also been bound over to keep the peace under section 106, Criminal Procedure Code.

We are clearly of opinion that the conviction was right. It is found that the appellants with others to the number of 100 armed with aruvals, sticks, etc., went to a piece of land claimed by the prosecutor with the object of taking possession of it and demolishing a building upon it and though no force or violence was used—that was because the prosecution party were overawed and did not come into conflict with them.

It is however contended, and we think rightly, that the accused in the circumstances of this case were improperly bound over to keep the peace under section 106, Criminal Procedure Code, inasmuch as[1] they were convicted by a Second-class Magistrate only and not before a Court such as is named in the section and (2) they have not been convicted of an offence involving a breach of the peace.

We think that the power given to an Appellate Court to make an order under this section is not an unlimited power to make such an order in any circumstances, but is to be taken as giving the Appellate Court power to do only that which the lower Court could and should have done, and therefore, that the power of the Court to pass such an order is confined to cases where the conviction has been by a Court named in the section and in circumstances required by the section.

It has been held that the words "involving a breach of the peace" in the section, require that a breach of the peace should be an ingredient of the offence proved, and that before the section can be put in force there must be a finding that a breach of the peace has occurred (see *Baidya Nath Majumdar* v. *Nibaran Chunder Gope*(1) and *Kannookaran Kunhamad and others* v. *Emperor*(2). As in this case there was no finding that a breach of the peace had been committed, and the offence for which the accused were convicted did not necessarily involve a breach of the peace and no breach of the peace was in fact committed, we set aside the order requiring the accused to give security for keeping the peace, and the bonds if already executed will be cancelled.

Except as above, we affirm the convictions and sentences.

1905. *December* 11. **I. L. R. 29 Mad. 192.**

Before Mr. Justice Boddam and Mr. Justice Moore.

EMPEROR *v.* RAMASAWMY RAJU.‡

Madras District Police Act XXIV of 1859, s. 44—Police constable not returning to duty after expiry of leave guilty of offence under.

A police constable, who, having obtained casual leave, does not return to duty on the expiry of such leave and stays away without obtaining fresh leave, is guilty under section 44 of Act XXIV of 1859 of the offence of 'ceasing to perform the duties of his office without leave.'

THE facts necessary for this report are set out in the judgment.

The Public Prosecutor (Mr. *Powell*) for appellant.

---

(1) I.L.R., 30 Calc., 93. (2) I.L.R., 26 Mad., 469.

‡ Criminal Appeal No. 298 of 1905.

Digitized by Google

JUDGMENT.—We think the order of acquittal in this case must be set aside.

The accused, a police constable, was charged under section 44 of Act XXIV of 1859 with "ceasing to perform the duties of his office without leave." It appears that he applied for leave which was refused. He then obtained three days' casual leave, and whilst on such leave again applied for long leave which was again refused. He did not however return to duty at the expiry of his casual leave but stayed away without leave. Having stayed away from duty for over one month sanction was granted for his prosecution under the above section, and the Stationary Sub-Magistrate of Madura Town tried, convicted, and sentenced him to a fine of Rs. 12 or in default one week's simple imprisonment. On appeal the Sub-Divisional First-class Magistrate set aside the conviction and acquitted him, holding that the facts proved did not constitute the offence of "ceasing to perform the duties of his office without leave" inasmuch as he was on casual leave and merely overstayed his leave.

We think that is wrong. We are of opinion that, if a police constable is granted casual leave for a limited period and does not at the end of that period resume his duties as a police constable, he withdraws himself from his duties and "ceases to perform the duties of his office without leave" within the meaning of the section.

The intention of the section is to render police constables liable to punishment for such neglect or breaches of duty as are not punishable under section 10 of the Act, such as desertion: *Prima facie*, a constable absent without leave is guilty of "ceasing to perform his duty." The fact that he has been permitted to be absent on casual leave for a time immediately anterior to his absenting himself from duty can make no difference in his offence At the expiry of his casual leave he should, presumably, be on duty, and his own omission to return to duty cannot make his conduct less an offence than if he had returned to duty and then ceased to perform his duty.

We therefore set aside the acquittal of the First-class Sub-Divisional Magistrate, and restore and confirm the conviction and sentence of the Stationary Subordinate Magistrate.

1905. *September* 8. **I. L. R. 29 Mad. 236.**

Before Mr. Justice Sankaran Nair

RANGACHARLU AND ANOTHER (ACCUSED), PETITIONERS, *v.* EMPEROR.*

Criminal Procedure Code—Act V of 1898, s. 421 Summary rejection of appeal.

Where a petition of appeal signed by a pleader is presented to a Magistrate by the party in person, the appeal cannot be dismissed without giving the pleader a reasonable opportunity to appear.

Where the conviction is based on the evidence of witnesses whose credibility is impeached by the accused on reasonable grounds. the appeal should not be summarily rejected under section 421 of the Code of Criminal Procedure without sending for the records.

The facts necessary for this report are set out in the judgment.

Dr. *Swaminadhan* for petitioners.

The Public Prosecutor (Mr. *E. B. Powell.*) opposed the petition.

---

* Criminal Revision Case No. 105 of 1905.

Digitized by Google

JUDGMENT.—The memorandum of appeal to the lower Court is signed by a pleader; it was presented to the Magistrate who was in camp, by the appellant in person, on the 13th December 1904 and was summarily rejected at once without giving a reasonable opportunity to the pleader to appear.

The Magistrate was wrong in thus rejecting the memorandum. Nor does the case appear to be one in which the appeal ought to have been summarily rejected without sending for the records. The conviction is based on the evidence of witnesses who are no longer members of the company and are alleged by the accused to have been dismissed by them. Their evidence ought to have been read by the Magistrate or he should have heard the pleader before dismissing the appeal.

I accordingly set aside the order of the Magistrate, under section 421 of the Criminal Procedure Code, direct the First-class Magistrate of Masulipatam Sub-division to restore the case to his file and dispose of it according to law.

1905. *October* 17. **I. L. R. 29 Mad. 237.**

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice.

KADER BATCHA AND OTHERS (FIRST PARTY), PETITIONERS, *v.* KADER BATCHA ROWTHAN AND OTHERS (SECOND PARTY), COUNTER-PETITIONERS.†

Criminal Procedure Code Act V of 1898, s. 147—Dispute as to right to use a mosque within the section—Charter Act, s. 15.

An order under section 147 of the Code of Criminal Procedure, declaring possession to be with a certain person is illegal when there has been no enquiry as to the party in possession and will be set aside under section 15 of the Charter Act.

A dispute as to the right to use a mosque between persons claiming to be entitled to officiate as Kazi therein is a dispute coming within section 147 of the Code of Criminal Procedure.

THE Second-class Magistrate of Tiruppattur, acting on certain petitions presented to him by persons interested in the mosque at Tiruppattur, and on a police report and being satisfied that a breach of the peace was likely to occur from the attempts made by one Peria Sevvai to introduce two other persons to officiate for him as Kazi in the mosque, referred the matter to the Sub-Divisional Magistrate of Ramnad. The Sub-Divisional Magistrate issued notice under section 147 of the Code of Criminal Procedure, to the parties to appear and file written statements and produce evidence as to their respective claims to the right of appointing persons to officiate in the mosque. The parties accordingly filed statements and adduced evidence but there was no inquiry as to who was in possession of the mosque. The Sub-divisional Magistrate passed orders, the operative portion of which was as follows:—

"I find for the counter-petitioners' party declaring the mosque to be in their possession and direct the petitioners to cease from a course which is likely to engender strife until they have established their claim as indicated above."

The petitioners preferred this criminal miscellaneous petition.

K. N. Ayya for petitioners.

---

† Criminal Miscellaneous Petition No. 87 of 1905.

Digitized by Google

Messrs. *Mohamed Ibrahim Sahib* and *Mohamed Ismail Sahib* for counter-petitioners Nos. 2 to 5.

ORDER.—No doubt there was no enquiry in this case as to who was in possession of the mosque. The order therefore in so for as it declares possession to be with the second party cannot be maintained and the vakil who represents that party concedes this. As to the real point in question it is clear that a dispute as to a right to use a mosque by persons claiming to be entitled to officiate as Kazis therein is a dispute coming within section 147 of the Code of Criminal Procedure and *Muhammad Musaliar* v. *Kunji Chek Musaliar*(1), so far as it goes confirms the above view. The order will therefore be modified by directing that Ibrahim and Kather Ibrahim shall not be introduced into the mosque to officiate therein, by the five individuals mentioned in the Magistrate's order as forming party No. I, until the decision of a competent Civil Court recognizing the alleged right is obtained by them.

1905. *November* 10. **I. L. R. 29 Mad. 331.**

Before Mr. Justice Benson and Mr. Justice Moore.

RUNGA AYYAR *v.* EMPEROR.*

Criminal Procedure Code—Act V of 1898, s. 476—Power to direct proceedings conferred on Court and not on Magistrate trying—Dismissal of complaint without adjudication no bar to proceedings under.

The power to direct a prosecution under section 476 of the Code of Criminal Procedure is conferred on the Court and not on the individual Magistrate who tried the case. Such power is not ousted by the dismissal, without adjudication, of a complaint by the party in respect of the same offence under a sanction previously given by the Court.

THE petitioner was a witness for the prosecution in Criminal Case No. 81 of 1903 on the file of the First-Class Magistrate of the Calicut Division. The case was tried by the Deputy Magistrate then in charge, who discharged the accused and granted sanction for the prosecution of the petitioner and others for perjury. The accused who obtained the order granting sanction presented an unstamped complaint which was dismissed.

The Head Assistant Magistrate, who succeeded in charge of the Division, directed the prosecution of the petitioner and others under section 476 of the Code of Criminal Procedure.

Against the order of the Head Assistant Magistrate, the petitioner presented this revision petition.

V. Krishnaswami Ayyar and *M. R. Sankara Ayyar* for the petitioner.

The Public Prosecutor Mr. *E. B. Powell* opposed the petition.

ORDER.—We are clearly of opinion that the Court of the Assistant First-class Magistrate in charge of Calicut Division had jurisdiction under section 476 of the Criminal Procedure Code to direct the prosecution, though the Magistrate who made the order under section 476 was not the same Magistrate who tried the case. The power is given to the Court, not to the individual Magistrate. Nor does the fact that the complaint was rejected as not properly stamped in any way bar the jurisdiction of the Court. There was

(1) I.L.R., 11 Mad., 323.

* Criminal Revision Case No. 372 of 1905.

Digitized by Google

no adjudication on the matter. It was not even necessary for the Court to have read the complaint before rejecting it as not properly stamped.

As the Court of the Assistant First-class Magistrate in charge of Calicut Division had jurisdiction, we have no power to interfere with his order. We may say that we entirely agree with his opinion that it is to be regretted that the Court did not originally deal with the matter under section 476 of the Criminal Procedure Code instead of merely giving sanction to prosecute. We dismiss the petition.

1906. *February* 7. **I. L. R. 29 Mad. 372.**

Before Sir Arnold White, Chief Justice.

EMPEROR *v.* CHINNAPAYAN §

Criminal Procedure Code—Act V of 1898, ss. 243, 252—Trial of a warrant case as a summons case not a mere irregularity.

Where a Magistrate in trying a warrant case does not adopt the course prescribed by section 252 of the Code of Criminal Procedure, but convicts the accused on his own admission without taking evidence and without framing a formal charge, such procedure is not a mere irregularity and the conviction will be set aside.

THE facts necessary for this report are fully set out in the letter of referenee which is as follows :—

One Cinnapian of Cuddalore New Town was charged by the Station House Officer, Pudupalaiyam town, for unlicensed manufacture and sale of opium under section 9 (*b*) and (*f*) of the Opium Act No. I of 1878. The Stationary Sub-Magistrate, Cuddalore, before whom the charge sheet was laid, did not record any evidence in support of the charge but asked the accused to plead to the charge, convicted him on his own plea and sentenced him on 18th October 1905 to suffer two months' simple imprisonment in Calendar Case No. 1402 of 1905 on his file. An offence under section 9 of Opium Act is a warrant case, whereas the Sub-Magistrate tried it as a summons case. The accused appealed against his conviction to the Sub-Divisional Magistrate, Cuddalore Division, who while recognising that the Sub-Magistrate's procedure in trying the case as a summons case was irregular nevertheless held that the said irregularity had not occasioned a failure of justice. He accordingly confirmed the conviction and dismissed the appeal on 25th November 1905 in Criminal Appeal No. 24 of 1905 on his file. While the appellate judgment came up for perusal I noticed that the grounds of appeal had not been stated therein, and on calling for the records found that the appellant had denied his plea of guilty in the lower Court. In view of the ruling in *Mohideen Abdul Kadir* v. *Emperor*(1) I consider that the conviction should be set aside and a retrial ordered.

The Public Prosecutor appeared in support of the reference.

ORDER.—There is no doubt that this case ought to have been tried as a warrant case and not as a summons case. If it had been tried as a warrant case, it would have been the duty of the Magistrate under section 252 of the Code of Criminal Procedure to take such evidence as might be produced in support of the prosecution; and the accused could not have been called upon

§ Case Referred No. 4 of 1906 [Criminal Revision Case No. 17 of 1906].

[1] I.L.R., 27 Mad., 238.

Digitized by Google

to plead until after a charge had been framed and read and explained to him (section 255).

The Magistrate appears to have convicted the accused under section 243, on an admission made by the accused, without taking any evidence and without framing a formal charge. It seems to me this is something more than an irregularity, and that the accused may possibly have been prejudiced by the procedure adopted by the Magistrate.

The conviction must be set aside. As the accused has served his term of sentence, there is no object in ordering a new trial.

1906. *January* 31. **I. L. R. 29 Mad. 373.**

Before Mr. Justice Subrahmania Ayyar.

VYTHIANADA TAMBIRAN (PETITIONER), PETITIONER. *v.* MAYANDI CHETTY (COUNTER-PETITIONER), RESPONDENT.†

Criminal Procedure Code—Act V of 1898, s. 148 [3]--Award of costs may be made within a reasonable time after disposal of the main question.

An award of costs under section 148 [3] of the Code of Criminal Procedure should, in the usual course, be contemporaneous with the decision of the main question. Where, however, circumstances require the postponement of the award of costs, it should be made within a reasonable time after the disposal of the principal subject of the proceeding, in the presence of both parties.

IN Miscellaneous Case No. 33 of 1905, the Head Assistant Magistrate of Chingleput passed order under section 145 of the Code of Criminal Procedure declaring the counter-petitioner to be in possession of the disputed lands. This order was passed on the 30th June 1905, and on the 3rd July 1905, the counter-petitioner applied for the award of his costs. The petitioner objected and the Magistrate, after hearing both parties, passed an order on the 7th July 1905 awarding costs to the counter-petitioner under section 148 of the Code of Criminal Procedure. Petitioner moved the High Court to revise the order under sections 435 and 439 of the Code of Criminal Procedure.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the petitioner.

P. R. Sundara Ayyar for respondent.

ORDER.—The facts of the case are these: The Magistrate passed the order under section 145 of the Criminal Procedure Code as to possession in favour of the counter-petitioner on the 30th June. On the 3rd July the counter-petitioner applied for costs. The petitioner accepted notice and objected to any order being passed in the matter. On the 7th idem the Magistrate passed the order now sought to be revised directing the petitioner to pay Rs. 250 as costs to the counter-petitioner. Mr. Ramchandra Ayyar contends that the order was passed without jurisdiction as it was not passed at the time the matter of possession was decided. I cannot accept the construction suggested by Mr. Ramchandra Ayyar that section 148 (3) which empowers a Magistrate to award costs in proceedings under chapter XII of the Code of Criminal Procedure permits him in a case like this to award costs only simultaneously with the decision as to possession. The word ' passing ' which follows the term ' Magistrate ' in the

†Criminal Revision Case No. 355 of 1905.

Digitized by Google

said provision, as I understand it, means no more than that the Magistrate who may award costs, is the officer holding the proceeding under the chapter or his successor entitled to discharge his functions in connection with the matter. Even if this would be going too far, and the right construction were that the award of costs should be made by the same Magistrate that deals with the main question in the proceeding, the order here cannot be held to be void or illegal in as such in fact was the case here. The view as to the section thus taken by me is not only not opposed to the cases of *Queen-Empress* v. *Tomijuddi*(1), *Giridhar Chatterjee* v. *Eradullah Naskar*(2), and *Binoda Sundari Chowdhurani* v. *Kali Kristo Pal Chowdhary*(3), to which my attention has been drawn but is more or less supported by them. It is scarcely necessary to add that though I hold the circumstance that the award of costs is not made at the very time the substantial question in the proceeding is disposed of, does not necessarily render the award invalid, I should not be understood as implying that the length of the interval is immaterial. In the usual course the award should almost invariably be contemporaneous with the decision as to the main question. A different course should be pursued only when the circumstances of the case really require the postponement of the disposal of the question of costs and no order in the matter should be passed except within a reasonable time after the disposal of the principal subject of the proceeding and in the presence of both the parties. Upon the facts of this case no objection on the score of long delay exists and in the view of the section I take, it is not open to me to go into the question as to whether the amount awarded is proper. I dismiss the petition.

1906. *May* 16. **I. L. R. 29 Mad. 375.**

Before Sir Arnold White, Chief Justice.

IN THE MATTER OF KUPPAMMALL (COMPLAINANT), PETITIONER.‡

Criminal Procedure Code—Act V of 1898, ss. 517–523 Sections not applicable where there was no trial and no evidence recorded.

When a person charged before the Magistrate with criminal breach of trust in respect of certain jewels died before trial and before any evidence was recorded and the alleged owner of the jewels, which were recovered by the Police from the pledgees and sent to the Magistrate along with the charge sheet, applied to be put in possession of them under sections 517 and 523 of the Code of Criminal Procedure after enquiry as to their ownership:

Held, that section 517 of the Code of Criminal Procedure did not apply to the case.

Held further, that as there was no evidence or finding about ownership, section 523 of the Code of Criminal Procedure did not apply and that the Magistrate was not bound to hold an inquiry simply to determine the ownership of the jewels.

THE facts necessary for this report are fully set out in the order of the Magistrate which is as follows:—

ORDER.—On the 9th April 1906 three charge sheets were put in by the Police of the C Division against one Munee Bai *alias* Munee Rao under section 406, Indian Penal Code, charging him with criminal breach of trust in respect of certain jewels borrowed by him from different persons and recovered by the Police, as the result of a complaint made by one of the persons concerned, from parties with whom they had been pledged. The jewels were sent to this Court with the charge sheets. As the accused was certified by the

[1] I.L.R., 24 Calc., 757. [2] I.L.R., 22 Calc., 385. [3] I.L.R., 22 Calc., 387.

‡ Criminal Revision Case No 239 of 1906.

Digitized by Google

Medical officer of the Penitentiary to be too unwell to attend Court on the 9th, the cases were adjourned to the 19th idem and the accused remanded to that date. He died in the Penitentiary on the 13th April 1906. The matter now engaging the attention of the Court is the disposal of the property connected with the charge sheets. The case is a peculiar one and enquiries in the Magistrate's Courts in Madras have failed to produce a precedent. The alleged owners of the property, who say that the deceased accused borrowed it from them, pray for an order for its restoration to them, while the persons, with whom the accused pledged the property are equally desirous that it should be returned to the possession from which it was recovered by the Police.

2. Chapter XLIII, Criminal Procedure Code, contains the law for the guidance of Magistrates in the disposal of property. The only two sections that need be considered now are 517 and 523. The former empowers a Court *on the conclusion of an enquiry or a trial* to make such order as it thinks fit for the disposal of any property brought before it in any way in connection with the subject of such enquiry or trial. It has been ruled in Bombay High Court Criminal Ruling No. 10, dated 16th March 1898, that an order under section 517 *cannot be made before the conclusion of the trial.* The object is to ensure that the Magistrate shall be in possession of all the facts of the case before disposing of the property.

3. In the case *In re Devidin Durgaprasad*(1) it is laid down that section 517 is the only section under which a Court can make an order for the disposal of property produced before it in the course of an enquiry or trial and if the Court finds that the matter does not come within section 517, the only legal order that can be passed is to restore the previous possession.

4. In this case, although the preliminary steps for a trial were taken, it cannot be said that the trial has been *concluded*, the real value of that word in that connection is "to make a final judgment or determination of." It is more correct to say that the trial has *abated*, that is, it has failed. I therefore hold that section 517, Criminal Procedure Code, does not apply to this matter.

5. The other section relating to the disposal of property by a Magistrate is section 523, Criminal Procedure Code. That gives a Magistrate power to make an order for the disposal of property seized by the Police under section 51, Criminal Procedure Code, or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence. Reading sections 517 and 523 together, it seems that when once property is sent on to a Magistrate with a charge sheet it is removed from the provisions of section 523 and we have already seen that the Magistrate must then act under section 517. This view is confirmed by the ruling *In re Ratanlal Rangildas*(2) "the scope of section 523 must be confined to property seized by the Police of their own motion in the exercise of the powers conferred on them by law, for instance, under sections 51, 54, 164 or 165, Criminal Procedure Code." We may therefore take it that section 528 does not apply to this case and it has already been held that section 517 does not. This being so, the remark *In re Ratanlal Rangildas*[2] must be borne in mind. "These "cases being, as I have pointed out, not of the classes contemplated by sec-"tions 523 and 517 and there being, therefore, no provision of the law autho-"rising the Magistrate to depart from the general rule that property taken "under the authority of the law for a particular purpose should, on the fulfil-ment of that purpose, go back to the custody whence it was taken . . . ."

(1) I.L.R., 22 Bom., 844. (2) I.L.R., 17 Bom., 748 at p. 755.

Digitized by Google

6. The particular purpose for which the Police seized this property was to secure the punishment of the person who had committed an offence in connection with it and not in order that it should be restored to its owner.

7. The principal function of a Criminal Court is to punish offenders. It has other duties of secondary importance to perform. One of them is to pass orders as to the disposal of property produced before it in connection with a trial. It does not appear that it is authorised to usurp the functions of a Civil Court and convert the trial of an accused person into an enquiry in regard to property.

8. I have heard Mr. S. Guruswami Chetti on behalf of one of the "owners" and I have considered carefully his contentions but they do not induce me to depart from the conclusions recorded above. It is true that both sections 517 and 523 have been enlarged since the date of the Bombay ruling quoted, but I do not find that the amendments render in any way inoperative the application of those rulings to the sections as they now stand.

9. In the result I hold that there is no authority for this Court to enter into a long and contested enquiry to enable it to arrive at a decision as to how the property before the Court should be disposed of. I therefore direct that the various articles of jewellery and the note-books produced by the Police in connection with the three charge sheets referred to, be returned to the parties from whose possession respectively they were taken, subject to a written undertaking by each person so receiving any article or articles to produce the particular and identical article or articles received by him before the Civil Court when called upon to do so; and I also direct that this order shall not take effect for one month from this date to enable the alleged owners of the property to apply to the High Court for the revision of this order and for the issue of such further orders as may be just under section 520, Criminal Procedure Code, should they wish to do so.

S. Guruswami Chetti for the petitioner.

ORDER.—I think the Magistrate was right. It was conceded by the vakil for the petitioner that the provisions of section 517, Criminal Procedure Code, did not apply. His contention was that he was entitled to an order under section 523. It seems to me that on the facts of the present case, section 523 has no application. There is no finding, and there is nothing to show, that the property in question belongs to the petitioner. As I read the section, there is no obligation on the Magistrate to hold an enquiry simply for the purpose of deciding whether the property claimed is the property of the petitioner.

The criminal revision case and the criminal miscellaneous petition are dismissed.

1906. *October* 24. **I. L. R. 29 Mad. 517.**

Before Mr. Justice Benson and Mr. Justice Moore.

IN THE MATTER OF PONNUSAMI AND ANOTHER ACCUSED.*

Criminal Procedure Code Act V of 1898, s. 4 (*o*), and The Cattle Trespass Act I of 1871, ss. 20, 22—Appeal lies against order made under ss. 22 of the Cattle Trespass Act.

By section 4 [*o*] of the Code of Criminal Procedure, the word 'offence' includes an act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act; and

* Case Referred No. 168 of 1901 [Criminal Revision Case No. 381 of 1901].

Digitized by Google

a person against whom an order under section 22 of the Cattle Trespass Act is made is a "person convicted on a trial" and is entitled to appeal under section 407 of the Code of Criminal Procedure.

THE facts of this case are set out in the Letter of Reference from the District Magistrate of South Arcot which was as follows :—

The entertainment of an appeal against an order passed under section 22 of the Cattle Trespass Act appears to be illegal under the High Court's Proceedings, No. 2113, dated 27th November 1879, printed at pages 676 and 677 of Weir's 'Criminal Rulings' (3rd edition), and I therefore recommend that the Deputy Magistrate's order may be set aside.

The Deputy Magistrate explains that he entertained the appeal under the impression that the award of compensation by the Sub-Magistrate was subject to appeal under section 250, Criminal Procedure Code, and that he was not aware of the above ruling of the High Court.

ORDER.—The District Magistrate has overlooked the change that has been made in the definition of an 'offence' since the ruling of the High Court to which he refers was made. By section 4 (*o*) of the Criminal Procedure Code as now revised the word 'offence' includes an act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act. It follows that a person against whom an order under section 22 of the Cattle Trespass Act is made is a "person convicted on a trial." In the present case the accused were "convicted on a trial" by a Magistrate of the third class.

An appeal against that conviction therefore lay under section 407, Criminal Procedure Code, and there is no ground for our interference.

We may add that the Deputy Magistrate was wrong in supposing that he was acting, or had any jurisdiction, under section 250, Criminal Procedure Code. That section applies to a case in which compensation is awarded to an accused person, because a frivolous complaint has been made against him. Here compensation was awarded not to the accused but to the complainant, and it was awarded under section 22 of the Cattle Trespass Act, not under section 250, Criminal Procedure Code.

We may also point out to the District Magistrate that in a reference of this kind the essential facts should be briefly stated in the Letter of Reference instead of being left to be gathered by the High Court from a perusal of the record.

1906. *April* 4, 11. **I. L. R. 29 Mad. 558.**

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

THOMAS (PRISONER), APPELLANT, *v.* EMPEROR, RESPONDENT.*

Criminal Procedure Code Act V of 1898, ss. 222, 234—Criminal breach of trust—Joinder in one trial of charges for two distinct items with another for a gross sum is not illegal—Construction of statute.

Under section 222 of the Code of Criminal Procedure a charge of criminal breach of trust in respect of a gross sum, without specifying the items, is a charge for one offence within the meaning of section 234.

Section 222 of the Code of Criminal Procedure does not apply only to cases where there is a general deficiency and the prosecution is unable to specify the particular items of the deficiency, but also to cases where the items may be, but are not, specified.

---

* Criminal Appeal No. 8 of 1906.

Digitized by Google

The joinder in one trial of charges of criminal breach of trust in respect of two distinct items with a charge in respect of a gross sum [the items constituting which may be but are not specified] is a joinder of only three charges, and is not bad as contravening the provisions of section 234 of the Code of Criminal Procedure.

"The essence of a Code is to be exhaustive on the matter in respect of which it declares the law and it is not the province of Judge to disregard or go outside the enactment according to its true construction."

Subrahmania Ayyar v. King-Emperor, [I.L.R., 25 Mad., 61], distinguished.

IN this case the accused was tried on charges of criminal breach of trust in respect of two cheques for Rs. 18 and 54 and also on another charge in respect of a sum of Rs. 60 made up of three distinct items. The charge last-mentioned, however, was in respect of the gross sum of Rs. 60 and did not specify the items of which it was composed.

The accused was convicted on the first two charges and acquitted on the third.

On appeal to the High Court by the accused it was contended that the trial was in fact on five distinct charges, as the last charge must be treated as a charge of three distinct offences and that the trial was accordingly in contravention of section 234 of the Code of Criminal Procedure.

Mr. *A. S. Cowdell* for appellant.

The Public Prosecutor for respondent.

JUDGMENT.—In this case the appellant was the head clerk and cashier in the firm of Rungiah Gowndan & Co. He has been convicted of criminal breach of trust by a servant under section 408 of the Indian Penal Code, in respect of two cheques for Rs. 18 and Rs. 54, respectively. He has been acquitted on a similar charge with respect to a sum of Rs. 60. This charge, as at first framed, was in respect of Rs. 611-11-0 and the items said to have been comprised in that sum numbered some 15 or 20 small sums. At the trial this charge was amended by reducing the amount to Rs. 60, which is the total of three items which, though not specified in the charge, might have been specified, and in respect of which separate evidence was, in fact, given. This amendment of the charge simplified it in the interest of the accused and it was clearly legal with reference to section 227, Criminal Procedure Code.

But the chief point taken in appeal is that as the sum of Rs. 60 in the third charge, as amended, was, in fact, made up of three separate items which could have been specified and which might have each formed the subject of a separate charge, the accused was really called on to defend himself against five charges in all (including the charges in respect of the two cheques), and that the trial was therefore illegal with reference to section 234, Criminal Procedure Code, and the decision of the Privy Council in the case of *Subrahmania Ayyar* v. *King-Emperor*(1). The case relied on has no application, since it did not relate to an offence of criminal breach of trust for which section 222, Criminal Procedure Code, makes a special provision which is in the nature of an exception to the general rule. The general rule is that stated in section 233 of the Criminal Procedure Code, viz., that "for every distinct offence of which a person is accused there shall be a separate charge and every such charge shall be tried separately," except in certain cases. One of these cases is that stated in section 234 which allows three separate offences of the same kind committed within the space of twelve months to be charged and tried at one trial, section 222 makes, in effect, a further extension

[1] I.L.R., 25 Mad., 61.

Digitized by Google

of this rule by enacting that "when an accused person is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed without specifying particular items on exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234, provided that the time included between the first and last of such dates shall not exceed one year." In the present case the third charge as amended, and even as it originally stood, must, therefore, be deemed to be a charge of one offence only, and section 234 allows three offences of the same kind to be tried together, provided all were committed within the space of twelve months from first to last. In the present case the two offences in respect of the two cheques and the offence in respect of the sum of Rs. 60 were all committed within that space of time, and the trial for all three offences together was therefore legal We cannot accede to the argument of the learned counsel for the appellant that section 222 is only intended to apply to cases where there is a general deficiency in an account and the prosecution is unable to specify the particular items of the deficiency. Had the Legislature intended to provide for such cases only, it could have found apt words in which to express the intention. The words used do not contain any such limitation and we are not justified in reading into the section a limitation which its language will not support. As observed by the Privy Council in a recent case "The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction" *Gokal Mandar* v. *Padmanund Singh*(1)). We may add that the accused is not in a worse, but is in a better, position when the items can be, and are, specified, rather than when they cannot be, or are not, specified. The view that we take is supported by the decisions of the High Courts of both Allahabad and Calcutta (*Emperor* v. *Gulzari Lal* (2), *Emperor* v. *Ishtiaq Ahmad*(3), and *Samiruddin Sarkar* v. *Nibaran Chandra Ghose*(4)) and we are not aware that a contrary view has been taken by any of the High Courts.

The trial was therefore not illegal by reason of the charges on which the accused was tried. On the merits we are satisfied that the accused was rightly convicted in respect of the two cheques which formed the subject of the first and second charges.

We dismiss the appeal.

1906. *July* 16, 25, 30. **I. L. R. 29 Mad. 561.**

Before Mr. Justice Davies and Mr. Justice Moore.

SREEMAN KUMARA TIRUMALRAJA BAHADUR, RAJAH OF KARVETNAGAR, PETITIONER, *v.* SOWCAR LODD GOVIND DOSS KRISHNA DOSS, RESPONDENT *

Criminal Procedure Code Act V of 1898. s. 145—Enquiry to be held before issuing preliminary order under—Jurisdiction of Magistrate—Failure of jurisdiction where Magistrate refuses to receive evidence which party is entitled to adduce under s. 145 [5].

(1) L.R., 29 I.A., 196. (2) I.L.R., 24 All., 254. (3) I.L.R., 27 All., 69.
(4) I.L.R., 31 Calc., 928 at p. 931. * Criminal Revision Case No. 209 of 1906.

Digitized by Google

In order that a Magistrate may have jurisdiction to act under section 145 of the Code of Criminal Procedure, he must be satisfied from a Police report, or other information, that a dispute likely to cause a breach of the peace exists concerning any land, etc. Where there is no Police report the statement of interested parties ought to be received with great caution and ought not to be acted upon unless they are corroborated by the testimony of less interested persons. The opposite party also, ought to be given an opportunity of cross—examining the party making such statements before the Magistrate takes any action on them.

Under section 145 of the Code of Criminal Procedure, a party who is required by a preliminary order to attend at the Magistrate's Court is entitled to show that no dispute likely to cause a breach of the peace exists or had existed, and it is not open to such Magistrate to refuse to receive such evidence when tendered. Where the Magistrate refuses to receive such evidence, his order will be set aside as having been passed without jurisdiction.

Per DAVIES, J.—A Magistrate acts *ultra vires* in clubbing together disputes relating to a large number of villages and treating them as one. Each village must stand on its own footing and the Magistrate should satisfy himself that a dispute existed in respect of all the villages. He should ascertain, as regards each village, which party was in possession at the date of the order and confirm that possession.

The object of Chapter XIV of the Code of Criminal Procedure being to procure prompt action to avert breaches of the peace, the Legislature could not have contemplated under that chapter wholesale proceedings in regard to a large number of villages which, if the procedure above stated be adopted, would entail a prolonged enquiry.

THE facts necessary for this report are fully set out in the order of the lower Court, the material portions of which are as follows:—

" The estate of Karvetnagar was until lately under the management of the Court of Wards, who handed it back to the Rajah of the Karvetnagar on 27th September 1905. While doing so, they restored possession of the Narayanavanam Taluk to the petitioner who was the usufructuary mortgagee. The Rajah immediately issued a notice to the ryots that he had come into possession and this has caused unrest. Hence the application.

" The facts are very clearly stated by my predecessor in his order of 9th March 1906, and I here embody it with this order.

"The Narayavanam Taluk was mortgaged with possession to Dewan Bahadur Lodd Kristna Doss Bala Mukund Doss (father of the petitioner on July 20, 1878, and was in possession of the usufructuary mortgagees subsequent to that date until management was assumed by the Court of Wards under Act IV of 1899. On the 13th June 1905 the incapacitated proprietor (the father of the counter-petitioner) died and the Court of Wards having decided to relinquish the superintendence and managements of the estate, restored the possession of the Narayanavanam Taluk to the usufructuary mortgagee on the 27th September 1905.

" It appears from the affidavit of R. Subramania Ayyar, the Deputy Tahsildar of the mortgagee in possession, that on the very day that possession was given to the morgagee the counterpetitioner issued notices to the ryots and village officers to the effect that possession of the taluk had *passed* to him and not that rents were to be paid and accounts rendered to him alone and not to the mortgagee.

" On this being brought to the notice of the Regulation Collector, that officer caused a notice to be promulgated in the villages by beat of drum informing the ryots and village officers of the true facts.

" The records of this case also show that a copy of the notice was obtained and supplied to the Collector and District Magistrate who communicated with the counter-petitioner in the hope of inducing him to recall the notice to the ryots and refrain from action that appeared as illegal, as it was ill advised and was likely to lead to a disturbance of the public tranquillity.

Digitized by Google

"The affidavit of the Deputy Tahsildar of petitioner shows that the Karvetnagar Rajah without paying the least attention to the disinterested advice given him by the Chief Magistrate of the District, has made further determined efforts to gain possession of the taluk by force instead of through the proper Courts. He has opened a Taluk Office of his own in the taluk and is employing every means to induce the ryots and village officers to attorn to him.

"The action of the counter-petitioner, even if he *bonâ fide* believes that possession "passed" to him on the surrender of management by the Court of Wards, cannot but lead to breaches of the peace and disturbances throughout the taluk, and paragraphs 19 to 25 of the Deputy Tahsildar's affidavit recount what I must consider are only the mutterings of the coming storms.

* * * *

"Being satisfied then that a dispute likely to cause a breach of the peace exists regarding the possession of the Narayanavanam Taluk of the Karvetnagar Zamindari which is within the local limits of my jurisdiction, I make this order in writing in which I have stated above the grounds of my being so satisfied and I hereby require the parties concerned in the dispute to attend this Court in person or by pleaders within the next 10 (ten) days and to put in written statements of their respective claims as respects the fact of *actual possession* of the subject of dispute.

"The two special points on which the enquiry was to proceed were these;—(1) is there any likelihood of a breach of peace; (2) in whom does the actual possession vest.

* * * *

"It is for these reasons that I declined to take oral evidence to the effect that no breach of the peace has taken place or was to be apprehended. It is evident that relations are even now strained to the point of breaking.

* * * *

"Next it is argued that the Raja can show that whole villages have entirely attorned to him and that such partial possession should be declared to be with him. I see no reason for splitting up the case in this way. The question is, what is to be the unit? In this case, it has been taken to be the taluk. The office is administering the Taluk as a whole and not merely a bundle of unconnected villages in it. Would it be possible if the dispute were about a village to say that the dry lands were in possession of one party and the wet of another, or that of his wet lands certain survey numbers were possessed by one party and certain others by the other? or that a sub-division of a field was in possession of A and the rest of B? where can the line be drawn? I am clearly of opinion that as the dispute is about the Taluk the order should deal with the Taluk as a whole."

Against this order the petitioner preferred a Revision Petition.

The Hon. the Advocate-General (Mr. *J. E. P. Wallis*) and the Hon. Mr. *L. A. Govindaraghava Ayyar* for respondent.

The Acting Public Prosecutor [Mr. *C. Sankaran Nair*], *P. R. Sundara Ayyar* and *A. S. Balasubrahmania Ayyar* for respondent.

ORDER—MOORE, J.—In order that a Maaistrate may have jurisdiction to act under section 145. Criminal Procedure Code, he must be satisfied from

Digitized by Google

a Police report or other information that a dispute likely to cause a breach of the peace exists concerning any land, etc. It is therefore necessary to ascertain what information Mr. Pinhey, District Magistrate, North Arcot, had before him when he passed his order of the 9th March 1906, and Mr. Rice who succeeded him as District Magistrate, when he passed his final order in this matter on the 2nd April. From Mr. Pinhey's order it is clear that he had no Police report before him. He was District Magistrate. He believed that there was serious danger of riots breaking out all over a whole taluk in one of the zamindaris in his district, and yet as far as can be ascertained from the record, he never referred the matter to the District Superintendent of Police for enquiry and report, or obtained any information from that officer or any of his Subordinates in the Police before he jumped to the conclusion that there was a danger of riots all over a considerable tract of country. All that the District Magistrate had before him was a petition from a Deputy Tahsildar in the employment of Mr. Lodd Govinda Doss, the mortgagee who had taken over possession from the Court of Wards. Mr. Lodd Govinda Doss was, it is clear, most anxious that the District Magistrate should take action under the Criminal Procedure Code and decide that he was in possession. The facts being as stated it must be held that the District Magistrate should have received the Deputy Tahsildar's statements with great caution and should have declined to act on them unless they were corroborated by some less interested person. This official should also have been summoned before the District Magistrate and examined on oath, full opportunity being given to the Vakil of the Raja of Karvetnagar to cross-examine him more especially as to the statements that he makes in his petition as to the danger of riots breaking out in various villages in the taluk. Nothing of the sort, however, was done and Mr. Pinhey, considering that the action that had been taken by the Raja on the surrender of the management by the Court of Wards, could not but lead to breaches of the peace and disturbances throughout the taluk placed on record in his order of the 9th March 1906 that he was satisfied that a dispute likely to cause a breach of the peace existed, and directed the parties concerned in the dispute to attend at his court within ten days. Mr. Rice took the matter up and passed final orders on the 2nd April. He stated in his proceedings that the facts of the case had been clearly set out by his predecessor, and he accordingly embodied Mr. Pinhey's order of the 9th March in his proceedings. He then went on to add that as each party was claiming possession of the taluk and trying to collect rents and get leases executed to distrain, and generally to exercise acts of ownership, he was satisfied that a collision was inevitable sooner or later. The vakil for the Raja of Karvetnagar wanted to produce evidence to show that there was no danger of a breach of the peace. The District Magistrate, however, refused to receive any evidence. It is clear that in so refusing Mr. Rice acted contrary to law. Section 145, clause 5 of the Criminal Procedure Code, lays down that nothing in that section shall preclude any party required by a preliminary order to attend at the Magistrate's Court, as the Raja had been required, from showing that no dispute likely to cause a breach of the peace existed, or had existed, and it was consequently not open to the District Magistrate to refuse to receive the evidence tendered to him. I feel very doubtful if it could be held that the petition of the Deputy Tahsildar afforded information such as to give Mr. Pinhey jurisdiction to pass his order of March but however this may be, I have no hesitation in holding that Mr. Rice's subsequent refusal to receive evidence gives this Court no option but to declare that his order of April was passed without

Digitized by Google

jurisdiction and to direct that it be on that account set aside.

DAVIES, J.—I concur throughout with my learned colleague. I would go even further and hold that *ab initio* the District Magistrate acted *ultra vires* in clubbing together 230 alleged subjects of dispute and treating them as one. Each village stood on its own footing The Raja had possession of some and the mortgagee of others. Before the District Magistrate made his declaration that there was a dispute likely to lead to a breach of the peace, he should have found that that was so in respect of all the villages, but as Mr. Justice Moore has pointed out he had no materials for saying that such a dispute existed in respect to a single village.

Then, when he came to the question of possession he should have decided which party at the date of his order was in actual possession of this or that village and confirmed that possession. Here without taking any evidence on the point he has arbitrarily found that the mortgagee was in actual possession of all the villages, which, as a matter of fact, we understand he was not. This course would no doubt have entailed a prolonged enquiry a circumstance which itself indicates that the Legislature did not contemplate wholesale proceedings of this sort in cases under chapter XIV of the Code of Criminal Procedure, the object of which is to procure prompt action to avert breaches of the peace. Had the provisions of the Code been strictly followed the cases before us could not have been disposed of in so off hand a fashion.

1906. *July* 30. **I. L. R. 29 Mad. 567.**

Before Sir Arnold White, Chief Justice, & Mr. Justice, Subrahmania Ayyar.

NARAYANASWAMI NAIDU *v.* EMPEROR.§

Criminal Procedure Code—Act V of 1898, s. 562—Power conferred by section not confined to Courts of First Instance.

The power of passing orders under section 562 of the Code of Criminal Procedure is not confined to Courts of First Instance.

Emperor *v.* Birch, (I.L.R., 24 All., 306), approved.

THE facts necessary for this report are set out in the letter of reference which is as follows:—

"The appellant Narayanaswami Naidu, a youth of 21 years of age, appears to have been keeping a woman named Govindammal. On the 13th March 1906 he could not find her and on making enquiries seems to have been informed by some one that she was concealed in the house of one Chinnasami Pillai. Thereupon at 2 A. M. he entered Chinnasami Pillai's house, demanded his concubine, and raised such a disturbance that the police had to be summoned. The appellant was convicted after trial of offences under sections 447 and 352, Indian Penal Code, and sentenced to undergo rigorous imprisonment for two weeks. On appeal the Deputy Magistrate affirmed the conviction (he should more approximately have altered it to one under sections 448 and 352, Indian Penal Code), but remitting the sentence, in view of the trivial nature of the offence and the youth of the appellant, directed under section 562, Criminal Procedure Code, that he should enter into a bond for Rs. 50 with one surety for a like amount to be of good behaviour for six months.

§ Case Referred No. 38 of 1906 (Criminal Revision Case No. 185 of 1906).

Digitized by Google

The attention of the Deputy Magistrate was drawn to the fact that the power conferred by section 562, Criminal Procedure Code, can only be exercised by the Court before whom an offender is convicted by a Magistrate dealing with the matter in the manner provided by section 380. The Deputy Magistrate however relies on the ruling in *Emperor* v. *Birch*(1) in support of his procedure. With all deference to the learned Judge who gave that ruling, I respectfully submit that it is opposed to the plain wording of section 562 and to the intention of the Legislature. In the statement of objects and reasons against section 423 it is noted that the insertion of clause (*d*) is rendered necessary by the amendment of section 106.

As regards the merits too it seems doubtful if the offence is so trivial as the Deputy Magistrate thinks. The appellant had no justification for considering that the complainant Chinnasami Pillai was concealing his concubine; Chinnasami Pillai is a man of respectable character and to burst into his house at 2 A. M., and create an upoar is hardly a trivial matter. Further the appellant was also complicated in Criminal Appeal No. 55 of 1906 on the same Deputy Magistrate's file in respect of vexatious charge regarding this very matter and the Sub-Magistrate's order directing him to pay compensation was upheld.

The Acting Public Prosecutor in support of reference.

JUDGMENT.—We do not think it was the intention of the Legislature by the use of the words "Court before whom he is convicted" in section 562, Criminal Procedure Code, to limit the power of making orders under that section to the Court of First Instance. The proviso to the section appears to us inconsistent with the view that this was the intention of the Legislature.

We agree with the decision in *Emperor* v. *Birch*(1).

1906. *July* 9, 11, 18. **I. L. R. 29 Mad. 569.**

Before Sir Arnold White, Chief Justice.

MANAVALA CHETTY (ACCUSED), PETITIONER. *v.* EMPEROR, RESPONDENT.†

Penal Code—Act XLV of 1860, ss. 478, 480—Offence of using false trademark—No acquisition of the trademark in the sense used in the English Act necessary under s. 478 of the Indian Penal Code—Criminal Procedure Code, Act V of 1898, ss. 227, 233, 234—Joinder of more than three offences in one trial illegal—Trial not validated by striking out charge to cure such defect after case closed, though before judgment.

A person selling soap not manufactured by P, in a box which bears the name of P as a soap manufacturer, uses a false trademark and is guilty of an offence under section 480 of the Indian Penal Code. It is not necessary to constitute an offence under section 478 that a trademark in the sense in which the word is used in the English Patents, Designs and Trademarks Acts should have been acquired: and the mark is none the less a false mark because it appeared on the box and not on the goods.

Under sections 233 and 234 of the Code of Criminal Procedure, a person cannot be charged with more than three offences at one trial; and the defect cannot be cured, after the accused had pleaded and the case had closed, by amending the charges so as to reduce it to three offences. Although the words in section 227 of the Code of Criminal Procedure are wide enough to warrant a Court in altering a charge by striking out one of the charges at any time before judgment, the section does not warrant the striking out of a charge for the purpose of curing an illegality already committed, and after the mischief which the Legislature intended to guard against had been done.

Subrahmania Ayyar v. King-Emperor, (I.L.R., 25 Mad., 61), referred to and explained.

---

(1) I.L.R., 24 All., 306.

† Criminal Revision Case No. 158 of 1906.

Digitized by Google

THE petitioner in this case was tried and convicted by the Chief Presidency Magistrate under section 482 of the Indian Penal Code for using a false trademark by selling soaps of German manufacture in boxes bearing the trademark of Messrs, A. & F. Pears & Co.

The charge originally included more than three offences, but when this was brought to the notice of the Magistrate at the argument after the trial was closed, the charge was amended so as to include only three offences. The portion of the judgment of the Magistrate dealing with this point was as follows :—

" On the facts deposed to by the prosecution witness this Court charged accused with offences under sections 417, 420 and 482, Indian Penal Code. In the course of argument it was brought to the Court's notice that the charge was defective as it transgressed the provisions of section 234, Criminal Procedure Code, having included more than three alleged offences committed within the space of twelve months. On March 9 accordingly the Court altered the charge under the provisions of section 227, Criminal Procedure Code, by striking out the offence alleged on August 12, 1905. This course was objected, by Mr. Cowdell, counsel for accused, and the case of *Subrahmania Ayyar* v. *King-Emperor*(1) quoted in support of his contention but the objection was overruled, as in my opinion, the case quoted did not apply to the circumstances of the present action. My reasons for this ruling need not, I think, be more than very briefly stated and they amount to this. In *Subrahmania Ayyar* v. *King-Emperor*(1)—the trial was proceeded with on an indictment contravening the provisions of section 234, Criminal Procedure Code. Judgment was pronounced and sentence passed ; on appeal the High Court of Madras treated the contravention of section 234 as mere irregularity under section 537, Criminal Procedure Code, and disposed of the case on other counts. This was held improper by the Privy Council, This Court, before argument, was closed and judgment pronounced, cured a defect in the charges which otherwise would have resulted in causing the very evil the Privy Council condemns. Section 227, Criminal Procedure Code, gives the Court power so to cure a defect at any time before judgment is pronounced. "

Petitioner preferred this criminal revision petition.

Mr. *T. Richmond* and Mr. *A. S. Cowdell* for the petitioner.

The Crown Prosecutor (Mr. *John Adam*) in support of the conviction.

JUDGMENT.—The first point raised on behalf of the petitioner in this case was, assuming the prosecution evidence to be true, that an offence under section 480 of the Indian Penal Code had not been made out. I am of opinion that if the petitioner sold to a customer soap which was not manufactured by Pears in a box upon which the name of Pears appeared as a maker of soap, he used a box with a mark thereon in a manner reasonably calculated to cause it to be believed that the soap contained in the box so marked was manufactured by Pears, and by so doing, he used a false trademark and was guilty of an offence under the section. The argument that it had not been shown that Pears had acquired a trademark, in the sense in which the word is used in the English Patents, Designs and Trademarks Acts, in the design which is printed on the box in which the soap was sold, is beside the point. Under section 478 of the Indian Penal Code, " Trademark " includes any trademark which is registered under the English Acts, but by the same section the term is expressly defined to mean a mark

(1) I.L.R., 25 Mad., 61.

Digitized by Google

used for denoting that goods are the manufacture or the merchandise of a particular person. In my opinion the mark is none the less a false mark because it appeared upon the box in which the goods were sold and not upon the goods themselves.

The second point raised on behalf of the petitioner was that the conviction was bad inasmuch as the petitioner had been charged with more than three offences in contravention of sections 233 and 234 of the Code of Criminal Procedure. In connection with this point the facts appear to be as follows:—

The petitioner was charged with an offence alleged to have been committed on August 12, 1905, and with three other offences alleged to have been committed on August 13, August 17 and September 30 of the same year. He was charged with these offences and he pleaded out guilty to all the charges. Evidence was adduced on behalf of the prosecution and on behalf of the defence, and the case was closed. In the course of the argument of counsel after the close of the case the attention of the Court was drawn to the fact that the petitioner had been charged with more than three offences. Thereupon the Magistrate purporting to act under section 227 of the Code struck out the charge relating to the offence alleged to have been committed on August 12. The petitioner's counsel objected to this being done. The Magistrate states in paragraph 8 of his judgment that, except for the purpose of the defence, he does not purpose to notice the evidence of the witnesses who spoke to the offence alleged to have been committed on August 12th. The Magistrate did not convict the prtitioner of any specific offence with reference to the dates specified in the charge but he convicted him, in general terms, of "an offence under section 482 of the Indian Penal Code."

I do not think it was open to the Magistrate at the stage of the proceedings when he struck out the charge to amend the charge so as to reduce the offences to three. Section 233, Criminal Procedure Code, lays down the general rule that for every distinct offence there must be a separate charge. Section 234 qualifies the general rule of providing that, in certain cases, an accused person may be charged with and tried at one trial for not more than three offences. If the prosecution seek to have the benefit of the exception which modifies the general rule, it is, of course, for them to show the case falls within the terms of the enactment which provides for the exception. In the present case the charge was not amended until after the petitioner had been charged with four offences and evidence had been adduced on both sides with reference to four offences. It may be that the words of section 227 are wide enough to warrant a Court in altering a charge by striking out one of the charges at any time before judgment; but it seems to me the section does not warrant the striking out of a charge for the purpose of curing an illegality which had already been committed. One of the subjects of the limitation contained in section 234 is to prevent the accused being embarrassed by a multiplicity of charges. I am unable to hold that a charge which is bad on the face of it can be cured by an amendment made at a stage of the proceedings when the mischief which the Legislature intended to guard against by the enactment which has been contravened, may already have been done.

The learned Magistrate was of opinion that the observations of Lord Halsbury in delivering the judgment of the Privy Council in *Subrahmania*

Digitized by Google

Ayyar v. *King-Emperor*(1) did not apply to this case, since in this case the defect in the charge was cured before judgment was pronounced. It seems to me that Lord Halshury's observations are applicable to the facts of this case.

With reference to the case of *Subrahmania Ayyar* v. *King-Emperor*(1) I may observe that the real point in that case was not—as seems sometimes, to be assumed whether the charging with and trying for more than three offences at one time could be regarded as an error, omission or irregularity within the meaning of section 537 but whether, under article 26 of the Letters Patent the Court had power to adopt the course which was taken in that case.

I am of opinion that the conviction in the present case was bad and must be set aside. I accordingly set it aside and order a new trial.

END.

(1) I.L.R. 25 Mad., 61.

Digitized by Google

Digitized by Google

THE
INDIAN LAW REPORTS
Bombay, Series Vol. 24
CRIMINAL CASES.

1899 *July* 12. I. L. R. 24 Bom. 75.

Before Mr. Justice Parsons and Mr. Justice Ranade.

IN RE KHIMJI JAIRAM.*

Municipality—Bombay City Municipal Act (Bombay Act III of 1888), Sec. 249—Notice to construct urinals in a particular place in the owner's premises—Illegality of such notice.

Accused was convicted and fined Rs. 50 for not complying with a notice issued by the Municipal Commissioner of Bombay under section 249 of Bombay Act III of 1888. The notice required him to construct a urinal of six compartments in the open space inside the entrance gateway to the Cloth Market from Champawady, and a water-closet in the corner of the entrance from 1st Ganeshwady near the fire-engine station.

Held, reversing the conviction and sentence, that the notice was *ultra vires*, inasmuch as it required the accused to construct urinals in a particular place in his premises.

(Note :—This case is Ref: 9 BOM. L. R. 667.)

APPLICATION under section 435 of the Code of Criminal Procedure (Act V of 1898).

The accused was the managing director of a cloth market (called the New Piece Goods Market) in Bombay.

On the 2nd December, 1898, the Municipal Commissioner of Bombay issued a notice to the accused under section 249(1) of the Bombay Municipal Act III of 1888.

The notice required the accused to construct a urinal of six compartments in the open space inside the entrance gateway to the cloth market from Champawady and a water-closet of four seats in the corner of the entrance from 1st Ganeshwady near the fire-engine station.

The accused was convicted and sentenced to pay a fine of Rs. 50 by J. S. Slater, Chief Presidency Magistrate, for not complying with the notice.

Against this conviction and sentence the accused applied to the High Court under its revisional jurisdiction, contending (*inter alia*) that section 249 of Bombay Act 111 of 1889 did not authorize the Municipal Commissioner to require the accused to erect urinals in a *particular* spot in the cloth market.

Spott for the applicant.

Crawford for the Municipality.

PER CURIAM:—The notice being admittedly *ultra vires* of section 249 of the Bombay Municipal Act, 1888, in as much as it requires the applicant to construct urinals in a particular place in his premises, the Court reverses the conviction and sentence, and orders the fine paid to be refunded.

---

* Criminal Revision, No. 109 of 1899.

(1) Section 249 of Bombay Act III of 1888 provides as follows :—Where it appears to the Commissioner that any premises are, or are intended to be used, as a market, ... the Commissioner may, by written notice, require the owner or occupier of the said premises to construct a sufficient number of water closets or latrines or privies and urinals for the separate use of each sex."

Digitized by Google

1899 *August* 23. I. L. R. 24 Bom. 125.

Before Mr. Justice Parsons and Mr. Justice Ranade.

IN RE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY *v.* HARI DWARKOJI.

HARI DWARKOJI, APPLICANT.*

Bombay City Municipal Act (Bom. Act III of 1888), Sec. 381—Low ground—Low-lying ground—Notice by Municipal Commissioner requiring owner of low-lying ground to fill it with sweet earth up to a certain level.

Under section 381 of the Bombay Municipal Act (Bom. Act III of 1888) the Municipal Commissioner for the City of Bombay issued a notice to the appellant as owner of certain low-lying ground. The notice stated that in the opinion of the Commissioner the ground accumulated water in the monsoon and caused nuisance to the tenants of two chawls situated on the premises. The owner was, therefore, required by the notice "to fill in the low-lying ground with sweet earth to the level of the road and slope it towards the new drain on the road side."

As the owner refused to comply with the notice, he was convicted and sentenced to pay a fine of Rs. 15 by the Presidency Magistrate under section 471 of the Municipal Act (Bombay Act III of 1888).

Held, reversing the conviction and sentence, that the notice was illegal. The words used in section 381 are "low ground," which is not the same as low-lying ground. And though the section gives power to the Commissioner to require the owner of low ground to cleanse and fill up the same, it does not permit him to issue an order that an indefinite extent of low-lying ground shall be filled up, much less that it shall be filled up to some particular level, or filled up with sweet earth, or that it shall be sloped in a particular direction.

APPLICATION under section 435 of the Code of Criminal Procedure (Act V of 1898).

The applicant was owner of a large area of low-lying ground at Dadar Road in Bombay.

On 8th February, 1899, the Municipal Commissioner of Bombay issued to the applicant a notice under section 381(1) of the City of Bombay Municipal Act (Bom. Act III of 1888).

The notice was in the following terms:—

"Whereas in my opinion the ground accumulates water in the monsoon and causes nuisance to the two chawls situated in your premises, now pursuant to the provisions of section 381 of the City of Bombay Municipal Act, 1888, I do hereby with the approval of the Standing Committee require you within one month from the service hereof *to fill in with sweet earth the low-lying ground to the level of the road and slope it towards the new drain, on the road side.* And if you fail to comply with this requisition, you will be liable to the penalty prescribed by section 471 of the said Act."

The applicant was prosecuted for not complying with this notice He pleaded that he was fazendar of the land, and had leased it to one Manekji Edu'ji for a term of 999 years at an annual rent of Rs. 275, and that the lessee ought to have been called upon to fill in the ground.

This contention was overruled, and the applicant was convicted and sentenced to pay a fine of Rs. 15 under section 471 of the Municipal Act (Bombay Act III of 1888) by W. R. Hamilton, Second Presidency Magistrate.

The accused moved the High Court under its Revisional Jurisdiction to set aside the conviction and sentence.

H O Coyaji, for applicant.

L. Crawford, for the Municipality.

PARSONS, J:—We have no materials before us upon which we can decide whether the applicant is or is not the owner of the ground in question. It is said

* Criminal Revision, No. 151 of 1899.

(1) Section 381 of Bombay Act III of 1888 provides as follows:—If, in the opinion of the Commissioner, any pool, ditch, tank, pond, well, quarry-hole, *low ground* or stagnant water is or is likely to become a nuisance, the Commissioner may, with the approval of the standing Committee by notice in writing, require the owner thereof to cleanse, fill up, drain off or remove the same or take such other order therewith as the Commissioner shall deem necessary.

Digitized by Google

that he has leased it to a third party for a term of 999 years renewable at the option of the latter for a further term of 999 years. There is, however, no proof of this lease, as no evidence was taken on this point by the Magistrate. If the lease is proved no doubt a question arises whether he is the "owner" within the meaning of section 381 of the City of Bombay Municipal Act, 1888; but it cannot arise until that point is proved. In the present case it is unnecessary for us to order further enquiry, because we are of opinion that the notice is not a legal one under the section. It is addressed to Hari Dwarkoji, "owner of the low-lying ground at Dadar Road," and after reciting that the ground accumulates water in the monsoon and causes nuisance to the tenants of the two chawls situated in his above mentioned premises, requires him within one month "to fill in with sweet earth the said low-lying ground to the level of the road and slope it towards the new drain on the road side."

The words used in section 381 are "low ground," which is not the same as low-lying ground, and though the section gives power to the Commissioner to require the owner of low ground to cleanse and fill up the same, it does not permit him to issue an order that an indefinite quantity of low-lying ground shall be filled up, much less that it shall be filled up to some particular level, or filled with sweet earth, or that it shall be sloped in a particular direction.

For this reason we reverse the conviction and sentence and acquit the applicant, and direct the fine if paid to be refunded. This will leave the Commissioner free to take such further steps, if any, as he may be advised in the matter and as may be legal.

1899. *October 9.* **I. L. R. 24 Bom. 287.**

Before Mr. Justice Ranade and Mr. Justice Crowe.

QUEEN-EMPRESS *v.* BAKU AND ANOTHER. *

Indian Penal Code (Act XLV of 1860), Secs. 108 A, 372—Disposing of a minor for immoral purposes—Abetment—Offence committed out of British India—Jurisdiction—Offence not triable except with the certificate of Political Agent or sanction of Government—Criminal Procedure Code (Act V of 1898), Sec. 188.

A minor girl under the age of sixteen years was taken by accused No. 1, under direction of the accused No. 2, from Sholapur to Tuljapur (in the Nizam's territory), and there dedicated to the goddess Amba, with intent or knowing it to be likely that the minor would be used for purposes of prostitution.

The District Magistrate of Sholapur convicted accused No. 1 of an offence under section 372 and accused No. 2 of abetment of the offence under sections 372 and 108 A of the Indian Penal Code, and sentenced them each to six months' rigorous imprisonment.

Held, that as the offence of the disposal of the minor took place out of British India, the Magistrate had no jurisdiction to try the offence, in the absence of a certificate of the political Agent or the sanction of the Local Government as required by section 188 of the Code of Criminal Procedure (Act V of 1898).

Held, also, that accused No. 2 was not guilty of abetment, and section 108A of the Indian Penal Code had no application to the present case.

Mere intention not followed by any act cannot constitute any offence, and an indirect preparation which does not amount to an act which amounts to a commencement of the offence does not constitute either a principal offence or an attempt or abetment of the same.

The intention of either of the accused while they were staying at Sholapur did not constitute any offence, and their removal with the girl to Tuljapur did not by itself constitute an abetment.

APPEAL by the Local Government from an order of acquittal passed by E. M. Pratt, Sessions Judge of Sholapur.

Piri was a girl under the age of sixteen years, and living under the care and protection of her grandmother Baku and her grandfather Tukaram.

---

* Criminal Appeal, No. 336 of 1899.

Digitized by Google

The charge against Baku was that she took the minor from Sholapur to Tuljapur, a town in the Nizam's territory, and there dedicated the girl to the temple of the goddess Amba, with intent or knowing it likely that the minor would be employed or used for purposes of prostitution. She was, therefore, charged with committing an offence under section 372 of the Indian Penal Code (Act XLV of 1860).

Tukaram was charged with abetment of the offence, in having directed Baku to dispose of the minor for an immoral purpose.

The District Magistrate of Sholapur found both the accused guilty of the offences charged, and convicted them under sections 372, and 372 and 108A of the Penal Code, 1860, respectively, and sentenced them each to six months' rigorous imprisonment.

On appeal the Sessions Judge reversed the convictions and sentences, holding that as the offence of disposal of the minor took place at Tuljapur out of British India, the District Magistrate had no jurisdiction to try the offence, in the absence of a certificate of the Political Agent or the sanction of the Local Government as required by section 188 of the Criminal Procedure Code (Act V of 1898). The Sessions Judge also held that the removal of the minor from Sholapur to Tuljapur was, at the most, a preparation for the commission of the offence, and as such did not constitute either the principal offence, or the abetment thereof He, therefore, acquitted the accused.

Against this order of acquittal the Local Government appealed.

Rao Bahadur *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

D. A. Khare for accused.

RANADE, J. :—This is an appeal by Government against the decision of the Sessions Judge of Sholapur, who reversed the conviction and sentence passed by the District Magistrate under section 372, and sections 372 and 109, on the accused Baku and Tukaram, respectively.

Baku was the grandmother, and Tukaram was the grandfather, of a minor girl, named Piri, under sixteen years of age, and under their care. The charge against Baku was that she took Piri from Sholapur to Tuljapur to dedicate her to the goddess Amba, with intent or knowing it to be likely that the girl would be employed or used for the purpose of prostitution, and Tukaram was charged with having directed Baku to do so, in consequence of which Piri was made an *aradhin murli*, who are intended to lead generally a life of prostitution. Both the accused were found guilty of the offences charged under section 372 and sections 372 and 109, and were sentenced to six months' rigorous imprisonment. In appeal, the Sessions Judge of Sholapur held that as the offence of the disposal of the minor took place at Tuljapur, where the dedication actually took place, and as Tuljapur was out of British India, the District Magistrate had no jurisdiction, in the absence of the certificate or sanction required under section 188, Criminal Procedure Code, 1898, to try the offence. The Sessions Judge was also of opinion that the removal of the minor from Sholapur to Tuljapur was, at the best, a preparation for the commission of the offence, and mere preparation was not indictable. He accordingly reversed the conviction and acquitted and discharged the accused.

The Government Pleader on behalf of Government contended (1) that the District Magistrate had jurisdiction to try the accused; (2) that the removal of the minor with the intention of disposing of her by dedication at Tuljapur was an offence triable in British India; (3) that as Tukaram was found to have insti-

Digitized by Google

gated the other accused in Sholapur to commit the offence, the District Magistrate had at least jurisdiction to try the offence of abetment committed by him in British India.

The points for consideration are—(1) whether the District Magistrate had jurisdiction to try both or either of the accused; (2) whether the offences charged were proved as against both or either of them. As regards the first point, it is clear that the actual dedication of the girl Piri took place at Tuljapur in the Nizam's territory, and the offence, if any, must be held to have taken place there. The Magistrate's charge, however, shows that he was of opinion that the offence of the disposal of the minor took place at Sholapur, where the intention to dedicate the girl was first formed. This, however, seems to be an erroneous view. In a Madras case—*Bapu* v. *The Queen*(1)—a tindal was entrusted with goods at Mangalore to be taken to Calicut. While on the way to the latter port, the tindal deviated from the journey, and took the goods to Goa, and sold the same there. He was tried at Mangalore, and convicted by the Sessions Judge, but the conviction was set aside on two grounds: (1) that though the intention and deviation took place on the high seas, that did not confer jurisdiction, as the conversion took place at Goa, where the offence must be held to have taken place; and (2) that for want of a certificate from the Political Agent, the trial and conviction were illegal. In *Queen-Empress* v. *Kathaperumal*(2) this earlier decision was followed in a case where the offence was committed in the French territories; even when the District Magistrate, who tried the case, was himself the Political Agent, who had to certify under section 188. The absence of a certificate was held to be a defect which could not be cured under section 532. Of course, where there is no Political Agent, a native Indian subject may be tried in British India for an offence committed beyond the limits of British India under the sanction of the Local Government—*Queen-Empress* v. *Daya Bhima*(3); *Queen-Empress* v *Sheik Abdool Rahiman*(4); *Dhadphale* v. *Gurav*(5); *Imperatrix* v. *Abdul Husen Abdul Kadir*(6). In *Empress of India* v. *Sarmukh Singh*(7) the prisoner was a native Indian subject, and a soldier subject to the articles of war, and he was tried for murder committed at Cyprus. The circumstances of the case were peculiar, and there was admittedly no Political Agent who could certify under section 188. The absence of a certificate under section 188 was held to be absolutely prohibitive in a case where the offence took place in Nepal—*Queen Empress* v. *Ram Sundar*(8).

It was, however, contended that, under the amended section 108A, an abetment in British India by the accused Tukaram of an offence committed by the accused Baku in foreign territory might be tried in British India. That amendment was no doubt suggested by the decision of this Court in *Queen-Empress* v. *Ganpatrao Ramchandra*(9) where it was held that such abetment was not punishable. The facts of the present case, however, clearly distinguish it from the circumstances of the case noted above. There was a distinct separate offence committed in British India by the accused charged in *Queen Empress v Ganpatrao Ramchandra*, which, under the amended section 108 A. would now make him indictable for abetment. In the present case, beyond the mere intention and indirect preparation, there was no distinct offence by way of instigating the act committed out of British India. Mere intention not followed by any act cannot constitute an offence, and an indirect

(1) (1882) 5 Mad. 23.
(2) (1889) 13 Mad. 423.
(3) (1888) 13 Bom., 147.
(4) (1889) 14 Bom., 2[illegible].
(5) (1881) 6 Bom., 12[illegible].
(6) Cr. Rul. No. 37 of 1895.
(7) (1879) 2 All., 218.
(8) (1896) 19 All., 109.
(9) (1894) 19 Bom. 105.

Digitized by Google

preparation, which does not amount to an act which amounts to a commencement of the offence, does not constitute either a principal offence, or an attempt or abetment of the same. The intentions either of Baku or Tukaram, while they were staying at Sholapur, did not constitute any offence, and Baku's accompanying the girl to Tuljapur by the orders of Tukaram did not by itself constitute an abetment. Tukaram was, therefore, not guilty of abetment under section 108A. The District Magistrate, in the absence of the certificate or sanction, had thus no jurisdiction to try the accused, and the Sessions Judge's decision on this point of law must be upheld.

It is not necessary, under the circumstances, to discuss the second question which relates to the merits. The accused were admittedly guardians of the minor girl. Mr. Khare's argument, that the evidence did not show that the girl was below sixteen years of age, is opposed to the medical evidence, and the girl's own statement, and the suggestion made by one of the accused himself. The distinction sought to be made between prostitution and concubinage is also without any basis. Both the accused admitted that they knew that the life most likely to be led by the girl in consequence of the dedication would be an immoral life, being of the same kind as that of the *Bhavins*, or dancing girls, or *Basris*, noticed in *Reg.* v. *Jaili Bhavin* (1); *Reg.* v. *Aruna Chellam*(2) *Shrinivasa* v. *Annasami*(3), *Queen-Empress* v. *Basava*(4), and *Queen-Empress* v. *Tippa*(5), among whom married life was impossible, and prostitution the usual means of livelihood. Consenting knowingly to such a dedication with all that it involved certainly constituted the offence of a disposal of the minor under section 372. The defect caused by the absence of the Political Agent's certificate vitiated the prosecution, and the District Magistrate had no jurisdiction to try the case. The Sessions Judge was, therefore, right in reversing the sentence and discharging both the accused.

1899. *October* 9. I. L. R. 24 Bom. 293.

Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Candy and Mr. Justice Ranade.

IN RE DADABHAI JAMSEDJI.*

Indian Railways Act (IX of 1890), Sec. 110—"Compartment"—Meaning of the word.

Per JENKINS, C. J., and Candy, J.:—Good sense requires that to the word "compartment" in certain sections of the Indian Railways Act (IX of 1890) the quality of complete separation should be attributed, and it is with that force that it is used in section 110.

Per RANADE, J.:—The word "compartment" is used in section 110 of Act IX of 1890 in the same sense in which it is used throughout the Act, and does not necessarily mean a completely partitioned division.

This was an application under section 435 of the Code of Criminal Procedure (Act V of 1898).

A complaint was lodged before S. B. Spencer., Acting Fourth Presidency Magistrate, under section 110(1) of the Indian Railways Act (IX of 1890)

(1) (1869) 6 B. H. C., 60.
(2) (1877) 1 Mad., 164.
(3) (1892) 15 Mad., 41.
(4) (1892) 15 Mad., 75.
(5) (1891) 16 Bom., 737.

* Criminal Revision, No. 169 of 1899.

(1) Section 110, clause 1 of Act IX of 1890 provides as follows:—"If a person without the consent of his fellow passengers, if any, in the same compartment, smokes in any compartment except a compartment specially provided for the purpose, he shall be punished with fine, which may extend to twenty rupees."

Digitized by Google

charging the accused with smoking in a non-smoking compartment of a second class railway carriage without the consent of the complainant who was a fellow passenger with him in the same compartment.

The accused was further charged with insulting the complainant and hurting his religious feelings under sections 298 and 504 of the Indian Penal Code.

The Magistrate discharged the accused on all the charges, holding that the accused and the complainant, though they were fellow passengers, were not in the same compartment within the meaning of section 110 of the Indian Railways Act (IX of 1890).

Against this order of discharge the complainant applied to the High Court under its criminal revisional jurisdiction.

Macpherson (with him *R. B. Paymaster*) for complainant.

There was no appearance for the accused.

JENKINS, C. J. :—In this case a rule has been granted calling on the accused to show cause why the order of the Magistrate should not be set aside.

It seems that the complainant and the accused were travelling in the same carriage on the B. B. and C. I. Railway and that the accused smoked without the complainant's consent. For this he has been prosecuted under section 110(1) of the Indian Railways Act, 1890.

That sub-section is in these words:—(His Lordship read the section and continued :—)The case was heard before Mr. Spencer, who held that the complainant and accused, though they may have been fellow passengers, were not in the same compartment and discharged the accused. On this an application was made to this Court, and the rule to which I have referred was granted by Parsons and Ranade, JJ., who at the same time called for a report. In compliance with this Mr. Spencer has furnished us with a very careful and clear statement of the reasons which induced him to decide as he did. From his report and from what has been stated before us it seems that the portion of the carriage in which the complainant and accused were travelling was separated from the rest of the carriage by a complete partition, and that this portion was itself cut off into two sections, the dividing line between them being a partition about three feet high which served as a common back for seats in each section. This is shown by the diagram attached to Mr. Spencer's report. Now this three feet partition manifestly would not screen passengers in one of these two sections from the sight of those in the other, nor would it in any way interrupt the passage of smoke from the one section to the other. Therefore it is difficult to regard such a division as a compartment that would comply with the provisions of the Legislature requiring the reservation for the exclusive use of females of one compartment at least of the lowest class of carriage forming part of the train and that it should be furnished with a closet. When one bears in mind the customs intended to be respected by this provision it would be impossible to suppose that a section such as I have indicated could be taken to be a compartment within the meaning of section 64.

I now pass to consider whether the complainant can be deemed to have been in different compartments for the purpose of section 110.

It appears to me to be obvious that the purpose of the section is to secure that no one shall smoke in a railway carriage so as to be an annoyance to any fellow passenger. But I have already shown that the partition between the two sections of the carriage in question in no manner helped to avert this annoyance.

(1) *Supra* 293. (see p. 6 of this Book).

Digitized by Google

It r quires no great effort of imagination to see that a smoker may cause even greater annoyance to those who may be seated in the adjoining section even than to those travelling in the same one as himself. Under these circumstances is there anything which compels me to ascribe to the word 'compartment' a meaning which would result in my having to hold that the complainant and the accused were in separate compartments?

If I turn to the dictionaries I find myself under no such obligation, but I concede that this can be taken as no way conclusive as to the meaning of the word in this Act or perhaps I shou.d say in this section.

Mr. Spencer has pointed out with perfect truth that the Act contains no definition of the word but he would find a clue to its meaning in the 63rd section of the Act coupled with the practice of the companies. I allude to their practice of exhibiting inside or outside of each section, though divided from its neighbour only by a partial partition, the maximum number of passengers which may be carried in it.

But there are two objections to this method of reasoning, each of which seems to me to be equally destructive. In the first place it treats the B. B. and C. I. Railway Company as the infallible interpreter of this act and it attributes to the Company an interpretation which does not necessarily follow from the premises.

Because they notify how many can be seated in each section, it by no means follows that they say each section is a compartment, nor would their practice otherwise be a failure to comply with the provisions of the Act, for the maximum permissible for the compartment would be the sum of the maximum permissible for each section of the compartment.

It did at one time seem to me that section 109 might support the view that each section though divided by a partial partition was a compartment within the meaning of the Act, but on the wh.le I think it d.es not. The truth is that the word 'compartment' is not used throughout the Act with the same precise force, and whereas certain provisions of the Act would be satisfied if there be a partial partition, there are other provisions in which it appears to me that good sense requires that we should attribute to compartment the quality of complete separation, and it is with that force that in my opinion it is used in section 110. It results, then, from this that in my judgment the complainant and accused were in different parts of the same compartment, and that consequently the accused was not entitled to smoke without the complainant's consent.

I pass to consider whether the offence was of so trivial a nature that it falls within section 95 of the Indian Penal Code.

I think it cannot be so treated: to a smoker it may perhaps appear too trivial to be an offence to smoke even in a place where it is forbidden and despite the protest of one whose consent is necessary. Still that is not the view of the Legislature, for it has provided otherwise, and, I therefore, think the case should, in my opinion, go back to the Magistrate to be tried. As to the other charge, I would not disturb the conclusion of the Magistrate, who is eminently qualified to form an opinion on such a subject.

RANADE, J.:—This was an application for the revision of an order of discharge passed by the Fourth Presidency Magistrate in a complaint brought by the applicant under sections 504 and 298 of the Indian Penal Code, 1860. A further charge was added at the instance of the complainant's pleader under section 110 of the Indian Railways Act The latter charge was dismissed on the ground that the compartment in which the complainant was travelling

Digitized by Google

was not the same as that in which the accused was seated, and that even if accused had smoked in that compartment, he committed no offence, and that under the circumstances no other offence was disclosed. The applicant seeks a revision of the order of discharge on the ground (1) that the Magistrate was in error in holding that the complainant was sitting in a different compartment and (2) that even if there was no offence under the Railways Act, the Magistrate ought to have inquired into the complaint under sections 504 and 298, in respect of which it was not necessary that the complainant and the accused should be sitting in the same compartment.

It is clear that in so far as the offence under section 110 of the Railways Act is concerned, the question turns upon the definition of the word "compartment". Section 110 provides that if any person, without the consent of his fellow passenger, if any, in the same compartment, smokes in any compartment except a compartment specially provided for that purpose, he shall be punished with fine. The accused must, therefore, be shown to have been sitting in the same compartment when he smoked to the annoyance of the complainant. The Magistrate held, on the evidence, that the accused was sitting in a separate compartment. Mr. Macpherson, who appeared as counsel for the complainant, contended that the Magistrate was in error in his interpretation of the words "same compartment" in section 110. He contended that a compartment implies that the separating partition should be a complete partition, which was admittedly not the case in the division separating the place where the complainant was sitting from the place where the accused is alleged to have been smoking. Section 64 was referred to as showing that under it provision has to be made of one compartment for the exclusive use of females, and it was suggested that for such a purpose, the separating partition must be complete. This is, however, only an inference. In these carriages the height of the half shut-up backs would be about four feet and the protection intended for the females is thus practically ensured in the half shut-up compartment, and such compartments are so used occasionally. The use of the word "compartment" in the other sections shows clearly that the separating partition of compartments might be half as in the present case. Section 63, for instance requires, that the number of passengers to be carried shall be exhibited outside or inside each compartment. The words "to seat ten persons" are admittedly written in each of the half of a division which makes a compartment, whether the compartment is shut out completely or o herwise. The word occurs in a similar connection in section 93. Section 95 refers to section 64 noticed above. Section 102 has reference to section 63, and it punishes railway servants who compel passengers to enter compartments in which a maximum number of passengers are seated. This obviously does not refer to completely partitioned divisions only, but intends half shut-out compartments as well. Section 109 and 119 use the word "compartment" similarly.

Reading all the sections together it is clear that the word "compartment" must be understood as having been used in the same sense throughout, and section 69 does not necessarily suggest the word was used in different senses in different places.

The Magistrate's interpretation of the word "compartment" was, therefore, correct, and though the place in which complainant was sitting was not completely partitioned off from the place where accused was smoking, it cannot be said that they were sitting in the same compartment under section 110. The complaint under the Railway Act was, therefore, very properly dismissed.

R

Digitized by Google

As regards the offence under the Indian Penal Code, the Magistrate's report shows that he dismissed that complaint under section 95 of the Code, as the matter complained of was too trivial to constitute an offence.

I would dismiss the application, as also the companion case No. 168.

The Judges having differed, the case was by order of the Chief Justice referred to Mr. Justice Candy for opinion under section 429 of the Criminal Procedure Code (Act V of 1898), who recorded the following judgment:—

9th October, 1899 CANDY, J. :—This case has been referred to me under section 429 of the Criminal Procedure Code (Act V of 1898). I have not thought it fit to direct any further hearing.

On the case as laid before me I deliver my opinion that the view taken by the learned Chief Justice is correct, and that the complainant and the accused were "in the same compartment" as provided by section 110 of the Indian Railways Act, 1890.

There is no definition in the Act of the word "compartment". It is possible that it may be used in different senses in various sections of the Act. In the Oxford New Dictionary "compartment" is "a division separated by partitions: a part partitioned off". In each of the second class carriages of the B. B. and C. I. Railway used between Bandora and Bombay there are (as shown in the plan attached to Mr. Spencer's report) three main compartments. They are divisions separated from each other by partitions right up to the roof of the carriage. Each division is thus completely screened off from its adjoining division. Each division is thus a compartment. But each of such divisions is further sub-divided by a partition which is about three feet high. Each sub-division or section is in itself a compartment, for it is a part of the original compartment, which is partitioned off and it has its own door for entrance and egress. For the purpose of exhibiting the maximum number of passengers for each compartment (sections 63, 93, 102 and 109) the Railway administration treat each section or sub-division as a "compartment". They may be perfectly right in so doing: it is not inconsistent with the language of the section. But if they follow the same line with regard to sections 64, 95 and 119 (reservation of compartments for females) or 110 (smoking), then their action is not consistent with the intention of the Legislature. A thing is not within the statute unless it is within the intention of the statute. Obviously the intention of the Legislature is that in certain cases there shall be a compartment reserved for the exclusive use of females, so that they may have privacy and be unmolested by males. A section or sub-division of a compartment, as I have described above, is certainly not such a compartment. So, too, with smoking it is obvious that in a full compartment of twenty persons, if one or more of the passengers in section or sub-division A can smoke without regard to the assent or dissent of the passengers in section or sub-division B, then the provisions of section 110 are a farce. We are not compelled so to read the statute. The case will accordingly go back to the Magistrate with the direction set out by the Chief Justice, *viz.*, that the order of the Magistrate be reversed, and the case sent back for trial on the charge under section 110 of the Railways Act of 1890. The finding of the Magistrate on the charges under sections 504 and 298 of the Indian Penal Code in Application No. 169 of 1899, and under sections 298 and 109 of the Indian Penal Code in Application No. 168 of 1899 is not disturbed.

Digitized by Google

1900. *January 10.* I. L. R. 24 Bom. 423.

Before Mr. Justice Parsons and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* TYAB ALLI.§

Indian Arms Act (XI of 1878), Sec. 22—Master and servant—Master's liability for the criminal acts of his servant.

Where the manager of a licensed vendor of arms, ammunition and military stores sold certain military stores without previously ascertaining that the buyer was legally authorized to possess the same,

Held, that the licensee was liable to punishment under section 22 of the Indian Arms Act (XI of 1878), though the goods were not sold with his knowledge and consent.

The principle—"whatever a servant does in the course of his employment with which he is entrusted and as a part of it is his master's act"—is applicable to the present case.

Attorney General V. Siddon (1) followed.

APPEAL from the conviction and sentence recorded by Sanders Slater, Chief Presidency Magistrate, in the case of *Queen-Empress* v. *Tyab Alli.*

The accussed kept a shop under a license granted to him for the sale of arms, ammunition and military stores. He did not himself sell the goods, but placed a man in charge of the shop for the purpose of selling the goods. This man sold certain military stores, *viz.*, 8 cwts. of leaden bird shot. to one Hasan Ali and fuzes to Raghunath Martand, without previously ascertaining that such persons were legally authorized to possess the same.

Thereupon the accused was prosecuted under section 22 of the Indian Arms Act (XI of 1878) (2).

The accused pleaded that the goods were sold without his knowledge and consent, and that he was not criminally liable for the acts of his servant.

The Chief Presidency Magistrate overruled this contention, and convicted accused under section 22 of Act XI of 1878 and sentenced him to pay a fine of Rs. 250,

The accused appealed from this conviction and sentence.

Macpherson (with him Messrs *Nanu and Hormusji*) for accused :—A principal is not criminally answerable for the acts of his agent. There must be a *mens rea*, a guilty knowledge, before a person can be convicted of a criminal offence. In the present case it is found that the military stores were sold and delivered without the knowledge and consent of the accused. The conviction is, therefore, illegal—*Queen* v. *Stephens* (3), *Hearne* v. *Garton*(4); *Imperatrix* v. *Balu Miya* (5). There is no provision in the Indian Arms Act(XI of 1878) which makes the master liable for the acts of his servant.

Lang Advocate General, for the Crown:—The goods were delivered by the accused's servant in the course of his employment. The delivery by the servant would, therefore, be a delivery by the master. Otherwise the provisions of the Act would be defeated. The master may be ignorant of his servant's doings, he may have given express(directions to his servant to act in accordance with the provisions of the Act, and yet he will be held responsible if the servant

§Criminal Appeal, No. 492 of 1899.

(1) (1890) 1 Cr. and J. 220.

(2) Section 22 of Act XI of 1878 provides as follows;—

"Whoever knowingly purchases any arms, ammunition or military stores from any person not licensed or authorized under the proviso to section five to sell the same; or delivers any arms, ammunition or military stores into the possession of any person without previously ascertaining that such person is legally authorized to possess the same, shall be punished with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees, or with both."

(3) (1866) L. R. 1 Q. B. 702, 710.

(4) (1859) 28 L. J. M. C., 216.

(5) (1891) Bom. H. C. Cr. Bul. No. 40.

Digitized by Google

breaks the law. To prevent an indiscriminate sale of military stores, the law requires a dealer to take a license. If he chooses to misplace his confidence, he must suffer. The fact that he is a seller, and not the actual salesman, makes no difference in his liability. Refers to *Mullins* v. *Collins* (1) and *Coppen* v. *Moore* (No. 2) (2).

PARSONS, J.:—The Indian Arms Act, 1878, section 22, makes penal the delivery of military stores into the possession of any person without previously ascertaining that such person is legally authorized to possess the same. The question is whether the appellant in this case delivered the stores. He did not deliver them with his own hands, that is admitted, because that was not his mode of business. He had a shop which was kept under a license granted to him for the sale of arms, ammunition and military stores, but he did not himself sale any stores there; he only visited it occasionally for purposes of inspection. He placed a man in charge of the shop for the purpose of selling the goods there. We fail to see how it can be contended that under these circumstances a delivery of goods by the man in charge would not be a delivery by the owner of the shop? It is not a question of intention, of *mens rea*, or of knowledge; it is the delivery which the Act makes penal, and the delivery by the manager is clearly in this case a delivery by the licensee. The authorities are concurrent upon this point, In *The Attorney General* v. *Siddon* (3) the rule is thus stated: "Whatever a servant does in the course of his employment with which he is entrusted and as a part of it is the master's act." This rule, which is of general application so far as civil liability goes, is applicable to certain criminal proceedings also. In *Mullins* v. *Collins* (1) where the servant of a licensed victualler supplied liquor to a constable on duty without the authority of his superior officer, it was held that the licensed victualler was liable to be convicted under 35 and 36 Victoria, Chapter 94, section 16, sub-section 2, although he had no knowledge of the act of his servant, that statute forbidding any licensed person to supply liquor in that way. So, too, it was held in *Coppen* v. *Moore* (No, 2) (2), that a master was liable for the sale by his servants when acting under the general scope of their employment of goods in contravention of the provisions of section 2, sub-section 2 of the Merchandise Marks Act, 1887. The present case is undistinguishable from these, and we have no doubt that the appellant is liable, "Any other conclusion would render the act ineffective for its avowed purposes." The appeal is dismissed.

Appeal dismissed.

1899. *December* 6. I. L. R. 24 Bom. 471.

Before Mr. Justice Parsons and Mr. Justice Ranade.

IN *RE* RATTANSEE PURSHOTTUM. *

Muscat—Court of Her Majesty's Consul at Muscat—High Court's criminal revisional jurisdiction over the Consular Court—Order in Council dated 4th November, 1867—Criminal Procedure Code (Act V of 1898), Sec. 435—Jurisdiction.

The High Court at Bombay has no criminal revisional jurisdiction over the proceedings of Her Majesty's Consul within the dominions of the Sultan of Muscat.

---

(1) (1874) L. R. 9 Q. B. 292. (2) (1898) 2 Q. B., 306.

(3) (1830) 1 Cr. and J., 220.

* Criminal Revision, No. 191 of 1899.

Digitized by Google

THIS was an application under section 435 of the Criminal Procedure Code (Act V of 1898).

The accused was convicted by C. G. F. Fagan, Her Majesty's Consul at Muscat, of an offence under section 176 of the Indian Penal Code, and sentenced to seven days' imprisonment and a fine of Rs. 200.

Against this conviction and sentence the accused moved the High Court under its criminal revisional jurisdiction.

The accused contended that the High Court had jurisdiction to revise the proceedings of Her Majesty's Consul at Muscat under the Order in Council dated 4th November, 1867.

P. M. Mehta (with *A. R. Bakhle*), for accused, referred to sections 14, 15 and 23 of the Muscat Order in Council, dated 4th November, 1867 (1), and section 15 of the Letters Patent, and argued that under section 14 the High Court of Bombay was a Court of reference in criminal matters, and under sections 15 and 23 the High Court had original criminal jurisdiction, and consequently by virtue of section 15 of the Letters Patent (the Charter Act) the Consular Court at Muscat was subject to the supervision of the Bombay High Court.

Scott (with Acting Advocate General) for the Crown.

PARSONS, J.:—We are clearly of opinion that we have no criminal revisional jurisdiction over the proceedings of Her Majesty's Consul within the dominions of the Sultan of Muscat. The Order of Her Majesty in Council, dated 4th November, 1867, gives this Court no appellate jurisdiction over his Court, and, therefore, section 15 of the Act establishing High Courts has no application.

We must dismiss the application.

Application dismissed.

(1) Sections 14 and 23 of the Muscat Order in Council, dated 4th November, 1867:—

"14 and it is further ordered that if the crime or offence whereof any person being a British subject may be accused before Her Majesty's Consul as aforesaid shall appear to such Consul to be of such a nature as, if proved, would not be adequately punished by the infliction of such punishment as aforesaid, it shall be lawful for such Consul to summon not less than two, or not more than four, disinterested British subjects of good repute to sit with him as Assessors for inquiring into, trying and determining the charges against such person; and the Consul when he shall try any such charge with the assistance of Assessors as aforesaid shall, if he is himself convinced of the guilt of the party accused, have power to award any amount of punishment not exceeding imprisonment for twelve calendar months, of a fine of 1,000 dollars; and the Assessors aforesaid shall have no authority to decide on the innocence or guilt of the party accused, or on the amount of punishment to be awarded to him on conviction, but in the event of the said Assessors, or any of them, dissenting from the conviction of, or from the amount of punishment awarded to, the accused party, the Assessors or Assessor so dissenting shall be authorised to record in the minutes of the proceedings the grounds on which they and he may so dissent, and the Consul shall forthwith report to the High Court of Bombay the fact of such dissent, and of its having been so recorded in the minutes of the proceedings, and shall, as soon as possible, lay before the said Court copies of the whole of the depositions and proceedings with the dissent of the Assessor or Assessors recorded therein; and it shall be lawful thereupon for the Court, by warrant under seal addressed to the Consul, to confirm or vary, or remit altogether, as to the Court may seem fit, the sentence and punishment awarded to the party accused, and such Consul shall give immediate effect to the injunction of any such warrant: Provided always, that in any case in which," &c.

"23. And it further ordered that it shall be lawful for Her Majesty's Consul to cause any British subject charged with the commission of any crime or offence, the cognisance whereof may at any time appertain to him, to be sent in any of Her Majesty's ships of war, or in any British vessel, to Her Majesty's territory of Bombay fo r before the High Court of the said territory: and it shall be lawful for the Commander".....[the section then provided for dilivery to safe custody by the keeper of the common jail of such person, and continued :—] "and it shall be lawful for the keeper of the said common jail to cause such party to be.....produced upon the order of the said High Court, and the High Court at the sessions to be holden next after such committal shall proceed to hear and determine the charge against such party and to punish him for the same if found guilty, in the same manner as if the crime with which he may be charged had been committed within Her Majesty's said territory of Bombay."

Digitized by Google

1900 January 23. I. L. R. 24 Bom. 527.

Before Mr. Justice Ranade and Mr. Justice Crowe.

In RE PANDURANG GOVIND AND OTHERS. *

Criminal Procedure Code (Act V of 1898), Secs. 144, 145, 435 and 439—Dispute about right to perform service in a public temple—Notice—High Court—High Court's criminal revisional jurisdiction.

A Magistrate professing to act under section 145 of the Criminal Procedure Code (Act V of 1898) is bound to follow the proper procedure. He must set forth the grounds on which he is satisfied that there is a dispute likely to cause a breach of the peace. He is bound to issue notices to all parties concerned so as to give them an opportunity to put in their respective claims. And his order should not interfere with the rights of the parties as determined by previous decisions of the Civil Court.

A dispute relating to the right of performing religious service in a public temple when it is likely to cause a breach of the public peace, falls under section 145 of the Criminal Procedure Code (Act V of 1898).

The High Court ordinarily has no jurisdiction to interfere with an order under Chapter XII of the Criminal Procedure Code (Act V of 1898), which is not a proceeding within the meaning of section 435 of the Code: but when the Magistrate exceeds his jurisdiction under section 144 or 145, the High Court has power to interfere under its revisional jurisdiction (section 439).

A dispute arose between certain classes of priests attached to a Hindu temple, about the right of performing a certain religious service. On the complaint of one of the parties, the Magistrate of the district, purporting to Act under section 145 of the Code of Criminal Procedure (Act V of 1898), passed an *ex-parte* order prohibiting the other party from taking any part in the said service, although both parties had been previously declared by the Civil Court to be entitled to officiate at the service.

Held, that the order was illegal, and opposed to the provisions of section 145 of the Code.

(NOTE: This case has been considered in 2 Bom: L. R. 88. Ref; 25 All. 537; 25 Bom. 179; 1 Bom. L. R. 416; 4 Bom: L. R. 582).

APPLICATION for revision under section 435 of the Criminal Procedure Code (Act V of 1898).

The applicants were the *Shevadhâris* or hereditary priests attached to the temple of Shri Pandurang at Pandharpur.

There were seven classes of *Shevadharis*, *viz.*: (1) the *Pujaris*, (2) the *Hardas*, (3) the *Benaris*, (4) the *Dingres*, (5) the *Divates*, (6) the *Danges* and (7) the *Paricharacks*.

The *Badves* were the chief priests, managers and overseers of the temple. On the 6th September, 1899, one Dnyaneshver Dadaji Badve made a complaint to the District Magistrate of Sholapur to the following effect:—

"While performing on behalf of our *yajmans* the *Alankar puja* of the deity Shri Pandurang in accordance with the decisions of the High Court, the *Benaris* who have no right to attend that *puja*, in spite of the Magistrate's orders to that effect passed from time to time, assemble there without any cause and offer resistance to us. I, therefore, pray that you will be good enough to order the *faujdar* to take steps preventing the *Benaris* from offering resistance."

The District Magistrate forwarded the application to the First Class Magistrate for report.

Thereupon the First Class Magistrate made a report to the following effect:—

* Criminal Revision, No. 247 of 1899.

Digitized by Google

"In a case between the *Badves* and the *Shevadharis*, with regard to the *Alankar puja* which was recently tried by me, I, on a consideration of the evidence in that case, expressed my opinion to the effect that the *Benaris* have no right whatsoever to attend while the *Alankar puja* is being performed."

On receipt of this report the District Magistrate without issuing any notice to the *Benaris* or the other *Shevadharis* passed an *ex-parte* order as follows:—

"There appears to be a dispute with regard to the *Alankar puja*. But looking to the practice continued from former times, it seems that the *Badves* only have the right to perform this *puja*. Moreover, in the orders passed by the High Court it has been decided that only the *Badves* should perform this *puja*. The *Benaris* and other *Shevadharis* have no right at all to perform this *puja*. Therefore, should the *Shevadharis* or any other persons cause obstruction to the *Badves* during the performance of this *puja*, the police should remove the said obstruction of theirs and if necessary the persons causing obstruction should be sent out of the temple. The *Badves*, whenever they may have an occasion to perform such *puja*, should give intimation thereof to the police."

In accordance with this order the chief constable of Pandharpur went to the temple on the 18th of October, 1899, and prevented all the *Shevadharis* from performing their respective duties at the time of the *Alankar puja*.

Thereupon the *Shevadharis* applied to the High Court for a reversal of the District Magistrate's order, as being illegal and *ultra vires*.

The High Court called for the record of the case.

G. S. Rao for applicants.

Rao Bahadur *Vasudev Jaganath Kirtiker*, Government Pleader, for the Crown.

Inverarity (with *N. G. Chandavarkar*) for opponents.

RANADE, J.:—This is an application for the revision of an order passed by the District Magistrate of Sholapur. The order was to the following effect:—"There appears to be a dispute about the *Alankar puja* (service). But looking to the past practice, the *Badves* alone have the right to perform this service and the High Court of Bombay has also decided that the Badves alone should perform this *puja*. The *Benaris* and other *Shevadharis* (temple-servants) have no right at all to perform this service. For this reason, if the *Shevadharis* or other persons obstruct the *Badves* at the time of this service, the police should remove the obstruction. And if necessary those who cause the obstruction should be expelled from the temple during this service. The *Badves* should give information to the police when the service is to be performed.

"A copy of this order should be sent to the chief constable at Pandharpur, and the applicant be informed in writing, and this proceeding should be returned. Dated 10th October, 1899."

The applicants seek revision on the following grounds, namely, (1) that the District Magistrate passed the order *ex-parte*; (2) that the District Magistrate had no jurisdiction to interfere with the rights of the applicants; (3) that the District Magistrate misconstrued the decisions and decrees of the Civil Courts; (4) that the District Magistrate assumed to himself the powers of a Civil Court; (5) that the District Magistrate should have referred the complainant to a Civil Court.

Digitized by Google

The facts of the case as disclosed by the record appear to be that one Dnyandev Badve applied to the District Magistrate on 6th September, 1899, that while performing *Alankar puja* for one of his *yajmans*, the *Benaris* (a class of temple-servants or *Shevadharis* whose names are not specified in the petition) obstructed him without right and offered resistance, and the complainant asked that orders may be issued to remove the obstruction. The petition was forwarded by the District Magistrate to the First Class Magistrate, who reported that in another case tried by him between *Badves* and *Shevadharis*, when the dispute was about *Alankar puja*, he had come to the conclusion that the *Benaris* had no right to perform the *Alankar puja*. The inquiry to which the First Class Magistrate referred was held on the complaint of one Sadashiva Badve brought against certain *Shevadharis*, twenty-one in number. Three of the present applicants were parties to this proceeding, and they represented three classes of *Shevadharis*, namely, *Pujaris*, *Benaris*, and *Dingres*. The first Class Magistrate on Sadashiva's application issued notices to thirteen of the opponents to show cause why they should not pass security-bonds for Rs. 500 each. The First Class Magistrate held an inquiry and came to the conclusion that under the High Court decisions, the *Pujaris* had the right to render certain services at the time of the *Alankar Puja*, but the *Benaris* and *Dingres* had no particular function at the *puja* and that the *Badves* had the chief right of management. The Magistrate, however, found that as a matter of fact no obstruction had been caused by the opponents, who were thereupon discharged on 2nd August, 1899. About the same time a proceeding had been instituted on the initiation of the chief constable on the 5th July, 1899, requiring both *Badves* and *Shevadharis* of all classes to pass security-bonds. This proceeding was also dropped by the order of the same First Class Magistrate on 2nd August, 1899. These proceedings appear to have been referred to in the First Class Magistrate's report submitted by him to the District Magistrate on the petition of Dnyandev Badve dated 6th September, 1899. The District Magistrate appears to have been satisfied that there was a dispute, and passed his order on 10th October, 1899, which was very general in its term and applied to all *Shevadharis*, of whom there are seven classes. The Chief Constable took action on the order of the District Magistrate, and prevented one of the *Shevadharis* from taking any part in the *Alankar puja*, and thereupon one representative of each of the *Shevadharis*, seven in number, have presented this revision application.

The first point for consideration in this case is whether this Court has, in the exercise of its revisionary powers, jurisdiction to interfere with the District Magistrate's order. The decision of this question depends upon the inquiry under what section the District Magistrate passed his order. The order makes mention of no particular section. The Government Pleader suggested only two sections under which the order could have been passed—section 144 and section 145 of the Criminal Procedure Code. It is evident, from the mention of the existence of the fact of a dispute in the District Magistrate's order, that he had in view sections 145, 146, 147, and not section 144. This latter section has reference to temporary orders in urgent cases of nuisance. The section gives jurisdiction where urgency exists independently of dispute. The order under section 144 has to be directed to particular individuals or to the public generally enjoining particular acts or abstentions, and it is in its very nature a temporary order. The present order fulfils none of these conditions. An order under section 145, on the other hand, presupposes a dispute likely to cause a breach of the peace, and in making it, a Magistrate may take action on the report of the police or on other information. The dispute in this case

Digitized by Google

does not relate to the possession of any land, &c.; but it has been held in *Muhammad Musliar* v. *Kunji Chek Musaliar* (1) that the claim to perform a religious ceremony in a mosque, where it is the subject of an apprehended dispute, falls under section 145. The present case thus comes under Chapter XII of Criminal Procedure Code. The High Court has ordinarily no jurisdiction to interfere with the order under Chapter XII which is not a proceeding, but when the Magistrate exceeds his jurisdiction under sections 144, 145, the High Court has power to interfere in its extraordinary jurisdiction to set the order aright—*Reid* v. *Richardson* (2); *Ananda Chandra* v. *Carr Stephen* (3); *Agra Bank* v. *Leishman* (4); *Queen-Empress* v. *Lakhmidas* (5). As there was evidence on which the District Magistrate could act, namely, the Police and Magistrate's inquiries and reports, and the District Magistrate was satisfied that there was dispute, there is no doubt that the Magistrate had jurisdiction; but he was bound to follow the proper procedure. It does not appear that the District Magistrate in this case followed the procedure laid down. Several defects in the procedure may be noticed in this place. (1) In the first instance, the District Magistrate's order does not set forth, as the law requires, the grounds on which he was satisfied that there was a dispute likely to cause a breach of the peace. The only two proceedings to which his attention was drawn resulted in an acquittal of the persons charged, The other proceeding took place several years before, and was not sufficient to give jurisdiction. (2) The complaint did not specify the persons against whom the protection of the District Magistrate was asked. The original complaint was against *Benaris* generally without any particulars being specified. In the two complaints brought to his notice, certain persons were named, but they did not include all the *Shevadharis* to whom his order has been made to apply. The section requires that the parties concerned should be named specifically, for they are to be served with notices to attend the Court and state their case to the District Magistrate. (3) No such notice was issued in this case and the parties concerned had thus no opportunity to put in their respective claims. The Government Pleader admitted that, in so far as Dnyandev Badve's complaint is concerned, the order was an *ex-parte* order and not passed on any inquiry such as is contemplated by the sections. (4) The case is not covered by proviso to clause (iv), for that proviso relates to the attachment of the property. There was no such attachment, but a definite order in favour of *Badves* as a class and to the prejudice of the *Shevadharis* generally. (5) The order interferes with the decree passed by the High Court. One of these decrees recognised the rights of the *Pujaris* to take part in the *Alankar Puja* as held by the First Class Magistrate. This remark applies to the other *Shevadharis* also to less extent.

In these several respects, the procedure followed by the District Magistrate appears to be defective. It was held in *Queen Empress* v. *Gobind Chandra Das* (6) that it is obligatory on the Magistrate to inform the parties concerned of the grounds of the report or complaint before he makes an order under section 145. It is also the duty of the Magistrate to ascertain who are the parties concerned, and give them notice before he makes his final orders—*Ram Chandra Das* v. *Mohohur Roy* (7); *Protap Narain Singh* v. *Rajendra Narain Singh* (8). An order is bad if all the parties interested are not made parties—*Behary Lall* v. *Darby* (9). Following the authorities quoted above,

(1) (1887) 11 Mad., 323.
(2) (1887) 14 Cal., 361.
(3) (1891) 19 Cal., 127.
(4) (1894) 18 Mad., 41.
(5) (1889) 14 Bom., 165.
(6) (1893) 20 Cal., 520.
(7) (1893) 21 Cal., 29.
(8) (1896) 24 Cal, 55.
(9) (1894) 21 Cal.. 915.

Digitized by Google

we must hold that the procedure followed by the District Magistrate was defective, and that his order must be set aside. The District Magistrate should re-hear the case after making all the persons interested parties, and receiving the evidence they may produce before him, and pass a fresh order.

Order set aside and case remanded for further hearing.

VOLUME XXV.

1900 *April* 10. I. L. R. 25 Bom. 45.

Before Mr. Justice Parsons and Mr. Justice Ranade.

IMPERATRIX *v.* RUDRA.*

Evidence— Dying declaration—Indian Penal Code (Act XLV of 1860), Sec. 396.

Appellant was convicted and sentenced to transportation for life on a charge of dacoity. The most material evidence for the prosecution was the statement, in the nature of a dying declaration, made to the jamadar of police by one Fakiria Shimpi, who received wounds during the dacoity and who died before the trial commenced.

The Assistant Surgeon, who made the *post-mortem* examination on the deceased, was not called, being on leave, but the Civil Surgeon, on a perusal of the notes left by the Assistant Surgeon; gave evidence that the cause of death of the deceased was pneumonia aggravated by a stab. In the notes themselves no cause of death was given, and there was no evidence as to how the pneumonia was aggravated. No explanation was given as to how the opinion was formed that the pneumonia was aggravated by the injury, and there was nothing in the notes to support it.

Held, that the statement of the deceased ought not to have been admitted in evidence in the absence of evidence to show that his death was caused or accelerated by the wounds received at the dacoity, or that the dacoity was the transaction which resulted in his death.

APPEAL from the conviction and sentence recorded by R. J. C. Lord, Sessions Judge of Dharwar.

The accused was tried (with two others) on a charge of dacoity under Section 396 of the Indian Penal Code (Act XLV of 1860) by the Sessions Judge assisted by two Assessors. The Judge differing from both the Assessors found the accused guilty of the offence charged and sentenced him to transportation for life.

The case for the prosecution was that the accused was one of the gang of dacoits who attacked and looted a wedding procession, and during the affray the accused stabbed the deceased Fakiria Shimpi. The dacoity took place on the evening of the 12th August, 1899. A statement, made by the deceased, was recorded by a police jamadar on the 13th August, because he thought that the deceased was on the point of death, and the Magistrate, who had been sent for, had not arrived. In that statement the deceased stated that the accused gave him a stab on the right side of his chest. The deceased died on the 20th August. The conviction and sentence were mainly based upon the alleged dying declaration and the deposition of one witness. The accused preferred an appeal, urging (*inter alia*) that the so called dying declaration was not properly recorded, and should be left out of consideration, and that the evidence of the witness on whom the Judge relied was unreliable.

Mahadeo B. Chaubal, for the appellant (accused).

Rao Bahadur *Vasudev J. Kirtikar* (Government Pleader) for the Crown.

PARSONS, J. :—The dacoity is alleged to have taken place on the evening of the 12th August, and clothes and ornaments to the value of some Rs. 2,750

---

* Criminal Appeal, No. 83 of 1900.

Digitized by Google

are said to have been stolen, of which a silver *tolbandi* and a few clothes only have been recovered. Nothing, however, was found in the possession of the appellant, who was the accused No. 1 in the Sessions Court and he was convicted by the Sessions Judge solely because the latter saw no reason to distrust the dying declaration of Fakiria Shimpi and the deposition of witness No. 1. The Assessors were of opinion that he was not guilty. We think that the charge is not proved against him. The declaration of Fakiria Shimpi must be eliminated from the evidence. It was made on the 13th August, and Fakiria died on the 20th. The Assistant Surgeon, who made the *post-mortem* examination, has not been examined as a witness. The Sessions Judge says as to this: "The Civil Surgeon had to be asked to give his opinion upon the Assistant Surgeon's notes of the *post-mortem*, his handwriting being proved by the compounder, because the Assistant Surgeon had gone on leave: the proceeding appeared to be somewhat objectionable, but under the circumstances was unavoidable. The opinion of the expert was, however, in favour of the defence, and the charge against the accused reduced itself naturally to one of dacoity alone." The Civil Surgeon says: "From those notes I find that the corpse had a wound in the right axilla. Also one of the ribs was fractured. From the report and the facts it contains I am certain that the cause of death was pneumonia. The pneumonia was aggravated by the injury, though not caused by it: the adhesions point to chronic lung disease, and I consider the man must have been ill before. From the notes I am of opinion that the wound was not such as would be likely, in the ordinary course of nature, to cause death." No explanation is given as to how the opinion was formed that the pneumonia was aggravated by the injury, and there is nothing in the notes to support it. The cause of death is not mentioned in them. In the absence of evidence to prove that the death of Fakiria Shimpi was caused or accelerated by the wounds received at the dacoity, or that it was the transaction which resulted in his death, his declaration ought not to have been admitted in evidence.

There remains only the statement of the complainant. The delay in naming the accused as one of the dacoits is such as to render the evidence of little value. The reason given for not telling the village officers, namely, that the complainant was a stranger and the decoits were of the same village as those officers, is not true because the accused was not an inhabitant of the same village as those officers. The further reason that he thought it better to mention all the names at one time is also untrue, because the accused No. 3 was then and there in the custody of the village officers, and was named by the complainant. Besides, if he would not tell the village officers, there was no reason why he should not have told Fakiria Pinjar, Fakiria Kurbav, Shamava and Gadigyavva, and he gives none. The accused is an inhabitant of the same village as the complainant and was known to him before, and the fact that he did not mention his name at once throws great doubt upon his after identification, particularly when the witnesses Nos. 2 and 3, who were spectators or victims of the dacoity and who also knew the accused No. 1 before, say that they did not see him at it. Very little weight seems to have been attached to the evidence at the time, because we find that the house of the accused was not searched till the 18th, and he was not arrested till the 19th.

We reverse the conviction and sentence passed upon the appellant, acquit him of the offence charged, and direct that he be set at liberty.

Conviction and sentence reversed.

Digitized by Google

1900 *April* 17. I. L. R. 25 Bom. 48.

Before Mr. Justice Parsons and Mr. Justice Ranade.

IN RE GOVIND HANMANT.*

Criminal Procedure Code (Act V of 1898), Sec. 250—Application for an order that a person should give security to keep the peace—Refusal of application—Compensation under Section 250 of Criminal Procedure Code (V of 1898).

To justify the application of Section 250, a person must be accused before a Magistrate of an offence triable by a Magistrate.

A applied to a Magistrate of the First Class to order B to give security to keep the peace (Section 107, Criminal Procedure Code, 1898). The Magistrate after inquiring into the matter discharged B under section 119 of the Criminal Procedure Code and directed A to pay B Rs. 50 as compensation under section 250 of the Code.

Held, that the award of compensation was illegal. The institution of proceedings under section 107 of the Criminal Procedure Code was not an accusation of an offence triable by a Magistrate within the meaning of section 250 of the Code.

Queen-Empress v. *Lakhpat* (1) followed.

REFERENCE under section 438 of the Criminal Procedure Code (Act V of 1898) by F. C. O. Beaman, Sessions Judge of Belgaum.

One Govind Hanmant Kulkarni applied under section 107 of the Criminal Procedure Code (Act V of 1898) to the First Class Magistrate of Belgaum to order Rachaya bin Chenbasaya to give security for keeping the peace.

The Magistrate after inquiring into the matter discharged Rachaya under section 119 of the Code and at the same time passed an order under section 250, directing the applicant to pay Rs. 50 as compensation to Rachaya.

The Sessions Judge being of opinion that this order for compensation was illegal, referred the case to the High Court under section 438 of the Code.

The reference was argued before Parsons and Ranade, JJ.

N. P. Patankar for applicant.

There was no appearance for the opponent.

PARSONS, J :—The applicant moved the Magistrate to take security from the opponent to keep the peace. The Magistrate issued the necessary notices and enquired into the matter under section 117, and discharged the opponent under section 119 of the Criminal Procedure Code. He further directed the applicant to pay the opponent the sum of Rs. 50 under section 250 of the said Code.

It is objected that this latter order is illegal. The objection seems good. To justify the application of section 250 a person must be accused before a Magistrate of an offence triable by a Magistrate. Here the opponent was not accused of having committed any offence The only charge heard against him was that he was likely to do some act that would probably occasion a breach of the peace, and that it was necessary, therefore, that he should give security for keeping the peace. This is not a case that falls within the purview of section 250. We agree on this point with the Allahabad High Court in *Queen-Empress* v. *Lakhpat* (2).

We reverse the order of compensation.

Order reversed.

---

* Criminal Reference, No. 5 of 1900.

(1) (1893) 15 All., 365. (2) (1893) 15 All., 365.

Digitized by Google

1900 *July* 19. I. L. R. 25 Bom. 90.

Before Mr. Justice Ranade and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* ANANT PURANIK.$

Criminal Procedure Code (Act V of 1898), Secs. 196 and 235—Sanction to prosecute—Joinder of charges—Trial for more than one offence—Offences falling under two definitions.

The accused was committed for trial before a Sessions Court on a charge of abetment of dacoity under section 116 of the Indian Penal Code (Act XLV of 1860). In the course of the trial the Assistant Sessions Judge added an alternative charge under section 511 of the Code and sentenced the accused under sections 395, 116 and 511 of the Indian Penal Code (Act XLV of 1860).

In appeal the Sessions Judge held that the evidence disclosed the offence of an attempt to commit the offence of collecting arms, &c., with intention of waging war against the Queen, under section 122, and as no charge under that section could be framed for want of the sanction of Government under section 196 of the Criminal Procedure Code (Act V of 1898), the accused could not be brought to trial at all. He, therefore, reversed the conviction and acquitted the accused.

Held, (reversing the order of acquittal], that the mere fact that no charge for the graver offence under section 122 of the Indian Penal Code [XLV of 1860] could be framed for want of Government sanction, did not render the trial for the minor offence of attempting or abetting dacoity either irregular or illegal.

Per FULTON, J. :—According to the 2nd clause of section 235 of the Criminal Procedure Code (Act V of 1898), if the accused abetted an offence under section 122 of the Penal Code, and by the same speech also attempted or abetted the offence of dacoity, he could be tried for each of these offences; but as that section is controlled, as regards the offence against the State, by the provisions of section 196 of the Criminal Procedure Code, its operation in this case is restricted to the minor offence for which the accused could legally be charged and tried.

Queen-Empress v. *Karigowda* (1) and *In re Nagarji* (2) distinguished.

APPEAL by the Local Government under section 417 of the Code of Criminal Procedure (Act V of 1898) from an order of acquittal passed by R. Knight, Sessions Judge of Satara.

The accused was originally charged under section 116 of the Indian Penal Code (Act XLV of 1860) with abetment of dacoity under the following circumstances as stated by the Sessions Judge :—

"In June, 1900, a Mang named Dasrya was arrested by the police for complicity in certain dacoities. From him the authorities learnt that a certain Brahmin had been moving about among the Mangs in this district endeavouring to collect men to "march to Pratapgad, loot the Mahabaleshvar treasury, slaughter the Saheb *log*, loot other treasuries, go to Poona, loot the jail and release Tilak.

"Dasrya named another Mang, Fakira, as cognizant of the plot. He was questioned, and corroborated Dasrya, and in his possession were found a number of *dhotis* and other garments much superior to the common apparel of his class. These, he said, the Brahmin had given him.

"At this time the accused, who happened to be in Satara, saw Fakira in police custody. Thereon he went to the Sheristedar of the District Superintendent of Police, an acquaintance of his, and asked him to recover from Fakira the money due for certain clothes which he, accused, had purchased for him from Kasturchand, a trader of this city. The Sheristedar mentioned this to the Chief Constable, and the identity of the accused with the Brahmin conspirator was immediately established.

"Inquiries were made of Kasturchand, from whose books it was ascertained that the accused had purchased of him garments similar to those found with Fakira, and the accused was then taken by the police and placed before

$ Criminal Appeal, No. 128 of 1900.

(1) (1894) 19 Bom., 51. (2) (1894) 19 Bom., 340.

Digitized by Google

the District Magistrate and the District Superintendent, in whose presence he made a certain statement. Further investigation was made and some small corroboration of the Mang's story was obtained, and accused was eventually committed for trial on a charge of abetment of dacoity."

In the course of the trial the Assistant Sessions Judge of Satara added an alternative charge under section 511 of the Indian Penal Code, and convicted the accused of either instigating or attempting to commit dacoity under sections 395, 116 and 511 of the Code and sentenced him to eighteen months' rigorous imprisonment.

On appeal the Sessions Judge held that the evidence disclosed the offence of an attempt to collect men with the intention of waging war against the Queen; that the accused ought, therefore, to have been charged under section 122 of the Indian Penal Code; and that as the charge could not be framed under section 122 for want of the sanction of Government under section 196 of the Criminal Procedure Code (Act V of 1898), he ought not to have been prosecuted at all. The Sessions Judge, therefore, quashed the conviction and sentence and acquitted the accused.

Against this order of acquittal, the Local Government appealed to the High Court.

Rao Bahadur *Vasudev J, Kirtikar* (Government Pleader), for the Crown.

B. A. Bhagvat, for the accused.

RANADE, J. :—This is an appeal by Government under section 417 against the decision of the Sessions Judge of Satara, who reversed the conviction and sentence passed on the accused by the Sessions Judge under sections 395, 116 or 511 of the Indian Penal Code. The accused had been originally committed for trial on a charge under section 116 of having instigated certain persons, Mangs and Ramoshis principally, to commit dacoity under section 395. In the course of the trial the Assistant Sessions Judge added an alternative charge under section 511, and convicted the accused of either instigation or attempting to commit dacoity under sections 395, 116 or 511, Indian Penal Code. In appeal the Sessions Judge acquitted the accused after reversing the conviction on the charges named above, as he was of opinion that the real charge which should have been brought against the accused was an attempt to commit an offence under section 122; and if for want of the sanction of Government required by section 196, Criminal Procedure Code, 1898 this charge could not be framed, the accused should not have been brought to trial at all, or, at the most, should have been bound over to keep the peace under Chapter VIII of the Code. The Government Pleader has appealed against this order of acquittal, and contended that the Sessions Judge was in error in holding that the offence proved was under section 122 only. He contended that though the accused might have been charged under section 122 if the sanction of Government had been obtained, it did not follow that he could not be charged for the offence under sections 395, 116 or 511, for which there was direct evidence. The immediate and direct purpose for which the accused attempted to collect and enlist Mangs and Ramoshis was that of plundering the treasury, and though the ultimate object might have been of a political character this did not change the real nature of the offence actually committed, which must be determined not by the remote and possible consequences, but by what was presumably the immediate, natural and probable consequence of the criminal intention entertained by the accused. This immediate intention was one which fell within sections 391, 116 or 511, and that, therefore, the Sessions Judge was in error in reversing the conviction and sentence passed by the Assistant Sessions Judge.

Digitized by Google

The only point for consideration in this appeal is whether there was any error in the procedure followed by the Committing Magistrate and the Assistant Sessions Judge when the one committed the accused and the other inquired into the minor charge under sections 395, 116 or 511 because, owing to the want of sanction under section 196, Criminal Procedure Code, a charge under section 122 could not be made or inquired into. It appears from the evidence of the District Magistrate that the idea of a prosecution under section 122, Indian Penal Code, was given up by him after correspondence with Government, as he found from the police inquiry that there was no evidence to substantiate the charge under section 122. The District Magistrate as representing the Government had certainly full discretion in the matter of selecting the particular charges under which Government chose to prosecute the accused, and if he elected for want of evidence to give up the charge under section 122 it did not necessarily follow that no prosecution should be instituted on the minor charges, which the evidence might prove, and for which no special sanction was necessary. This was the view adopted by the Assistant Sessions Judge, before whom the accused's pleader had contended that it was not open to the Committing Magistrate to split up the graver offence and charge accused for the minor offence, because the graver charge could not be inquired into for want of the sanction of Government. This contention assumed that the evidence was sufficient to prove that the accused not only tried to instigate dacoity by collecting men, but that he intended that the men were to be collected to overthrow the British rule and establish his own rule like Shivaji; and slaughter all the Europeans, &c. This assumption, however, could not be made under the circumstances stated by the District Magistrate, according to whom there was no evidence to bear out the charge under section 122. If the Government was not so satisfied, it was not for the Committing Magistrate to decline to frame any charge or for the Assistant Sessions Judge to refuse to inquire into the charges on which the commitment was made. The whole question, therefore, has not been properly approached by the Sessions Judge when he set aside the Assistant Session Judge's conviction; because, in his opinion, the evidence warranted a charge under section 122, and he held that if such a charge could not be brought for want of sanction, no trial should have taken place on the minor charges, for which no sanction was necessary, and which the evidence was sufficient to prove. The Sessions Judge virtually has taken on himself the function of setting his own judgment against the opinion of Government, in a matter which by law belongs properly to Government, which alone under section 196 has the right to grant or refuse the sanction. If in the exercise of that discretion it refused for want of evidence to make the order, it was not for the sessions Judge to hold that it should have made the order or drop the prosecution altogether. Section 196 is not the only section which requires sanction. The preceding section 195 also provides that certain offences shall not be taken cognizance of by any Court, unless previous sanction for such prosecution is granted by the Court before which those offences were committed. The Court before which the offences are committed, have a discretion in the matter of giving or refusing sanction, and if the Court refuses such sanction, it does not follow that no complaints should be inquired into of the minor offences involved in the particular offences for which sanction is needed. For instance, personation is an offence under sections 170 and 171, in respect of which no sanction is necessary. It is also involved in section 205, which relates to false personation for the purpose of a suit. An offence under section 205 requires sanction before it can be inquired into by any Court. Supposing sanction is not granted under section 205 by the Court before which false per-

Digitized by Google

sonation for purposes of a suit was committed, it surely does not take away the authority of the Courts to proceed under sections 170 or 171 if the evidence warranted such a conviction. This same remark would apply to sections 206 to 210, which relate to fraudulent claims made or prosecuted in Civil Courts. If for want of sanction these offences could not be inquired into, it does not follow that the fraud should remain unpunished, if it could be proved under other section of the Code, such as cheating, cheating by personation, &c. (sections 417 to 423) for which offences no sanction is necessary The same remark applies to prosecutions under section 211 which relate to false charges of offences. If these could not be inquired into for want of sanction, it does not follow that the offender cannot be punished for giving false information (section 188) or defamation (section 500) if these minor charges could be proved. This was the principle of the decision passed by this Court in *Queen-Empress* v. *Karigowda*[1]. The decision in *In re Nagarji* [2] was referred to in the argument, and some expressions used by the Judges who decided this last case no doubt favoured the contention that it is an invasion of the law to treat an aggravated as an ordinary offence and thus introduce a different jurisdiction and a lower scale of punishment. But the point decided in that case had relation only to the privilege of pleaders. The analogy of witnesses was applied to them, and it was ruled that as witnesses cannot be prosecuted for defamation though they might be tried for perjury if they give false evidence, the pleader could not be punished for defamation if he exceeds his privilege. The cases decided in *Empress* v. *Abdool Karim*[3] and *Ramanund* v. *Koylash*[4] have no bearing on the present case. They only rule that a Magistrate cannot assume jurisdiction by splitting up a charge so as to disregard that portion of the charge which is beyond his jurisdiction. There was no such splitting up of charges in this case. The Magistrate would only obtain jurisdiction to try under section 122 when the Government granted the sanction under section 196. In the absence of such sanction the minor charge was probably inquired into. It appears to me that the Sessions Judge has laid too much stress upon the so-called confession made by the accused, which confession was held inadmissible in evidence by the Assistant Sessions Judge. Granting that the confession was admissible and did disclose an intention of an offence under section 122, it was surely open to Government to see if that intention was of a character which it could take into account. The Judge himself admits that the accused Puranik was crazy, and his intention to wage war with the help of Mangs and Ramoshis was ridiculous. He characterizes the design as insane and yet he seems to think that the intention of a crazy man must determine the charge that should be made; and if that particular charge could not be made, because of the insanity and insanity of the design of a crazy person, there should be no prosecution. The Sessions Judge's reference by way of authority made to pages 463 to 467 of Mayne's work seems obviously to be without any bearing. Mr. Mayne's remark relates to the distinction between riots which are mere disturbances of the peace and riots which may develop into the waging of war. In such cases intention must be the sole criterion. It is otherwise where, as in the present case, the craziness and insanity made it impossible to assign any other design than that of looting, which in such cases was not a mere incident but the principal object of the attempted offence.

The possible difficulty created by the committal being under sections

[1] [1894] 19 Bom., 51.
[2] [1894] 19 Bom., 340.
[3] [1878] 4 Cal., 18.
[4] (1885) 11 Cal., 236.

Digitized by Google

395 and 116 in a case in which no overt act was committed by anybody, was removed by the alternate charge under section 511 added by the Assistant Judge—*Queen-Empress* v. *Kalyan Singh* (1); *In re MacCrea* (2). To constitute such an attempt it was not necessary that any overt act should be committed by the persons invited to join, but seeing that the accused admittedly gave rich clothes to the Mangs to induce them to collect men, his act cannot be said to have been a mere preparation though it might not be an instigation when nobody was induced to join by reason of the solicitation—*Queen-Empress* v. *Dhundi* (3). Section 511 does not relate only to the penultimate act but to all preceding acts if they were done with the intent to commit or facilitate the commission of the act. Taking this view I feel satisfied that the Assistant Sessions Judge was correct in the procedure followed by him, and that the Sessions Judge was in error in reversing that decision. It is not necessary to consider the question of fact, as both the Assistant Sessions Judge and the Sessions Judge agree in finding that the accused did instigate or abet the committing of dacoity. The sentence passed by the Assistant Sessions Judge must, therefore, be restored, and I order accordingly that the accused be sentenced to rigorous imprisonment for the unexpired portion of the original sentence passed upon him.

FULTON, J.:—Before dealing with the facts I will briefly refer to the questions of law on which the Sessions Court's decision turned. If it is true that the accused asked certain persons to collect men to overturn the Government and to loot the treasuries it seems to me that he abetted not only an offence under section 122, but also the abetment of dacoity (*vide* explanation 4 of section 108, Indian Penal Code). I cannot follow the reasoning on which the Sessions Judge held that as the accused was not prosecuted for the former offence he could not be convicted of the latter. We are bound by the provisions of the Code of Criminal Procedure, and the second clause of section 235 appears exactly to meet a case like the one under consideration. "If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the persons accused of them may be charged with and tried at one trial for each of such offences." That seems so explicit as to leave little room for argument. Here if the accused abetted an offence under section 122, and by the same speech also abetted the offence of abetment of dacoity, he could be tried for each of these offences according to the provisions of section 235, but as that section is controlled as regards the offence against the State by the provisions of section 196, its operation in this case is restricted to the minor offence for which the accused could legally be charged and tried. I do not think the decision in *Queen-Empress* v. *Karigowda* (4) has any bearing on the point in question. Some of the arguments in *In re Nagarji* (5) do support the view taken by the Sessions Judge, but with all deference to the learned Judges who decided that case I cannot but think that some of the dicta which were not really necessary for its determination go beyond the provisions of the Code.

The question whether a witness who makes defamatory statements in the witness-box can be convicted of defamation is one that has led to a great deal of difficulty, and various Courts have explained in different ways the grounds on which the practice of not convicting of defamation in such cases is believed to rest. In these circumstances I do not think we can safely apply to other classes of offences the arguments used in *In re Nagarji* (5). The law on the subject of

(1) (1894) 16 All., 409. (2) (1893) 15 All., 173. (3) [1886] 8 All., 304.
(4) (1894) 19 Bom., 51. (5) (1894) 19 Bom., 340.

Digitized by Google

major and minor offences committed in the same transaction appears to me to be very correctly explained by Mr. Justice Candy in *Queen-Empress* v. *Gundya*(1). Sections 346 and 347 prescribe the procedure to be followed by Magistrates in cases where the evidence indicates the commission of an offence which ought to be tried in a higher Court, but do not touch the matter now under consideration, in which there is no inherent insufficiency of jurisdiction in the Court, but merely a prohibition to its exercise without sanction. In these circumstances I agree with Mr. Justice Ranade in thinking that the refusal of Government to prosecute under section 122, Indian Penal Code, did not affect the accused's liability to punishment under other sections.

The next question to be determined is the section, if any, under which the alleged acts are punishable. The accused is said to have asked people to collect Mangs and Ramoshis for the purpose of making war on the Government and looting treasuries. Such an incitement I think is an instigation to instigate the commission of dacoity.

I am inclined to agree with the Judge in holding that an instigation to wage war against the Government includes an instigation to dacoity, as such war necessarily includes robbery; but there is no occasion to determine this point, as here it is said there was a distinct instigation to collect people to loot treasuries, which could only be effected by dacoity. There might or might not be a political object in view, but the offence of looting the treasury by means of a gang of more than five men and by overcoming the guards would certainly be dacoity. I cannot understand why the Sessions Judge says "a man does not in ordinary parlance, nor in any of the illustrations to section 108, instigate an offence which he is about to commit as a principal, nor is such an interpretation within the meaning of the term 'abetment.'" If A asks B and others to come with him to commit dacoity, he seems to me to instigate those men to dacoity, just as much as if he asks them to go under some other leader. Similarly if he asks B to ask C and others to join in dacoity he abets the abetment of dacoity. It would be a strange doctrine to hold that a person who did his best to bring about a dacoity by asking other people to join him, or employing an agent to collect them, could not be punished for abetment. The mere fact that no illustration of this kind is given under section 108, Indian Penal Code, does not alter the meaning of the word "instigate" in section 107. I agree with the Sessions Judge that section 511 is inapplicable in this case.

The most the accused did was to make unsuccessful efforts to collect men and to buy some articles of clothing apparently for the reward or decoration of his followers. Apart from the difficulty alluded to by the Sessions Judge of attempting to commit an offence like dacoity which may itself consist merely in an attempt to commit robbery, I do not think the acts of the accused amounted to an attempt. In many cases it is hard to indicate the precise point at which a preparation to commit a crime becomes an attempt to commit it; and it is still more difficult to define in general terms the difference between a preparation and an attempt. In some cases the distinction is clear. If A merely buys a stick in order to beat B no one would think of saying that he attempted to beat B If he ran at B with the stick, but was seized by C, probably most people would say that he did attempt to beat him. But there might be many intermediate cases in which there would be a difference of opinion

(1) (1889) 13 Bom., 502.

Digitized by Google

whether the acts amounted to an attempt or merely constituted a preparation. It is unnecessary to enter into any discussion on this subject, as here I think it is clear that the acts alleged did not amount to an attempt, and that the introduction of section 511 into the case was superfluous.

The third question which I have to consider is one of fact to which Mr. Bhagvat almost exclusively confined his argument. He contended that the individual acts of abetment were not proved. But as the general intentions of the accused are proved conclusively both by his confession to Mr. Dodgson and by numerous witnesses, there seems no good reason for disbelieving the act of abetment to dacoity deposed to by Mahadu, whose statement is corroborated by the evidence of Dattatraya and to some extent by Ganesh. War against the Government would naturally be initiated by attacks on treasuries. There are other acts proved which might also perhaps constitute acts of abetment; but as this one act seems established, there is no need to discuss the rest The accused ought to have been distinctly charged with the separate acts for which he was being tried instead of with one general charge of instigating various persons to commit dacoities; but he was defended by able pleaders who can have had no difficulty in finding out from the committal proceedings the offences alleged against him, and does not, therefore, appear to have been prejudiced by the irregularity. I would now reverse the acquittal by the Sessions Judge, and would convict the accused under section 116, Indian Penal Code; and I would restore the sentence of eighteen months' rigorous imprisonment imposed by the Assistant Sessions Judge, and direct that the prisoner undergo the unexpired portion thereof.

1900 *August* 7. I. L. R. 25 Bom. 151.

FULL BENCH.

Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Ranade, Mr. Justice Fulton, Mr. Justice Crowe and Mr, Justice Batty.

CHHOTALAL LALLUBHAI (ORIGINAL COMPLAINANT), APPLICANT, *v.* NATHABHAI BECHAR AND ANOTHER (ORIGINAL ACCUSED), OPPONENTS.

Criminal Procedure Code (Act V of 1898), Sec. 4 (h), Chap. XV, Part B, Secs. 191, 195, 196, 198, 199, and Sec. 345—Penal Code (Act XLV of 1860), Sec. 499, Explanation I—Defamation of wife—Complaint by husband—Aggrieved party.

Held by the Full Bench (Ranade, J., dissenting) that under the provisions of the Criminal Procedure Code (Act V of 1898) a husband is contitled to be complainant where the alleged offence is defamation, imputing unchastity to his wife.

(Note:— This case is Diss. 8 C. W. N. 515.)

APPLICATION for revision under section 435 of the Criminal Procedure Code (Act V of 1898) against an order passed by F. X. DeSouza, Sessions Judge of Ahmedabad.

The complainant Chhotalal Lallubhai lodged a complaint in the Court of the City Magistrate of Ahmedabad against Nathabhai Bechar and Ambashankar Dalsukhram charging them with having defamed his (complainant's) wife by imputing unchastity to her.

The Magistrate on the authority of *Imperatrix* v. *Kustantin John de*

* Criminal Application for Revision No. 70 of 1900.

Digitized by Google

Souza (1) discharged the accused under section 253 of the Criminal Procedure Code (Act V of 1898). The following is an extract from his judgment:—

"If the husband of a woman can be considered to be aggrieved when her chastity be called in question. why should not her parents, brothers, sisters and children be considered, if not more at least as much aggrieved as the husband himself? The reputation of the parents, I should think, suffers greater injury, and the reputation and the prospects of the brothers, sisters and children suffer greater harm from a social point of view as regards marriage and other caste matters, than the reputation and prospect of the husband. A woman married or a widow or a virgin may in some cases be living with her old decrepit father or mother or a sickly brother, or sister or a son or daughter of tender years, and may be the sole person on whom such a relative could depend for his or her nursing and care. In the event of her being defamed, can the law permit such a relation to file a complaint on the grounds that his or her reputation has suffered injury, and that in the event of the woman being outcasted he or she would not be able to live with her, would not for some reason or other be able to secure the aid and care of another nurse in her place, would not be able to obtain protection from another relative, and would consequently suffer harm in body or mind or both? When once the boundary laid down by law is crossed, where should the limit be fixed and to what degree of relationship should the privilege of bringing a complaint be extended or restricted? I think it would not be proper according to law to allow any such relative to be complainant. Why should, then, the husband be allowed to claim a greater privilege?

"The offence of defamation is compoundable: *vide* section 345, Criminal Procedure Code. The only person who can compound it is 'the person defamed.' Hundreds of cases may be conceived in which a husband may be quite anxious to run to Court for defamation of his wife, but the wife herself may be quite averse to such a course. Who can, in the event of a complaint being filed, then compound the offence? The wife and not the husband. When, then, once the provisions of section 198, Criminal Procedure Code, are made elastic to suit the convenience of the husband, why should those of section 345, Criminal Procedure Code, not be made equally so? And would such a course be legal and proper? I am respectfully of opinion that it would not be."

The Sessions Court at Ahmedabad having confirmed the Magistrate's order of discharge, the complainant applied to the High Court in its extraordinary jurisdiction (section 435 of the Criminal Procedure Code, (Act V of 1898) and obtained a rule *nisi* calling on the accused to show cause why the order of the Sessions Judge should not be set aside.

Lallubhai A. Shah appeared for the complainant in support of the rule.

There was no appearance for the opponents (accused).

The case was argued before a Division Bench composed of Fulton and Crowe, JJ., which referred it to a Full Bench. The following was the referring judgment:—

FULTON, J.:—We are inclined to agree with the decision of the Madras High Court in *Chellam Nattu* v. *Ramasami* (2) that when a married woman is defamed by the imputation of unchastity, her husband is a person aggrieved upon whose complaint the Magistrate may take cognizance of the case under section 198 of the Criminal Procedure Code. It seems to us that such an imputation made by a third person concerning the wife causes a direct injury to the honour and reputation of the husband.

But we find that in Criminal Reference No. 14 of 1887 this Court came to a contrary decision, and as it seems impossible to distinguish that case from the present, we have decided to refer the question to a Full Bench.

The question being thus referred, it was argued before the Full Bench composed of Jenkins C. J., Ranade, Fulton, Crowe and Batty, JJ.

Lallubhai A. Shah, for the complainant:—We say that a husband is a party 'aggrieved' within the meaning of section 198 of the Criminal Procedure Code. The use of the words "some person" in the section shows that the Legislature did not intend to limit the right only to the person actually defamed. The word 'aggrieved' also does not mean only the person against whom and in

(1) Criminal Rulings of the Bom. H. C. R., No. 14 of 1887—

Held (West and Birdwood, JJ.) that, in a case of defamation of a female, it is she herself, and not a male relative, who should make a complaint under section 198 of the Criminal Procedure Code (Act X of 1882).

(2) (1891) 14 Mad., 379.

Digitized by Google

respect of whom the defamatory matter is published; it means any person who is in any way concerned in, and affected by, the publication. The general rule in criminal matters is that any person who has the knowledge of the facts constituting an offence can lodge a complaint—section 190 of the Criminal Procedure Code; *In Re Ganesh Narayan Sathe* (1). The words in section 198 should be liberally construed. Criminal law regards the husband and wife as one person: see sections 216 and 216 A of the Indian Penal Code. There are only two rulings on this point, namely, *Imperatrix* v. *Kustantin John de Souza* (2) and *Chellam Naidu* v. *Ramasami* (3). In the first case there is no written judgment, and no reasons are given in support of the ruling. The second supports our contention. The ruling in *Brahmanna* v. *Ramakrishna* (4) does not touch the point.

[JENKINS, C. J.:—Does not the defamation of the wife in this case, that she is unchaste and adulterous, amount to defamation of the husband, inasmuch as it might affect his reputation and *status* in the caste?]

We submit that it would be defamation of the husband, and he would certainly be an 'aggrieved' party within the meaning of section 198 of the Criminal Procedure Code.

There was no appearance for the opponents (accused) to show cause against the rule.

The judgment of the Full Bench (Ranade, J., dissenting) was delivered by

JENKINS, C. J. (Fulton, Crowe and Batty, JJ., concurring):—The question arising on this reference is whether, under the provisions of the Code of Criminal Procedure, a husband is entitled to be complainant where the alleged offence is defamation imputing to his wife unchastity.

The solution of this question turns on the meaning to be ascribed to the expression in section 198 of the Code "by some person aggrieved by such offence." The referring Bench favoured the view that the husband could complain, but were pressed by an earlier unreported decision of this Court where the opposite view was taken; hence this present reference.

Now it will be as well, in the first place, to examine the general scheme of the Code with reference to the initiation of proceedings by complaint. The nature of a complaint we learn from section 4 (*h*), which provides that "'complaint' means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence."

Part B of Chapter XV of the Code deals with the conditions requisite for the initiation of proceedings, and by section 190 it is enacted that "except as hereinafter provided, any Presidency Magistrate, District Magistrate, or Sub-Divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence upon receiving a complaint of facts which constitute such offence." So far there is no limitation as to the person who can complain. By sections 195, 196, 198 and 199 the capacity to complain in respect of certain specified offences is limited to the persons described in those sections. Thus we find that under section 198 the Court cannot take cognizance of the offence of defamation "except upon a complaint made by some person aggrieved by such offence." A consideration of the offences named in sections 198 and 199 makes clear what the motive for the restriction is. The offences

(1) (1899) 13 Bom., 600. (2) (1887) Cr. Rul. No. 14. (3) (1891) 14 Mad., 379. (4) (1894) 18 Mad. 250.

Digitized by Google

named in section 198, *e. g*, are (1) criminal breach of contracts of service, (2) defamation and (3)the offences relating to marriage except adultery and enticing or taking away or detaining with a criminal intent a married woman. The offences of adultery and enticing away, &c., a married woman require under section 199 that the complaint should be made by the husband, or, in his absence, by some one who had care of her on his behalf. All these offences are obviously of a private character, and hence the limit on the persons by whom initiation of proceedings is allowed ; for it would be eminently undesirable that any one should have it in his power to drag into a Court of justice offences of this sort, and that I take to be mischief against which it is sought to guard.

Now it does not appear to me that a husband complaining of an imputation of unchastity on his wife's part would *prima facie* come within the mischief ; and I think one is entitled to approach the question in the light of this consideration, and to ask whether there is anything in the expression ' some person aggrieved by such offence ' that excludes him from being a competent complainant. I am unable to find in the Code any limitation of the sense in which the word ' aggrieved ' is used. Nor is there any indication of the kind of grievance which may qualify a man to complain. Still I think it must be conceded that any fanciful or sentimental grievance would not suffice : it must be such a grievance as the law can appreciate : it must be what has been termed a legal grievance and not a *stat pro ratione voluntas* reason.

Is, then, an imputation of unchastity in his wife a legal grievance to a husband? It appears to me that *a priori* it clearly is, though there no doubt may be special circumstances under which it would not be. Whether or not such special circumstances exist, is a question for determination on the facts of each case as it arises. My reason for saying that such an imputation is *prima facie* a legal grievance to the husband is this ; it is a grievance capable of recognition by a Court of justice ; for it is one that will entitle him to recover such special damages as may have resulted to him from it ; and as has been said, " the reputation of a husband is so intimately connected with that of his wife, that he has always been allowed to sue whenever he has received damage just as though the words had been spoken of himself. " Moreover, common experience of life shows that a husband under ordinary circumstances suffers by the evil reputation of his wife. Obviously, then, the grievance to the husband cannot be described as merely sentimental.

It seems to me impossible to limit the scope of the expression " some person aggrieved " to those by whom an offence may under section 345 of the Code of Criminal Procedure be compounded If that were the true view, then it is only the person defamed who can complain But in that case Explanation I to section 499 of the Indian Penal Code (Act XLV of 1860) becomes a dead letter. That explanation makes the defamation of a deceased person an offence; but if it is only the person defamed who can complain, it follows that there is no one who can initiate proceedings,and that I cannot suppose was ever intended, or can be the actual result of section 198.

The view, too, that the capacity to complain is not limited by section 345 finds, I think, some support in the form of the expression " some person aggrieved".

The conclusion, then, to which I come is, first, that the expression " some person aggrieved " is not necessarily limited to the person defamed, and secondly that *prima facie* a husband is a person aggrieved by an imputation of unchastity to his wife with whom he is living, and I would so answer the question referred.

Digitized by Google

I have not referred to the decided cases, for it appears to me that our office sitting here as a Full Bench is to ascertain the meaning of the Code. Still it will not be inappropriate to point out, as in some measure favouring the conclusion I have expressed, that the only reported case on the point prior to the recent re-enactment of the Criminal Procedure Code was that of *Chellam Naidu* (1), in which a husband was held to be a person aggrieved by the imputation of unchastity to his wife. Yet with that decision before them the framers of the new Code deemed no amendment necessary, a fact which, so far as it goes, favours the conclusion at which I have arrived.

RANADE, J. :—The question referred to the Full Bench is whether the husband of a married woman, who is defamed by the imputation of unchastity, can be regarded as a "person aggrieved" within the meaning of section 198 of the Criminal Procedure Code, which provides that no Court shall take cognizance of an offence under Chapter XXI, Indian Penal Code, except upon a complaint made by some person aggrieved by such offence. The Judges of the Division Bench, who made the reference, were inclined to agree with the decision in *Chellam Naidu* v. *Ramasami* (1) in which it was held that when a married woman is defamed by the imputation of unchastity, her husband is a person aggrieved within the meaning of section 198 of the Criminal Procedure Code.

In a later case (*Brahmanna* v. *Ramakrishna* (2) which related to a civil suit brought by a person to recover damages caused by an imputation that his wife had committed adultery with a *Paria*, and that her children were born of that *Paria*, Justice Muttuswami Ayyer said that there was no occasion to depart from the rule that the person who is defamed or slandered ought to sue and that as plaintiff's wife was *sui juris* no other person was permitted to sue. In so deciding this point, Justice Ayyer relied upon a previous decision (*Subbaiyar* v. *Kristnaiyar* (3) which also related to a civil suit, and reference was made to *Jaya* v. *Paramsukh* (4) and *Luckumsey* v. *Hurbun*(5), in the first of which cases a father was not allowed to sue for the defamation of his daughter, and in the second a *bhauband* of a deceased person was held not entitled to sue for the defamation of that person. These decisions in civil suits are of course not strictly applicable in the present case, which relates to a criminal proceeding, and the point in dispute is confined to the interpretation of the word "aggrieved" used in section 198 of the Criminal Procedure Code. These decisions, however, suggest the principle which ought to govern the relations of wife and husband in complaints of defamation. If the husband of the slandered person is not permitted to sue for the imputation on his wife's character, it cannot be assumed that, in the absence of special injury to himself, the husband would be permitted to make a complaint in respect of a slander of his wife. The force of the Madras decision in *Chellam Naidu* v. *Ramasami* (1) is thus considerably shaken by the later decision.

In Bombay the understanding has always been that none other but the female defamed, and not her male relation, can bring the complaint. See *Imp.* v. *Kustatin John de Souza*(6), The order passed in this last case is very brief and gives no reasons, but it may be safely gathered that the Judges, who disposed of the criminal reference, must have thought the person aggrieved in section 198, Criminal Procedure Code, was the person defamed. There is one decision in our Bombay Reports (*Queen-Empress* v. *Bai Rukshmoni*(7)) which was

(1) (1891) 14 Mad., 379.
(2) (1894) 18 Mad., 250.
(3) [1876) 1 Mad., 383.
[4] [1888] 11 All., 104.
[5] (1881) 5 Bom., 580.
(6) (1887) Cr. Rul., No. 14.
(7) (1886) 10 Bom. 340.

Digitized by Google

passed expressly on section 198, Criminal Procedure Code, in connection with a prosecution under section 494, Indian Penal Code. There the wife of a lunatic was prosecuted for bigamy on the complaint of the lunatic's brother, and it was held that this brother was not a person aggrieved within the meaning of section 198, Criminal procedure Code.

Explanation I to section 499, Indian Penal Code, permits that the near relations of a deceased person may complain of a defamation imputing anything to a deceased person if the imputation would harm the reputation of that person if living and is intended to be hurtful to the feelings of his family or near relatives. It will appear from this that though generally the person defamed is the person aggrieved, yet, in the case of a deceased person, an exception is made which allows the relations to complain when the imputation harms the reputation of the deceased and also at the same time hurts the feelings of living persons. The word "aggrieved" is used in reference to three different complaints: Ist, in regard to complaints under Chapter XIX; 2nd, in complaints under defamation; and 3rdly, in offences against marriage—sections 493 to 496, Indian Penal Code. In cases of adultery—sections 497 and 498, Indian Penal Code—it is expressly provided by section 199, Criminal Procedure Code, that either the husband or in his absence some person who had care of the wife may complain. The person defamed is obviously not always the person aggrieved. In the case of a deceased person, the aggrieved complainant may be other than the person defamed, but the section lays down that such a living person may complain if the imputation was intended to be hurtful to the feelings of living persons besides being harmful to the deceased.

In the present case, Chhotalal does not, however, complain that his reputation has been injured. In his complaint he says it is his wife who is defamed, and his name is included as being the husband of so and so. Under these circumstances, he cannot be regarded as an aggrieved person under section 198, Criminal Procedure Code, read alone with section 345, Criminal Procedure Code, which expressly enacts that the person defamed is the only person who can compound. If, as in the cases quoted above, brother and father were held not entitled to bring civil or criminal complaints, there is no ground for distinguishing the husband from other near relations. It would be a serious anomaly to hold that though the husband may complain, the wife may undo its effect by compounding under section 345, Criminal Procedure Code.

The imputation about eating and drinking was clearly personal and confined to the wife. The imputation about the wife's having intercourse with men low caste is of a similar character. The sting there is of an offence against caste and not an offence against the law or morals. No caste meeting was held charging Chhotalal for the fault of his wife, and there is nothing to show that anything was intended as against Chhotalal by the caste.

Under these circumstances the person aggrieved under section 198, Criminal Procedure Code, was the person who was defamed and who alone could compound. I would, therefore, reply to the reference made to us by saying that the Bombay decision was correctly decided and that the decision in *Chellam Naidu* v. *Ramasami* (1) must be regarded as overruled by the decision in *Brahmanna* v. *Ramarkishna* (2). The person aggrieved may be other than the person defamed under special circumstances, but the complaint in this case does not disclose such circumstance, and, therefore, the general law must govern.

Order according to the decision of the Full Bench.

(1) (1891) 14 Mad., 379. (2) (894) 18 Mad., 250.

Digitized by Google

1900 *August* 20. I. L. R. 25 Bom. 168.

Before Mr. Justice Fulton and Mr. Justice Batty.

QUEEN-EMPRESS *v.* BASVANTA AND OTHERS. §

Evidence—Confession—Retracted confession—Evidence (Act I of 1872), Secs. 24, 30 and 33—Deposition of a deceased witness—Admissibility of such deposition in subsequent proceedings.

A confession duly recorded and certified under section 164 of the Criminal Procedure Code Act V of 1898) is admissible in evidence against the person making it unless shut out by the provisions of section 24 of the Indian Evidence Act (I of 1872.)

A mere subsequent retractation of a confession which is duly recorded and certified by a Magistrate is not enough in all cases to make it appear to have been unlawfully induced.

The law in India is not identical with the law in England on the relevancy and admissibility of confessions.

Imperatrix v. *Balya Dagdu* (1) dissented from.

Reg. v. *Balvant* (2) followed.

Where a witness for the prosecution was examined before a committing Magistrate, but was not cross-examined, and then died before the case came on for trial to the Sessions Court, and his deposition was tendered in evidence at the trial.

Held, that the deposition was admissible under section 33 of the Evidence Act (I of 1872).

APPEALS from the convictions and sentences passed by F. C. O. Beaman, Sessions Judge of Belgaum, in the case of *Queen—Empress* v. *Basvanta* and four others.

The five accused were committed to the Sessions Court of Belgaum on a charge of murder under section 302 of the Indian Penal Code (Act XLV of 1860).

Accused Nos. 1 and 2 made confessions before the First Class Magistrate of Belgaum implicating themselves and the other accused in the crime.

These confessions were subsequently retracted by the accused during the course of the preliminary inquiry before the committing Magistrate on the ground that they had been extorted by torture.

The Sessions Judge refused to admit these confessions in evidence, as he considered that the circumstances were such as to throw a serious doubt on their voluntariness.

On the rest of the evidence for the prosecution the Sessions Judge concurring with the jury convicted all the accused of the offence charged, and sentenced them each to death subject to the confirmation of the sentence by the High Court.

Thereupon the accused appealed to the High Court.

Rao Bahadur *V. T. J. Kirtikar*, Government Pleader, for the Crown.

Nilkhant Atmaram for accused Nos., 2 and 3.

B. A. Bhagwat for accused Nos. 4 and 5.

FULTON, J. :—In this case the Sessions Judge of Belgaum has, on the unanimous verdict of a jury, convicted the five accused persons of the murder of one Satyagowda and has sentenced them to death. Against these convictions the prisoners have all appealed, and the case now comes before us, both on appeal and on the reference of the Sessions Judge for confirmation of the sentences.

The murder is proved to have been committed about 10 or 11 A. M. on the 14th April in the open street in the village of Nidsoshi, and there seems no reason to doubt that two persons—Anantbhat and Gopal—were actually present at the scene.

§ Criminal Appeals. Nos. 350 to 352 of 1900.

(1) Cr. Rul. No. 3 of 1898. (2) (1874) 11 Bom. H. C. R., 137.

Digitized by Google

The third accused was arrested within a very short time of the murder at a well on the Akivat road, where he was washing his clothes. The fourth and fifth accused were arrested about 10 P. M. the next day in a hut about a quarter or half a mile from the village of Nidsoshi. The first and second accused were arrested at Belgaum on the 22nd April—eight days after the murder.

The evidence to support the conviction has been carefully analysed by the Judge in his charge to the jury, and his classification may conveniently be adopted. (His Lordship then discussed the evidence in detail and continued as follows :—

It was suggested that the deposition of witness No. 25, who died before the trial, was inadmissible, as he was not cross-examined before the Magistrate. But, we think that, as the accused persons had the right and opportunity of cross-examining him, his evidence was admissible under section 33 of the Evidence Act, notwithstanding the omission of their pleader to avail himself of that right.

So far the case as presented to the jury was simple. Their verdict was amply suppoted by the evidence before them. But in addition to that evidence there are the confessions made by accused Nos. 1 and 2 on the 30th April, which, it is contended, introduce an element of uncertainty.

The learned Session Judge refused to admit these confessions, as he considered that the circumstances were such as to throw a serious doubt on their voluntariness.. The Government Pleader on the one side and Mr. Bhagwat on the other on behalf of accused No. 5 have both applied to us for their admission.

For two reasons we think that the Judge was in error in rejecting them.

In the first place, even if inadmissible against accused Nos. 1 and 2, who made them, they ought to have been admitted in favour of No. 5 on the principle explained in the case of *Pitamber Jina* (1). The Judge himself, when he came to pass sentence, felt the difficulty of the situation. He then very properly referred to these confessions, for it would have been wrong to pass sentence of death on No.5 without reference to them. Similar considerations might have suggested the necessity of laying them before the jury; but we notice with some surprise that the pleader for No. 5 does not appear to have pressed for their admission. Perhaps it may have been thought that they would not influence the verdict ; but they were obviously material to the case and required to be taken into account.

In the second place we think that even as against accused Nos. 1 and 2 there was no sufficient reason for their exclusion.

We are of opinion that in India a confession duly recorded and certified under section 164, Criminal Procedure Code, is admissible in evidence against the person making it, unless shut out by the provisions of section 24 of the Evidence Act, " to which alone ", as pointed out in *Pitamber's* case(1) by Chief Justice Westropp, " we are at liberty to look for the law of evidence in this country."

We have read with sympathetic interest the discussion on this subject which has lately appeared in the July Number of the *Bombay Law Reporter* and appreciate the manifest earnestness of the writer in his desire to prevent the extortion of confessions by unfair means. But, in deciding whether or not any particular confession is admissible in evidence, we have to be guided by the

(1) (1877) 2 Bom., 61.

Digitized by Google

provisions of the law enacted by the Legislature. It is true that in England when a doubt arises as to the admissibility of a confession, the Court has to decide whether it has been proved affirmatively to be free and voluntary. This is the law laid down in the *Queen* v. *Thompson*(1) by Mr. Justice Cave with the concurrence of Lord Coleridge, C. J., and Hawkins, Day, and Wills JJ.

In India the law on the subject is contained in section 24 of the Evidence Act, as follows :—

"A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise having reference to the charge against the accused person proceeding from a person in authority and sufficient in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

The section must be fairly construed according to its language, and if this is done it seems to us impossible to contend that the law in India is identical with the law in England as explained in *The Queen* v. *Thompson* and the cases therein referred to. The question which a Court has to decide when determining on the admissibility of a confession is whether it appears to the Court to have been induced by the means mentioned in that section. It may be that this section does not require positive proof, within the meaning of section 3, of improper inducement to justify the rejection of the confession. The use of the word "appears" indicates, it may be argued, a lesser degree of probability than would be necessary if "proof" had been required. A Court might perhaps in a particular case fairly hesitate to say that it was *proved* that the confession had been unlawfully obtained, and yet might be in a position to say that such *appeared* to it to have been the case. Still although we think that very probably a confession may be rejected on well-grounded conjecture, there must be something before the Court on which such conjecture can rest. It does not seem possible to say that the mere subsequent retractation of a confession which has been duly recorded and certified by a Magistrate, is enough in all cases to make it appear to have been unlawfully induced. Without assuming the functions of the Legislature we cannot lay down any general rule to meet the varying circumstances of different cases. To require, as the criterion of admissibility, affirmative proof that a duly recorded and certified confession was free and voluntary, would not, in our opinion, be consistent with the terms of sections 21 and 24 of the Evidence Act, or with the interpretation given to those sections by Mr. Justice Nanabhai in *Reg.* v. *Balvant*(2) which appears to us to have been correctly decided and to be in harmony with the practice of the Courts.

The remarks made in *Imperatrix* v. *Balya Dagdu* (3), in so far as they may have been intended to prescribe a different practice, cannot, we think, be accepted as consistent with section 24, nor do they appear to have been necessary for the decision of the case in which the disputed confession was accepted and acted on.

It may be thought that the law as it stands does not afford adequate protection to prisoners against illegal practices whereby confessions are extorted but it is not permissible to us to amend it. What the Legislature doubtless hoped and intended was that Magistrates would not record confessions unless they really believed that they were made voluntarily (Cf. *Queen* v. *Thompson*(4) In the case of Magistrates acting under section 164 of the Criminal Procedure Code, there can be no question that they must be affirmatively satisfied of the

(1) (1893) 2 Q. B., 12.
(2) (1874) 11 Bom., H. C. R., 137.
(3) Cr. Rul. 3 of 1898.
(4) (1893) 2 Q. B., 12.

Digitized by Google

voluntariness of the confession, and that when in doubt on this point they ought not to record or give the certificate. The consideration which this question is at present receiving will, we hope, lead to the issue of such instructions as may help Magistrates in the difficult task of deciding what confessions are "voluntary" but the matter is not one that can be further discussed in this judgment, in which we are confined to the points immediately at issue.

In the present case we can see no reason for supposing that the confessions were not voluntarily made. The accused were arrested on the 22nd and were sent to the Magistrate on the 29th April Their statements were recorded on the 30th, at which time their bodies were examined, and no marks of ill-treatment were discovered. Subsequently in the committal proceedings they retracted their confessions and said according to the English translation that they had been tortured. According to the vernacular, which doubtless contains the words actually used, No. 1 said he had suffered *tras* (trouble—annoyance); and No. 2 said he had been beaten (*badadu-hodadu*). The Magistrate, when these statements were made to him on the 30th May, ought, we think, to have questioned the accused further on the subject so as to ascertain exactly what they had to allege. The remarks of Chief Justice Westropp in *Reg.* v. *Kashinath Dinkar* (1) show that allegations of ill-treatment made by prisoners are not to be overlooked. These remarks, we fear, are as appropriate at the present day as they were when they were written in 1871. But it may be that as the Magistrate who committed the case was the same as the Magistrate who a month before had recorded the confessions and had examined the bodies of the accused, he was satisfied that the allegations of physical ill-treatment were untrue, and, therefore, refrained from further enquiry on the subject. There is nothing, then, to show that as a matter of fact these two accused had been ill-treated, for we do not think that their general statement on the subject on the 30th May outweighed the fact that no marks appeared on their bodies on the 30th April. The beating alleged by No. 2 could hardly have escaped detection, and no other form of torture was suggested. The fact that the accused were eight days in the custody of the police, might suggest unwillingness to confess at an earlier period but in the Sessions Court the policeman (witness No. 27) who sent them to the Magistrate, was not questioned as to his reasons for the delay. Looking to the terms of the confessions themselves there is nothing special to indicate coercion. Those terms can hardly have been dictated by the police, omitting, as they do, the name of No. 5. They contain full admissions of guilt, but they are slightly favourable to the men who made them, in as much as they are represented as instruments of others, rather than the originators of the plot. It may be matter for wonder why they should have confessed at all, but it is possible that they realized the hopelessness of their position, having committed the murder in the presence of witnesses and then fled from the village. In these circumstances they may have thought it useless to deny their guilt and may have supposed that confession was their best course. In many cases circumstances may suggest grounds for believing that confessions have been made under pressure, but such circumstances seem to us wanting in the present case. The Magistrate who recorded the confessions has certified that he believes them to have been voluntarily made, and there is nothing to make it appear to us that they were obtained by means which would render them inadmissible under section 24.

We, therefore decide to admit them under the provisions of section 375 of the Criminal Procedure Code. Without them the evidence is amply sufficient

(1) (1871) 8 Bom. H. C., 126, at pp. 137, 138.

Digitized by Google

for the conviction of accused Nos. 1, 2, 3 and 4; and the fact of these confessions having been made only serves to assure us of the correctness of the conclusion at which the jury have arrived, and to which we should ourselves have come on the evidence recorded by the Judge.

As regards No. 5 the confessions present difficulties which would otherwise have been wanting, but in spite of them we are of opinion that the conviction is right. It is difficult to disbelieve the evidence of the two eye-witnesses who are as positive about No. 5 as about the other prisoners.

(His Lordship, after dwelling upon the evidence presented against accused No. 5, proceeded as follows:—)

It seems impossible to suppose that all this evidence could thus hastily have been concocted against No. 5, merely on suspicion based on the old feud, or to doubt the truth of what the witnesses depose to. How, then, can the omission of the name of No. 5 in the confessions be accounted for? We think that it can only be explained on the hypothesis that for some reason or other Nos. 1 and 2, who probably knew nothing of his report, wished to screen him. They knew the facts, and possibly believed that he was not such an active instigator as Nos. 3 and 4. He seems to have taken a less prominent part in the murder itself and may have been half-hearted, but that he was concerned both in the plot and in the crime itself we think there can be no doubt.

The murder was cruel and deliberate. All who took part in it might justly be condemned to die. But as usual in cases where many prisoners are involved, we hesitate to confirm so many sentences and try to discriminate. For Nos. 3 and 4 there seems nothing to be said. Their sentences must be confirmed. Nos. 1 and 2 are younger men who seem to have been acting under the direction of others: No. 5, though meanspirited in his conduct, seems to have been less resolute about the murder than the rest. We shall commute the sentences in the case of these three prisoners We dismiss the appeals of Nos. 3 and 4 and confirm the sentences of death. In the case of the other three prisoners we commute the sentences to transportation for life.

1900. *August 23.* **I. L. R. 25 Bom. 179.**

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

IN RE PANDURANG GOVIND PUJARI AND OTHERS.*

Criminal Procedure Code (Act V of 1898), Secs. 145 and 526—Transfer of a case—Criminal case—Bias of Judge—Magistrate's powers under Sec. 145—Breach of Peace—Rights of the parties.

The provisions of section 526 of the Criminal Procedure Code (Act V of 1898) do not give any power to direct the transfer of any proceedings initiated under section 145 of the Code. Such proceedings do not constitute a "criminal case" within the meaning of section 526 of the Code. A criminal case means a case arising out of, and dealing with, some crime already committed. It does not include proceedings taken for the prevention of crime.

Under section 145 of the Code a Magistrate is not at liberty to go into the merits of the claims of any of the parties to the dispute, to a *right* to possess the subject thereof. He can decide only the fact of possession at the date of the order requiring the parties to put in their statements.

The parties cannot be called upon to furnish a statement of their rights, nor can the Magistrate take, as the basis of any action he may finally decide upon, any conclusion at which he may arrive, or at which he may have arrived, as to the respective titles of the parties.

---

* Criminal Application for Revision, No. 144 of 1900.

Digitized by Google

(NOTE:—This case is Ex. 3 Bom. L. 416. Diss: 12 M. L. J. 391 Ref: 5 c. w. 749; 28 Cal. 709; 6 Bom. L. 246, 480.

THIS was an application under section 526 of the Criminal Procedure Code (Act V of 1898) for the transfer of a case from the Court of the First Class Magistrate at Pandharpur.

The applicants were the *Sevadharis* (temple servants) of the temple of Shri Pandurang at Pandharpur (1). The *Badves*, who opposed the application, were the chief priests, managers, and trustees of the said temple.

A dispute arose between the *Badves* on the one hand and the *Sevadharis* on the other, about the right of performing the *Alankar Puja* (decoration rites) at the temple.

Thereupon one Dnyneshwar Dadaji Badve made a complaint to the District Magistrate of Sholapur, complaining that the *Benares*, a class of *Sevadharis*, had obstructed him in the performance of the said *puja*.

On this complaint the District Magistrate passed an *ex parte* order on the 10th of October, 1899, to the following effect :—

" There appears to be a dispute about the *Alankar Puja*. But looking to the past practice, the *Badves* alone have the right to perform the service, and the High Court of Bombay has also decided that *Badves* alone should perform this *puja*. The *Benares* and the other *Sevadharis* have no right at all to perform this service. For this reason, if the *Sevadharis* or other persons obstruct the *Badves* at the time of this service, the police should remove the obstruction, and, if necessary, those who cause the obstruction should be expelled from the temple during this service."

This order was set aside by the High Court on the 22nd January, 1900, on the ground of defect in procedure, and the District Magistrate was directed to re-hear the case after giving due notice to all persons interested in the matter.

After the remand the District Magistrate transferred the case for inquiry to the First Class Magistrate at Pandharpur.

On the 12th May, 1900, the Magistrate purporting to act under section 145 of the Criminal Procedure Code (Act V of 1898) issued an order to the *Badves* as well as to all classes of *Sevadharis* requiring them to file written statements of their respective rights and duties at the performance of the *Alankar Puja*.

Thereupon the present application was made to the High Court by the *Sevadharis* for the transfer of the case from the Court of the First Class Magistrate to another Court, on the following grounds, viz :—

" (1) That the First Class Magistrate at Pandharpur being a *yejman* or patron of one of the *Badves*, there was a likelihood of his dealing with the case with a real bias in their favour.

" (2) That the Magistrate had already expressed his opinion in favour of the *Badves* and against the *Sevadharis* about their respective rights and duties at the temple, especially in connection with the *Alankar puja*, in a report submitted by him to the District Magistrate of Sholapur on 5th May, 1899."

" (3) That the Magistrate having thus prejudged the merits of the case was disqualified from trying the case."

Upon this application the High Court issued notices to the District Magistrate and the *Badves* to show cause why the case should not be transferred.

Thereupon, the District Magistrate made the following affidavit :—

"It is a fact that Mr. Thakar is the *yejman* of Vishwanath Gopal Badve, but the word 'patron' is not a quite correct translation of the term '*yejman*.' It is customary for every Hindu to have some '*upadhya*' or priest at sacred places like Pandharpur ; this relation of '*yejman*' and priest has descended to Mr. Thakar and Vishwanath Badve from their forefathers as a mere matter of form. I am sure it can in no way affect the judicial impartiality of the former.

(1) See I. L. R. 24 Bom., 527.

Digitized by Google

"It is also true that Mr. Thakar once submitted a report to the District Deputy Collector, Sholapur, regarding the *Alankar puja* while Mamlatdar at Pandharpur; but that report simply expressed his general views and has nothing to do with the trial of the case or consideration of its judicial merits. It was merely a departmental report submitted in a non-judicial capecity. Besides, in the present case, this report has been already rejected as evidence. I, therefore, declare that neither of these facts will influence the Magistrate in a judicial inquiry or interfere with his judicial independence."

G. S. Rao for applicants.

N. G. Chandavarkar for opponents.

Rao Bahadur *V. J. Kirtikar*, Government Pleader, for the Crown.

The following judgment was delivered by.

JENKINS, C. J. :—A dispute having arisen at Pandharpur between the *Badves* and *Sevadharis* of a temple, with reference to the right of the *Sevadharis* (or temple servants) to participate in the *Alankar Puja* (or decoration rites), the Magistrate of the district, apparently with a view to prevent a possible breach of the peace, referred petitions received by him on the subject to a First Class Magistrate and on receiving his report issued an order purporting to affect the *Sevadharis* generally. That order owing to the defective procedure followed, and other grounds of objection, appearing to be open to revision as *ultra vires* of the powers conferred by Chapter XII of the Code of Criminal Procedure, was considered in Application No. 247 of 1899 and ultimately set aside by a Division Bench of this Court (*In re Pandurang Govind* (1), Mr. Justice Ranade and Mr. Justice Crowe) which directed the District Magistrate to "rehear the case after making all the persons interested parties, and receiving the evidence they may produce before him, and to pass a fresh order." It appears that after the return of the records and proceedings, further action was taken by the First Class Magistrate, who issued to the parties concerned in the alleged disput an order, which purports to be under sub-section 1 of section 145 of the Code, requiring them to attend in person or by pleader, or to put forward statements of the rights which they respectively claim. The present application has now been made to this Court to transfer the matter from the Court of the First Class Magistrate who made that order, to some other competent Court.

The impartiality of the Magistrate in question has been impugned both on the ground that he has already inquired into and reported (unfavourably it would seem to the present applicants) on the subject of the dispute, and also that he is the hereditary *yejman* of one of the parties concerned in the dispute as an *upadha* or priest of the shrine. Among the papers now before this Court is a document which purports to be an affidavit by the Magistrate of the District, and which (*inter alia*) sets forth the opinion of that officer to the effect that the Magistrate whose impartiality is impugned, will not be influenced by the relations in which he admittedly stands to one of the parties interested. It is somewhat difficult to understand on what grounds it could have been supported that such an expression of opinion could have formed a basis for any decision by this Court as to the advisability of directing the transfer applied for. And it is by no means reassuring to find that the head of the Magistracy of the district, in a document of so solemn a nature as an affidavit under the sanction of an oath, should have felt no hesitation in making a statement which is not one as to facts, but as to his personal opinion, which in the circumstances can only rest upon conjecture as to the mental attitude of another officer. In considering the expediency of directing a transfer for the ends of justice, the Calcutta High Court (*Dupeyron* v. *Driver* (2)) has deemed it esse-

(1) (1900) 24 Bom., 527.

(2) (1896) 23 Cal., 495.

Digitized by Google

ntial to decide "not merely the question whether there has been any real bias in the mind of a Magistrate, but also the further question whether incidents may not have happened which though they may be susceptible of explanation are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial." This ruling has been followed in *Legal Remembrancer* v. *Bhairab Chandra Chuckerbutty* (1), where it was observed that the importance of securing the confidence of parties in the fairness of the tribunal is next only to the importance of securing a fair and impartial tribunal (p. 733). A similar view was expressed by the Allahabad High Court—*Farzand Ali* v. *Hanuman Prasad*(2) the District Magistrate on perusing those rulings will no doubt perceive that the impressions produced in his own mind as to the impartiality of the Magistrate, require less consideration than the effect likely to be produced in the minds of the *parties and their witnesses*, by the selection of a Magistrate whose personal antecedents or circumstances have however unavoidably connected him with either the one party or the other. Such considerations could not altogether have been overlooked had it been necessary for this Court to determine whether transfer should in this case be directed.

Having regard, however, to the wording of section 526 of the Code we have come to the conclusion that the provisions of that section confer no power to direct the transfer of any proceedings initiated under section 145 of that Code.

The orders that may be passed under sub-section (1) of section 526 are specified in sub-clauses (i) to (iv) of that sub section. The first of these clauses authorizes an order that any offence be *inquired into* or *tried* by any Court competent in all respects but that of local jurisdiction. Section 145, however, does not contemplate inquiry or trial into an offence. It deals, as the heading to Part IV in which it is contained suggests, with the prevention of offences, which, if the procedure be effectual, may never be committed, and which if committed could not be inquired into or tried under the procedure prescribed in section 145.

Clause (ii) of section 526 authorizes an order that any criminal case or appeal or class thereof be transferred. The word "criminal" governs the word "appeal" as well as the word "case" and must, therefore, bear the same connotation in both connections—that is to say, a criminal case like a criminal appeal must arise out of and deal with some crime already committed. It seems, therefore, that this clause confers no power to deal with procedure that can be taken only for the prevention of crime. Indeed the phrase "criminal case" recurs in clause (iii) of section 526 where it is manifestly incapable of application to any proceedings which could not be transferred to, and tried before, this Court. Clause (iv) of section 526, it is equally obvious, has no reference to proceedings under section 145. The remaining sub-sections indicate with sufficient clearness that the power to transfer operates only when there is a person accused.

Section 145, it is true, contemplates a procedure which may involve such inquiry as would fall within the definition in clause (*k*) or (*m*) of section 4 of the Code. But the action which may ultimately be taken thereunder, is not punitive, but preventive, and for that purpose, as sub-section (6) shows, is provisional only until such time as final or formal adjudication on the rights affected may be obtained and carried into effect by a Court competent to deal with the matter in due course of law. The Magistrate in acting under that section

(1) (1897) 25 Cal., 727. (2) (1896) 19 All., 64.

Digitized by Google

is restricted by the necessity of observing all the conditions thereby imposed as precedent to the exercise of the powers conferred. Sub-section 4 expressly provides that he is not at liberty to go into the merits of the claims of any of the parties to the dispute, to a *right* to possess the subject thereof He can decide only the *fact of* possession at date of the order requiring them to put in their statements. And, further, this sub-section implies that it is unnecessary for him to formulate a decision even on that point if it should present insuperable difficulties. He is to decide the fact of possession "if possible", but alternative action when decision on that fact is not possible is authorized by the second proviso, which enables the Magistrate to attach the subject-matter of the dispute. It is thus evident that nothing that could affect the past, present or future *rights* of the parties, was contemplated in the section. The action to be taken (though judicial inquiry and judicial discretion are no doubt required as essential to the exercise of the powers conferred) is *quasi* executive action, having for its object and justification the prevention of a breach of the public peace. The existence of a dispute likely to cause a breach of the peace is a condition lying at the root of the powers conferred. It is expressly stated in sub-section (1) as a matter on which a Magistrate *must* be satisfied before he can take any action *at all* under the section, and sub-section (5) imperatively requires that the Magistrate shall, even after he has passed his order, cancel it on its being shown that no such dispute exists or has existed.

Looking to the facts of this case, and especially to the circumstance that proceedings appear to have been protracted there-in from a date earlier than the commencement of the current year without apparently any ground arising for apprehension of violence of any kind on either side, we deem it desirable that the Magistrate who is to deal with this case, should have his attention specially directed to the foregoing remarks in order that he may satisfy himself of the fact that there is such likelihood of a breach of the public peace as would be necessary to justify him in taking any action whatsoever under the section. We also deem it necessary to emphasize the necessity of limiting the enquiry, which must precede his final action, to the issues with which alone the section empowered a Magistrate to deal, that is to say to the actual fact of possession, as distinct from any question of rights. The rights of the parties can only be inquired into by Courts legally competent to give a definitive judgment thereon.

Our attention has been drawn to the wording of the order made by the First Class Magistrate, ostensibly under sub-section (1) of section 145. We understand that it requires the parties concerned in the dispute to put in statements as to their respective rights. That order is not now before us on revision We will, therefore, confine our remarks on it to the observation that the parties cannot be called on in these proceedings to furnish a statement of their rights, nor can the Magistrate take, as the basis of any action he may finally decide upon, any conclusion at which he may arrive, or at which he may have arrived, as to the respective titles of the parties. He is justified only, by the terms of the section, in taking measures to prevent a breach of the peace, if satisfied that otherwise a breach of the peace is likely to be caused by the dispute. Whether he is so satisfied, and what are the measures authorized by the section which are most appropriate in the circumstance, are matters for his own judicial conscience. His duty as a Magistrate is to prevent a disturbance of the peace, and provided he acts within the powers given him by law, there is nothing in the Code which would justify any of the parties in attempting to hamper the beneficent exercise of his discretion. Proceedings under section 145 of the

Digitized by Google

Code are by section 435 expressly excluded from the class of proceedings liable to be dealt with on revision. And in all the cases in which the High Courts have interfered with proceedings purporting to have been taken under Chapter XII, that interference has been justified by the fact that the orders revised were not really orders under that chapter at all, but would have required, to validate them, powers which the Legislature has not seen fit to confer on any one. The powers which are conferred by Chapter XII appear, however, to be such that in order to attain their object, the prevention of disturbances and other offences affecting the public, they must necessarily be exercised with promptitude, and it would paralyse the Magistracy in the preventive action contemplated in Chapter XII if, at the moment when such action is about to be taken, parties to a dispute likely to cause a breach of the peace could tie the hands of the Magistrate by obtaining a stay of his proceedings and a transfer to another Court. For these reasons we must decline to interfere, but direct that the remarks in this order should be communicated to the First Class Magistrate concerned, so far as they apply to the proceedings taken or to be taken by him.

Order accordingly.

1900 *December 7.* **I. L. R. 25 Bom. 422.**

Before Mr. Justice Candy, Mr. Justice Ranade and Mr. Justice Whitworth.

QUEEN-EMPRESS *v.* HUSSEIN HAJI.*

Criminal Procedure Code (Act V. of 1898), sections 337 and 494—Withdrawal of prosecution—Discharge—Acquittal—Evidence—Discharged persons called as witnesses—Competent witness—Practice.

Where the Public Prosecutor with the consent of the Court withdrew from the prosecution of two out of several accused persons tried jointly for an offence under section 4 of the Gambling Act (Bombay Act IV of 1887), and the two accused were thereupon discharged under section 494 of the Criminal Procedure Code (Act V of 1898) and then examined as witnesses for the prosecution,

Held, (WHITWORTH, J. dissenting) that the persons so discharged were competent witnesses.

APPEAL from the conviction and sentence passed by J. S. Slater, Esquire, Chief Presidency Magistrate, Bombay.

The appellant Hussein Haji Abba, along with twenty-four others, was charged before the Chief Presidency Magistrate, under section 4 of Bombay Act IV of 1887, with keeping a common gaming house.

In the course of the trial the Public Prosecutor with the consent of the Court withdrew the charge against two of the accused (Karim and Ibrahim). The Magistrate thereupon discharged them under section 494 of the Criminal Procedure Code (Act V of 1898).

They were then called as witnesses for the prosecution.

The appellant was convicted and was sentenced to pay a fine of Rs. 500 or in default to suffer three months' rigorous imprisonment.

The following passage in the Magistrate's judgment referred to the discharge of Karim and Ibrahim :—

As regards the position of the witnesses Karim and Ibrahim. They were discharged by me under section 494 of the Criminal Procedure Code. It might have been more in accordance with section 494 if I had acquitted them, but a mere error in making of an interlocutory order of this description comes directly within section 537 (*a*) of the Criminal Procedure Code, and

* Criminal Appeal, No. 436 of 1900.

Digitized by Google

has occasioned no failure of justice or prejudice to the accused. There was an order of discharge against both these accused granted at the request of the Public Prosecutor and in consonance with section 10 of Bombay Act IV of 1887."

The appellant contended *inter alia* that it was irregular and illegal to allow the accused Karim and Ibrahim, who had been discharged under section 494 of the Criminal Procedure Code, to be called and examined as witnesses for the prosecution, and that this irregularity vitiated the whole of the proceedings before the Magistrate.

H. Sealy for the appellant.

Lang (Advocate General) for the Crown.

CANDY, J.—The main question argued in this appeal is whether the witnesses Karim and Ibrahim were competent witnesses. These men with several others were arrested by the Police in a room said to be a common gaming house. When they and the other accused were before the Magistrate on 22nd June last, before any evidence has been led, the Public Prosecutor applied under section 494, Criminal Procedure Code, to withdraw from the prosecution of these two men, and the Magistrate consented. These two men were therefore discharged, and this discharge amounted in law to an acquittal. They were no longer accused, and they could never again be charged with the offence of which they were thus acquitted. They were forthwith examined as witnesses, and it is urged that they were not competent witnesses, and that their evidence could not be taken into consideration against accused No. 2, who was convicted and whose appeal is now before this Court.

The argument thus raised amounts to this, that any person whose prosecution has been withdrawn under section 494, Criminal Procedure Code, can never be examined as a witness, either for the Crown or for the defence, in a case in which he had been an accused I cannot agree with this contention. The cases quoted by the learned counsel, which had reference to witnesses who had been accused and who had illegally pardoned, have no application to the present case in which there has been no tender of pardon. Other cases quoted by the learned counsel show that these two men were competent witnesses. Thus in *Reg.* v. *Narayan Sundar*(1) one Bhaskar Sunder was one of the persons apprehended and brought before the Magistrate for trial. He was not even discharged; but he was examined as a witness, and the Court (Couch, C. J. and Newton, J.) held "that the witness Bhaskar Sundar was not at the time he was examined charged with the accused and upon his trial although he had been apprehended, and that he was by law a competent witness." So too in *Reg.* v. *Hanmanta* (2) reference was made to the evidence of several witnesses, to the admission of whose evidence objection had been taken on the ground that they also were persons accused before the Magistrate. But it was held that as these persons had been discharged, although some of them were undoubtedly accomplices, they were not accused persons when they were admitted as witnesses, and therefore their evidence was admissible. In the last case quoted by the learned counsel, *Imp.* v. *Lilladhar* (3) the reasoning in *Hanmanta's case*, with regard to an *illegally pardoned accused*, not being a competent witness, was extended to the case of an accused person against whom the Magistrate *illegally* allowed the charge to be withdrawn; his subsequent evidence as a witness was held inadmissible. That was a warrant case, in which a pardon could not be tendered under section 337 or in which the complaint could not be allowed to be withdrawn under section 248. The present case was a summons case, no

(1) (1868) 5 Bom. H. C. R. Cr. 1. (2) (1877) 1 Bom, 610, 619.
(3) (1889) Cr, Rul. No. 18.

Digitized by Google

pardon was tendered; the complaint could have been withdrawn under section 248, and as there was a Public Prosecutor, action could be taken under the special provisions of Chapter XXXVIII, section 494. The consent given by the Magistrate cannot now be attacked; and the evidence, whatever may be its weight, was admissible.

It was urged that a comparison with the provisions of sections 337 to 339 show that it could not have been intended by the Legislature that power should be given to the Police to pick and choose which accused persons should get scot-free and be turned into a witness, without any risk whether he deposes truly or falsely. The answer to that argument is that the special provision of section 494 can only be brought into force on the application of the Public Prosecutor, when there is one in the case, and with the consent of the Court. The provisions of section 248 are used when the complainant applies for permission to withdraw his complaint and the Court consents. There is nothing to show that the provisions of section 494 or of section 248 can only be applied when there is a single accused person in the case.

Reference was also made by the learned counsel to section 343; but that evidently refers to the examination of the accused under section 342, and moreover it is clear from the record in this case that the evidence of Karim and Ibrahim was not induced by any influence on the part of the Police. These men voluntarily offered their information, and no doubt they were told that the Public Prosecutor would be asked to make application for the prosecution against them to be withdrawn, and if the Court consented to that they would then be examined as witnesses.

The other points urged on behalf of accused appellants do not require lengthy notice. There was no error in adjourning the case against accused No. 1, who was ill, and proceeding against the rest of the accused. There is nothing to show that the appellant or his pleader made any application to examine as his witnesses those persons who had been summoned on behalf of accused No. 1. There is nothing even now to show that those persons are material witnesses, and that it is necessary for the ends of justice that their evidence should be recorded. As to the appellant's pleader not being permitted by the Magistrate to sum up this case, while the Public Prosecutor was allowed to reply, it is obvious that these facts do not affect the merits of the case. There is no question as to the appellant having been present when the room was raided by the Police. The only question is whether the room was a common gaming house. It is impossible to read the depositions of the two witnesses Karim and Ibrahim, and of the two Police officers, and the statement made on behalf of accused No 11, without coming to the conclusion that gambling, and not a game of skill, was going on. I would therefore confirm the conviction and sentence.

As my learned colleague is of opinion that Karim and Ibrahim were in effect illegally pardoned, and I cannot agree with that opinion, the case must be laid before a third Judge under section 429 of the Criminal Procedure Code.

WHITWORTH, J.—The principal question in this appeal is whether the men Karim and Ibrahim, who in the first instance were co-accused with the appellant, were, after the cessation of proceedings against them, competent witnesses against him. It cannot be disputed that any accused person who has been properly and judicially discharged or acquitted becomes a competent witness in the case. But in this connection it is necessary to observe also the

Digitized by Google

principle of the law in respect of pardoning an accused person; and by section 337, Criminal Procedure Code, permission to pardon is restricted to cases in which the offence is triable exclusively by the Court of Session. In the present instance the offence is not of that character but is one under the Gambling Act triable by a Magistrate. It is necessary to see that while in form following one provision of the law, another provision has not in reality been disobeyed. I think it has. It is not contended on behalf of the Crown in this case that Karim and Ibrahim were discharged merely upon proper judicial considerations, that is upon a consideration of the law and the evidence as affecting them alone. On the contrary, it is frankly avowed that the prosecution against them was withdrawn in order that they might be used as witnesses against other accused persons in the case. In ordinary judicial course, and if their evidence had not been required to be used against others, they would have remained on trial with the others, and the case of all would have been decided at once. (The fact that on account of the illness of one accused person the case was subsequently split into two does not affect the present question). That is, they would have been co-accused to the end of the proceedings and could not have been examined as witnesses against the others.

That would have been their position if the proceedings had been conducted to the end upon purely judicial considerations, and they have been removed from that position by the Magistrate looking beyond the judicial case as against them and in effect assuming the right of pardon which did not pertain to him in the case. The Magistrate has indeed purported to act not under section 337 but under section 494, Criminal Procedure Code, under which he consented to the withdrawal of the prosecution against Karim and Ibrahim; but the action was essentially the granting of a pardon to the two men or a consent to their being pardoned by the prosecution. It is needless to enquire whether the men first volunteered to give evidence of their own accord or whether the police pressed or advised them to do so. It would be impossible to ascertain exactly how far each party made an advance. But it is certain, and is not disputed, that an understanding was arrived at by which on the one hand they were to give evidence and on the other the prosecution against them was to be withdrawn. That is in effect they were pardoned.

It is necessary to reconcile the provisions of sections 337 and 494, and that can, I think, be done only in the way indicated above, namely, by taking "the consent of the Court" in section 494 as meaning consent based solely upon a judicial consideration of the case against the person from whose prosecution the Public Prosecutor desires to withdraw, and not upon any consideration of the uses to which that person may be put in a case other than his own. And indeed, apart from any conflict with section 337, I should think that to be the most natural interpretation of the section.

The case has rested mainly upon the evidence of these two witnesses, and if that be excluded the remaining evidence is, I think, insufficient to establish that the house was being used as a common gaming house. Nor indeed has it been argued that it is so sufficient. I would therefore reverse the conviction and sentence.

There being a difference of opinion between Candy and Whitworth, JJ., the case was referred to a third Judge [Ranade, J.] under section 429 of the Criminal Procedure Code, Act V of 1898, who delivered the following judgment.

RANADE, J.:—The only question of law on which there is a difference of opinion necessitating the reference under section 429 is whether Karim and Ibrahim, who were co-accused with the appellant, were competent witnesses

Digitized by Google

after the Public Prosecutor, with the consent of the Presidency Magistrate, withdrew from the prosecution instituted against them and they were discharged by the Magistrate. The Magistrate's judgment shows clearly that his order should have been not one of discharge but of acquittal. This admitted mistake is one which is covered by section 537, as it did not result in any failure of justice. If the Presidency Magistrate had acquitted Karim and Ibrahim, it is obvious that they would have been competent witnesses against the present appellant. The provisions of section 337 expressly lay down that a person who is directly or indirectly concerned in any offence, and who has received a pardon on his undertaking to give full and true disclosures, is a competent witness. A pardoned accomplice is certainly a less reliable witness than a co-accused in respect of whom the Public Prosecutor, with the consent of the Court, withdraws the prosecution, and who is thereupon acquitted by the Magistrate. The withdrawal of the prosecution in one case, like the acceptance of pardon in the other, restores to the accused his competency as a witness. In the present case though Karim and Ibrahim were apprehended with the appellant, the cross-examination of these witnesses shows clearly that from the first they were acting in full sympathy with the instructions of the police, and it was on that account that they were treated with special indulgence, and finally the prosecution was withdrawn against them. The considerations which influenced the Presidency Magistrate to give his consent were judicial considerations such as those referred to in section 337. The distinction made by Whitworth, J., appears not to be borne out by the evidence in this case, and I feel satisfied that the decisions referred in the judgment of Candy, J.—*Reg.* v. *Narayan*[1] and *Reg.* v. *Hanmanta*[2]—fully apply. In one of these cases the accused had been as in the present case, discharged, yet it was held that the accused were competent witnesses. On the whole I am disposed to agree with Mr. Justice Candy in holding that Karim and Ibrahim were competent witnesses, and that their evidence along with the other police testimony fully justified the conviction and sentence passed by the Magistrate.

1901 *January* 14. **I. L. R. 25 Bom. 543.**

Before Mr. Justice Candy and Mr. Justice Whitworth.

QUEEN-EMPRESS *v.* NARAYAN.*

Evidence—Confession—Confession of an accused while in custody of the police—Duty of Magistrate when such confession is made—Sessions Judge—Duty of—Criminal Procedure Code (Act V of 1898), section 164 (2)—Evidence Act (I of 1872), section 24.

When an accused person has been in custody of the Police and has made a confession, it is important that the Magistrate before recording such confession under section 164 of the Criminal Procedure Code (V of 1898) should ascertain how long the accused has been in custody. If there is no record of that fact, it is the duty of the Sessions Judge, before holding the confession relevant under section 24 of the Evidence Act (I of 1872), to send for the Magistrate and satisfy himself on the point.

APPEALS from the convictions and sentences recorded by H. L. Hervey, Sessions Judge of Kanara.

The two accused were charged with murder under section 302 of the Indian Penal Code (Act XLV of 1860).

---

[1] [1868] 5 Bom. H. C. R. 1. [2] [1877] 1 Bom. 610. p, 619.

* Criminal Appeals, Nos. 526 and 527 of 1900.

Digitized by Google

Accused No. 1 was arrested by the Police on 11th June, 1900. On the 23rd of June he made a confession before a First Class Magistrate, which he subsequently retracted during the preliminary inquiry before the Committing Magistrate.

The Sessions Judge relying on this confession and on the evidence of Timaka, convicted both the accused of murder and sentenced them to transportation for life.

Against these convictions and sentences the accused appealed to the High Court.

Branson (with *Shamrao Vithal*) for accused No. 1 :—The confession of accused No. 1 appears on the face of it to have been obtained by pressure and undue influence by the police. The accused was in police custody for ten or eleven days, and though there is no direct evidence on the point, it is impossible to believe that the accused made the confession voluntarily. The surrounding circumstances of the case clearly show that the confession was anything but voluntary. There is nothing to show that the Magistrate who took down the confession satisfied himself that the confession was voluntary, before formally recording it. Nor was the Magistrate examined on this point in the Sessions Court. The confession therefor is inadmissible. The rest of the evidence is wholly unreliable and cannot sustain the conviction.

Robertson (with *N. G. Chandavarkar*) for accused No. 2 :—The confession of accused No. 1 is self-exculpatory. It cannot therefore be taken into consideration as against accused No. 2.

Rao Bahadur *V. J Kirtikar*, Government Pleader, for the Crown :—The confession recorded in this case satisfies the requirements of section 164 of the Criminal Procedure Code (Act V of 1898). It bears the requisite memorandum of the Magistrate at the foot, and it must be presumed, until the contrary is established by clear evidence, that it was duly recorded in the manner required by law. It has been held that the omission of the Magistrate to record the circumstance that the accused was not in the custody of the police does not invalidate a confession —*Imperatrix* v. *Barku*(1); *Queen-Empress* v. *Anga*.(2) Under section 24 of the Evidence Act (I of 1872), it lies on the accused to prove that the confession was the result of inducement, threat or promise &c. There is ample evidence in the case corroborating the confession in material respects. It can therefore be taken into consideration against accused No. 2 also.

CANDY, J. :—We concur with the Sessions Judge that the evidence against the two accused consists solely of Timakha's deposition and the confession of the first accused, and that it has to be seen whether these statements can be accepted as true and voluntary.

First as to the confession. From the very first the relatives of Timakha's husband were suspected of having caused the death of Biranna, who had been Timakha's lover. The criminal intimacy was notorious, and the fact of the corpse having been apparently with set purpose placed on the verandah of Timakha's mother's house, pointed to the motive which the murderers were not anxious to conceal. Directly the police came upon the scene on the 11th June, a few hours after the murder, the houses of the relatives of Timakha's husband, including the present accused, were searched to see if anything suspicious could be found, but without success. Of course the difficulty with which the police were confronted was to discover which of the relations of the accused were im-

(1) (1891) Bom. Cr. Rulings, No. 8 of 1891. (2) (1898) 22 Mad. 15.

Digitized by Google

plicated in the murder. According to the police records, the police arrested accused No. 1 on the 21st June at 10 A.M. at Bargi, a village three miles from Hiregutti (the scene of the murder) and nine miles from Kumta. The story told by the Head Constable Vithalrao as to how by chance he happened to meet the accused on the road going from Hiregutti to Bargi, and how the accused voluntarily made a full disclosure of the facts regarding the murder, is, on the face of it, absurd, and is moreover proved by evidence in the case to be absolutly false. It was rightly disbelieved by the Sessions Judge. It is obvious that accused No. 1, having from the first, *i.e.* the 11th June, been practically under arrest, was purposely sent from Hiregutti, where the sympathy of the villagers was with the accused persons, to Bargi, where it was thought that the accused would be more ready to confess. The Police papers purport to show that accused No. 1 was arrested at Bargi on the 21st June at 10 A M, that is ten days after he had really been arrested. It is difficult to understand why he was detained at Bargi on the 21st ; possibly it was in order that the Chief Constable might see him. (The Chief Constable deposed that he left Hiregutti for Gokarn on the 21st, returned to Hiregutti that evening ; saw accused No. 1 at Bargi that night, and arrested accused No. 2 and Mahadu the next day.) But then there is no explanation why accused No. 1 was not examined by the Magistrate at Kumta till the 23rd. If sent off from Bargi on the morning of the 22nd, he must have reached Kumta by 10 A. M. on that day, and that is the time of the arrival before the Magistrate as given in the criminal return.

It is much to be regretted that there is nothing on the record showing in what way the Magistrate at Kumta carried out the provisions of section 164 (3) of the Criminal Procedure Code, which forbid a Magistrate to record a confession *unless*, upon questioning the person making it, he has reason to believe that it was made voluntarily. No doubt there is the usual formal certificate at the foot of the record ; but in a case like this, in which the confessing accused had been for ten days in detention by the police, obviously the first question which a Magistrate should put in order to satisfy himself that the confession will be a voluntary one, is, how long has the accused been in the custody of the police? Possibly in this case the Magistrate did so question the accused before recording the confession, though he did not write down such questions and answers. But considering that there was no record of the questioning, it was the duty of the Sessions Judge, before holding the confession to be relevant under section 24 of the Evidence Act, to have sent for the Magistrate and satisfied himself on the point. We entirely agree with the directions of Government (Government Resolution, Judicial Department, No. 1333, 27th February, 1886, a copy of which is on the files of the Sessions Judge) that in a case of this nature "it is the duty of the Court to inquire very carefully into all the circumstances under which the confession was taken, *and particularly as to the length of time during which the accused person was in custody.*"

In the present case the Committing Magistrate in the committal proceedings did not formally examine accused No. 1, or ask him to explain the circumstance of the confession. But it is clear from the proceedings that the accused did retract his confession, and (as usual) pleaded ill-treatment at the hands of the police. Many Judges and Magistrates, as well as accused persons, think that a confession cannot be irrelevant under section 24 of the Evidence Act, unless it can be alleged that there was torture, leaving marks of personal violence. This is a mistake. The confession is irrelevant if the making of it appears to have been caused by any inducement, threat, or promise, &c. Now what are the facts here, and what is the natural inference from those facts ? The most impor-

Digitized by Google

ant fact (as shown in the directions of Government above quoted, with which we concur) is the length of time during which the accused person was in custody. As shown above, accused No. 1 was virtually in custody from the 11th June; He made his "confession" to the Magistrate on the 23rd June. Is it reasonable to suppose that during all that time no pressure was put upon the accused by the police to induce him to "confess"? The Sessions Judge says: "My belief is that accused No. 1, finding himself under close and continuous observation—if not detention—by the police, and knowing that the whole village was aware of his guilt, felt impelled to make a clear breast of the matter." But if the whole village was aware of his guilt, that must have been from the first, or at least from the 13th June, when Timakha is said to have made her statement to the police and mentioned the name of accused No. 1. But accused No. 1 did not make his confession to the Magistrate till ten days after Timakha is said to have implicated him. As the Sessions Judge says, it is impossible to believe that the police were not attempting to get a confession from the accused, and we are unable to resist the conclusion that it was improperly induced and therefore was irrelevant and must be excluded from consideration.

There remains the evidence of Timakha. She was the only person in the village who would be likely to know anything about the murder, and, no doubt, she was questioned by the police on the 12th, though they falsely deny that fact. On the 13th she is said to have made a statement implicating the two accused and Mahadu, and on the 14th she showed the place near the haystack where she said she was sitting with the deceased when he was attacked. It is to be remarked that she was not then sent to the Magistrate for her statement to be recorded by the Magistrate under section 164 of the Criminal Procedure Code. The Chief Constable deposed in the Sessions Court: "I sent Timakha up before the First Class Magistrate, Kumta, who recorded her statement. I did this to prevent her being tampered with." But the record of the case shows that she was not sent to the Magistrate till the 2nd July. Accused No. 1 having, it is said, made his confessional statement to the police on the 21st June, the Chief Constable arrested accused No. 2 and Mahadu on the 22nd June, apparently at Hiregutti, where he was on that date conducting the inquiry and where were those accused persons. Why the police papers and the Magistrate's criminal return should show the arrest of accused No. 2 and Mahadu at 6 P. M. on the 22nd at Kumta is extraordinary. They could not have reached Kumta unless they were taken there in custody by the police.

The next point to be noticed is that on the 23rd June these two accused persons were put before the First Class Magistrate at Kumta, and ten days' time was asked for by the Chief Constable to complete the police enquiry. The Magistrate granted five days' time, and sent those two accused persons back into the custody of the police. Accused No. 1 having made a confession before the Magistrate on the 23rd June, was kept by the Magistrate in his own lock-up and was not sent back to the police. But it is difficult to see what further legitimate police inquiry was possible for which the presence of accused No. 2 and Mahadu was necessary. There was no property to be produced. It is noteworthy that the Chief Constable apparently made no attempt to produce Timakha before the Magistrate on 23rd June. Having obtained five days' time he on 29th June (*i. e.* after six days, one day possibly being counted for the Journey) sent the case to the Magistrate. In the criminal return the entry is that accused No. 2 and Mahadu arrived before the Magistrate at 3 P. M. on the 29th. But in the reasons of delay recorded by the Magistrate, and attached to his return, it is stated that the accused were brought before the Magistrate on the 2nd July;

Digitized by Google

and that the case was "postponed for the 9th as the Magistrate had to go to Honavar on some urgent duty under the orders of the District Magistrate." However, on the 2nd July the Chief Constable sent Timakha under the charge of a Constable to Honavar (apparently this was done after the Magistrate had formally postponed the case at Kumta and himself had gone to Honavar) with a memorandum saying that he had secret information that attempts were being made to tamper with the prosecution witnesses, and he requested that Timakha, a principal witness, might be examined under section 164 of the Criminal Procedure Code. This was accordingly done at Honavar, and the statement is recorded as Exhibit 9 in the Sessions Court. Her further deposition before the Magistrate on the 23rd July is No. 10, and her deposition before the Sessions Judge is No. 8. The question is whether her statements in those depositions are sufficient on which to base the convictions of the two accused.

We regret that after careful consideration we can come to no other conclusion than that it would be unsafe to base a conviction soley on Timakha's testimony. We must put aside her "realistic account of the appearance of the body" of the deceased when she went to her mother's door in the early morning of the 11th June. That may be quite true; but it has no connection with the alleged facts of the murder. Nor need we take into consideration any inconsistencies or slight discrepancies which may have arisen from the fact that she, a woman of bold demeanour, plainly resented close cross-examination by the pleader for the defence. The question is, can we accept her statement that she witnessed the murder? The Sessions Judge had no doubt that her desire was to avenge the murder of her lover, and that she was only kept from speaking at the first by her reluctance to proclaim her own shame and to bring ruin upon her husband's family. But she must have well known that her criminal intimacy with Biranna was notorious, and she certainly had no affection for her husband's family, who, according to her account, treated her badly. It is remarkable that in her statement before the Magistrate, recorded on the 2nd July, she stated that the accused who first assaulted Biranna and held him fast was Mahadu; and that agrees with the statement of the first accused. In her deposition recorded on the 11th July she said the first one who came was Narayan (accused No. 2). This was also the statement she made in the Sessions Court. This is not a slight discrepancy. Then is it likely that she would have been sitting for an hour or so with Biranna beside the stack, and that she would have been surprised there? Possibly she has invented this part of her statement and the story of the state of her health at the time, in order to avoid the admission that she was caught actually in bed with Biranna, the truth being that Biranna bolted when discovered sleeping with Timakha, and that he was overtaken near the haystack and strangled there. But this is more or less a surmise; and the difficulty is to reject part of Timakha's deposition and accept the rest. It is impossible to resist the suspicion that she did not witness the murder at all. If from the first, in natural indignation at the cruel death which her lover had met with, she had frankly told in a consistent story what she had seen, her testimony alone might have sufficed for conviction. As it is, we feel that the only safe verdict is that arrived at by the assessors. The Government Pleader contended that there was no ground for the suggestion that some other lover of Timakha might have killed Biranna, but he omitted to notice that besides the assertion of witness No. 1 (brother of Biranna), the Chief Constable himself, who conducted the investigation, deposed that he suspected Mahadu Deobhari.

Having regard to the above facts, we must reverse the convictions and sentences, and direct the accused to be acquitted and discharged.

Convictions and sentences reversed.

Digitized by Google

1901. *April* 7. I. L. R. 25 Bom. 636.

Before Mr. Justice Candy and Mr. Justice Fulton.

KING-EMPEROR *v.* THE CHIEF OFFICER OF THE S.S. "MUSHTARI."*

Jurisdiction—High seas—Offence committed on the high seas—Procedure—Penal Code (Act XLV of 1860),—37 and 38 Vict., chapter 27, section 9.

A Presidency Magistrate has authority to charge, convict and sentence under the Indian Penal Code (Act XLV of 1860) a person who has committed an offence in a British ship during her voyage on the high seas. The law applicable both as regards procedure and punishment is the Indian law.

REFERENCE by Khan Bahadur P. H. Dastur, Third Presidency Magistrate, Bombay. The reference was as follows:

"I have the honour to refer for the opinion of the High Court the following question of law which has arisen in a case now pending in this Court.

"Has the Presidency Magistrate, Bombay, authority to convict a person for an offence under the Indian Penal Code, the said offence having been committed in a British ship during her voyage on the high seas?"

The facts of the case briefly are as follow:

"The chief officer of the S. S. 'Mushtari,' a ship belonging to the Bombay and Persian Steam Navigation Company, Limited, is charged with criminal breach of trust as a servant (under section 408 of the Indian Penal Code) in that he received passage money from a pilgrim during the ship's voyage between Bandar Abbas and Bushire. The ship is proved to be a British ship, and by the combined effect of Acts 12 and 13 Victoria, chapter 96, and 23 and 24 Victoria, chapter 88, any Magistrate in British India has power to try the chief officer for an offence committed on the high seas; the only proviso being that the person convicted shall be liable to the same penalty as is provided for by the law of England.

"Now my difficulty in the present case is whether I should record a conviction under section 408 of the Indian Penal Code against the chief officer, and then pass a sentence provided for by the law of England for embezzlement, or whether I should frame a distinct charge under the English law and impose the penalty also prescribed therein.

"On a careful perusal of section 1 of 12 and 13 Victoria, chapter 96, it appears that the local Courts have jurisdiction and authority not only to inquire into and try offences committed on the high seas, but also to determine and adjudge them as if committed within the local jurisdiction of the said Courts. If so, the whole of the procedure to be adopted should be Indian and not English, and the framing of the charge being only a matter of procedure, the charge in the present case ought, in my opinion, to define the offence as mentioned in section 408 of the Indian Penal Code. The proviso (section 2), it is true, imposes a different penalty, but that is *after the person's conviction*, and there is a long gap between the framing of the charge and the conviction, and I do not therefore understand how section 2 could re-act on section 1 and modify the express provision made therein for the trial and determination of such offences. This point has, no doubt been decided in *The Queen* v. *Thompson*,(1) where it was held that the charge to be framed should be under the English law; but the reasons given in that case appear to me to be inconsistent with the wording of section 1, and I have therefore some hesitation in adopting the view therein expressed. In *Reg.* v. *Elmstone*(2) this point has not been speci-

* Criminal Reference No. 16 of 1901.

(1) (1867) 1 B. L. Reng. 1 (Cr.) (2) (1870) 7 Bom. H. C. R. 89.

Digitized by Google

fically dealt with, though it is true it is said there that the substantive law ought in such cases to be English and not Indian ; whilst in *Reg.* v. *Kastya Rama*(1) the offence was not committed on the high seas but within three miles of the shores of British India, and therefore the question about the nature of the charge to be framed did not arise I beg, however, to draw the attention of their Lordships to the remarks made by West, J., in that case, which seem partially to support the view I have already expressed in this reference."

The reference was heard by a Division Bench (Candy and Fulton, JJ.)

Scott (Acting Advocate General) with *Messrs. Crawford and Co.* for complainant (the Bombay and Persian Steam Navigation Company,) referred to Stat 12 and 13 Vict. c. 96, section 1 ; 23 and 24 Vict. c. 88, section 1 ; 54 and 55 Vict c. 67 ; 37 and 38 Vict. c. 27, section 3 ; Merechant Shipping Act of 1894, section 686 ; *Reg.* v. *Elmstone* (2) and *Reg* v. *Kastya Rama.*(1)

There was no appearance for the accused.

FULTON, J. :—The reply to the question put by the Third Presidency Magistrate is contained in section 3 of 37 and 38 Vict. c. 27.

His jurisdiction to try the offence is conferred by section 1 of 12 and 13 Vict. c. 96, declared applicable to India by section 1 of 23 and 24 Vict. c. 88, as well as by section 686 of the Merchant Shipping Act of 1894.

The question of procedure and punishment is determined by the first mentioned section of 37 and 38 Vict. c. 27. Section 2 of 12 and 13 Vict. c. 96 has been repealed by 54 and 55 Vict. c. 67.

Our answer is that the Presidency Magistrate, Bombay, has authority to convict a person for an offence under the Indian Penal Code, the said offence having been committed in a British ship during her voyage on the high seas. The charge should be framed in reference to the Indian Penal Code, and in case of conviction the punishment should be awarded under that Code.

Answer accordingly.

1897 *November* 3. **I. L. R. 25 Bom 667.**

Before Mr. Justice Ranade and Mr. Justice Fulton.

IMPERATRIX *v.* RATNYA.*

Jurisdiction—Scheduled Districts—Reference and appeal in a criminal case from the Scheduled Districts—Act No. XI of 1846 —Scheduled Districts Act XIV of 1874.

The Collector of Khandesh, in his capacity of Political Agent for the Mehwasi Estates, convicted the accused of murder committed at a village in the Scheduled Districts, and sentenced him to transportation for life. He then forwarded the proceedings to Government for confirmation. The accused also appealed to Government against the conviction and sentence. The Government thereupon directed the Political Agent to submit the proceedings to the High Court under Rule 35 of the Rules promulgated in 1855 under section 3 of Act XI of 1846. The appeal presented by the accused was also forwarded to the High Court. The question arose as to whether the High Court had jurisdiction to dispose of the reference.

Held, that the High Court had jurisdiction.

REFERENCE by A. Cumine, Collector of Khandesh and Political Agent of the Mehwasi Estates of Kathi in the Khandesh District, under section 7 of the Scheduled Districts Act No. XIV of 1874 in a murder case.

---

(1) (1871) 8 Bom. H. C. R. 63. (2) (1870) 7 Bom. H. C. R. 89.

* Criminal Reference No. 104 of 1897.

Digitized by Google

The accused was charged under section 302 of the Indian Penal Code (Act XLV of 1860) with having committed murder at Piprapani, a village belonging to the Mehwasi Estate of Kathi, a Scheduled District under Act XIV of 1874, in the Khandesh District. He was tried by the Collector of Khandesh as Political Agent of the Mehwasi estate of Kathi, and was found guilty and sentenced to transportation for life. After the conviction and sentence the Political Agent forwarded the papers of the case to Government for confirmation but Government having directed him to submit the proceedings to the High Court in accordance with Rule XXXV of the Rules made under Act XI of 1846, (1) he made the present reference. The accused also appealed to Government against the conviction and sentence, and his appeal was forwarded to the High Court along with the proceedings, and was registered as No. 593 of 1897.

There was no appearance for either party.

RANADE J.—In this case the Collector of Khandesh, acting in his capacity as Political Agent for the Mehwasi estates tried the accused Ratnya on a charge of the murder of his wife at Piprapani village belonging to the Kathi estate, and sentenced the accused to transportation for life, subject to the confirmation of the sentence by His Excellency the Governor in Council. The accused also presented a petition of appeal to the same authority. His Excellency the Governor in Council, however, directed the Political Agent to submit the proceedings to this Court, and the present reference was accordingly made by the Political Agent under Rule 35 of the Rules promulgated in July, 1855, under the powers conferred on Government by section 3 of Act XI of 1846.

Rule 25 invests the Agent with the functions of a Magistrate. Rule 32 empowers him to take cognizance of all crimes and offences perpetrated within the limits of his political charge, and Rule 35 gives him absolute jurisdiction to sentence offenders to fine and imprisonment for five years, and it directs that sentences involving punishment beyond that term or of greater severity must be submitted for confirmation to the Sadar Fouzdari Adalat. Rule 43 directs the Political Agent to forward the record of such cases, when confirma-

(1) Sections 3 and 4 of Act XI of 1846, entitled an Act for the exemption of certain territory in the province of Khandesh and the zilla Ahmednagar from the operation of the general Regulations:

3. And it is hereby enacted that it shall be competent to the said Governor in Council by an order in Council to prescribe such rules as he may deem proper for the guidance of the Agent aforesaid and of all the officers subordinate to his control and authority, and to determine to what extent the decision of the Agent in civil suits shall be final and in what suits an appeal shall lie to the (Sadar Dewani Adalat), and to define the authority to be exercised by the Agent in criminal trials and what cases he shall submit to the decision of the (Sadar Foujdari Adalat).

4. And it is hereby enacted that upon the receipt of any criminal trials referred by the Agent under the rule which may be hereafter prescribed by the Governor in Council (the Sadar Fouzdari Adalat) shall proceed to pass a final judgment, or such other order as may after mature consideration seem to the Court requisite and proper, in the same manner as if the trial had been sent up in ordinary course from a Sessions Judge.

(2) Rule XXXV of the rules promulgated under section 3 of Bombay Act XI of 1846:

XXXV.—The absolute jurisdiction of the Agent in criminal cases shall extend to fine and imprisonment for (5) five years with or without hard labour; and sentences involving a punishment beyond that period or of greater severity must be submitted for the confirmation of the Sadar Fouzdari Adalat.

(3) Section 7 of Act XIV of 1874.

7. All rules heretofore prescribed by the Governor General in Council or the Local Government for the guidance of officers within any of the Scheduled Districts for all or for any of the purposes mentioned in section 6, and in force at the time of the passing of this Act, shall be continued to be in force unless and until the Governor General in Council or the Local Government, as the case may be, otherwise directs.

All existing officers so appointed previous to the date on which this Act comes into force in such district shall be deemed to have been appointed hereunder.

Digitized by Google

tion is necessary, to the Sadar Fouzdari Adalat, and Rule 44 empowers the Adalat to call for proceedings on petition from the prisoner sentenced in such cases, and thereafter to deal with them as laid down in section 4 of Act XI of 1846. Section 4 of this latter Act provides that the Sadar Fouzdari Adalat shall in such confirmation cases pass the final sentence or order in the same manner as if the trial had been sent up in ordinary course by Court of Session. The present reference to this Court comes up for disposal under these provisions, and the point we have to consider is whether this Court possesses the jurisdiction which belonged to the late Sadar Fouzdari Adalat to deal with such cases either by way of confirmation or by way of appeal.

There have not been many occasions for the exercise of this jurisdiction since the constitution of the High Courts. In the only reported case, *Queen-Empress* v. *Sarya*,(1) a Division Bench of this Court (Birdwood and Jardine, JJ.) held that in cases where the sentence passed by the Political Agent was within the limits of the absolute jurisdiction of that officer, no appeal lay to this Court. Their Lordships held that Rule 44 noticed above was *ultra vires*. Birdwood, J., observed that there is no provision in Act XI of 1846 which empowers Government to confer appellate powers on the Adalat as done by Rule 44, and that rule cannot be regarded as a valid rule made under the Act. He makes a distinction between the rule relating to appeals and the rule directing references to be made to the Sadar Fouzdari Adalat, for he admits that the Act did contemplate that Court as a Court of reference, for the confirmation of sentences passed in certain criminal trials. The present case, so far as it is such a reference, would thus, in the opinion of Birdwood, J., not be excluded from the jurisdiction of the Sader Fouzdari Adalat, and therefore (under section 9 of the High Courts Act, and section 27 of the Letters Patent) of the High Court, which has taken up the place of the old Fouzdari Adalat in respect to all manner of jurisdiction. Jardine, J., indeed went much further. While agreeing with Mr. Justice Birdwood in his view that Rule 44 was *ultra vires*, Jardine, J., expressed an opinion to the effect that after the enactment of Act XIV of 1874 which repealed Act XI of 1846, these rules under the old Act ceased to be in force, so far as they had reference to the powers of this Court. He was of opinion that section 7 of Act XIV of 1874 did not continue these rules except so far as they related to the Political Agent and his officers, as they cannot be regarded as being in force at the time when the Scheduled Districts Act (XIV of 1874) was passed, and they were in conflict with the Letters Patent of the High Court. These remarks, it will be seen, have a larger bearing than the validity or otherwise of Rule 44. My colleague, Mr. Justice Fulton, is of opinion that section 7 of Act XIV of 1874 continued the rules of 1855 framed under Act XI of 1846, and that in consequence the powers of this Court as a Court of reference for confirmation purposes were continued. I am myself inclined to hold that this confirmation jurisdiction of the Sadar Fouzdari Adalat was in force under the operation of Act XI of 1846 and the rules of 1855 at the time when the High Court was constituted, and that until a fresh notification to the contrary has been issued under Act XIV of 1874 cancelling the rules of 1855, they must be held to be still in force by virtue of section 7 of Act XIV of 1875. The notifications of 1879 and 1887 have clearly not the effect. The rules of 1855 so far as they relate to confirmation proceedings are clearly contemplated by Act XI of 1846, and were in force in 1862, and are therefore still in force, and confer this jurisdiction on the High Court. As the point under consideration is, however, not entirely free from difficulties,

(1) (1890) 15 Bom., 505.

Digitized by Google

I agree with Mr. Justice Fulton that it would be desirable to issue notice to the Political Agent and the accused, and to hear further argument in the case before the reference is finally disposed of.

As regards the Appeal No. 593 of 1897, the precedent is more in point, but there is the consideration that in *Queen-Empress* v. *Sarya*, (1) the sentence passed was for five years within the absolute jurisdiction of the Political Agent, while the sentence in the present case clearly exceeds his jurisdiction, and certainly requires the confirmation of either this Court or of the Government. I would direct therefore, before admitting the appeal or disposing of the reference, that notices be issued to the Political Agent and the prisoner.

FULTON, J. :— In this case the Agent to His Excellency the Governor in Khandesh has submitted for the confirmation of this Court his proceedings in which he has convicted the prisoner of murder in the Mehwasi Estate of Kathi, and sentenced him to transportation for life. The reference is one for which no precedent has been brought to our notice and raises a question of considerable difficulty as to the jurisdiction of the Court.

By Act XI of 1846, which was passed to exempt certain Mehwasi Estates from the civil and criminal jurisdiction of the ordinary Courts, it was enacted that the Governor in Council might prescribe such rules as he deemed proper for defining the authority of the Agent in criminal trials, and for determining what cases the Agent should submit for the decision of the Sadar Fouzdari Adalat. It was further provided that "on receipt of any criminal trials referred under the said rule, the Sadar Fouzdari Adalat should proceed to pass a final judgment, or such other order as might after mature consideration seem to the Court requisite and proper, as if the trial had been sent up in the ordinary course by a Sessions Judge." It must be remembered that in 1846, when this Act was passed, the procedure prescribed by Regulation 13 of 1827, section 2, and Regulation 3 of 1830 required the Sessions Judge to submit for confirmation not merely sentences of death but also sentences of transportation or imprisonment for life. In 1855, rules which will be found on pages 1342—1346 of the Government Gazette for that year, were accordingly made. Rule 35 provided that the absolute jurisdiction of the Agent in criminal cases should extend to fine and imprisonment for five years, and directed that sentences involving punishment beyond that period, or of greater severity, should be submitted for the confirmation of the Sadar Fouzdari Adalat. Rule 43 declared that if the punishment deemed suitable by the Agent should exceed his own absolute jurisdiction, he should record the punishment he would award, and should forward the case in original to the Sadar Fouzdari Adalat, which Court should proceed to take congnizance of the case, and to pass such sentence or order as they might think proper, and that the instructions conveyed to the Agent from the superior Court should be carried into effect by him. Rule 44 purported to give the Sadar Fouzdari Adalat power to call for the Agent's proceedings in any case on petition being made to that Court by any party against whom a sentence might have been passed by the Agent, and thereafter to proceed according to the provisions of section 4 of Act XI of 1846.

In the case of *Queen-Empress* v. *Sarya*(2) some prisoners who had been sentenced to five years' imprisonment by the Agent for an offence committed in one of the mehwasi villages petitioned the High Court. Their Lordships treating the petition as an appeal rejected the application on the ground that Rule 44 was *ultra vires* as beyond the provisions of Act XI 1846. This decis-

(1) (1890) 15 Bom. 505. (2) (1890) 15 Bom. 505.

Digitized by Google

ion does not directly affect the case now under consideration, but the laborious researches of the learned Judges who decided it help most materially in enabling us to dispose of the question now before us. Accepting the conclusion that Rule 44 was *ultra vires*, and that the Sadar Fouzdari Adalat had under the Act no jurisdiction as a Court of Appeal or Revision in respect of sentences not exceeding five years, it seems nevertheless that its jurisdiction in the case of sentences beyond that term was unquestionable, being expressly provided for by the Act. The Criminal Procedure Code of 1861 did not extend to non-regulation districts (*vide* section 445), and as it did not touch Act XI of 1846, it left unaffected the jurisdiction of the Agent to refer and of the Sadar Fouzdari Adalat to deal with cases like the present. In 1862 the High Court was established under 24 & 25 Vic., c. 104, the 9th section of which enacted that its jurisdiction should be determined by Letters Patent save in so far as it might subsequently be modified by legislation. The original Letters Patent were issued in that year. Clause 27 provided that the High Court should be a Court of reference and revision from the criminal Courts subject to its appellate jurisdiction and should have power to hear and determine all such cases referred to it by the Sessions Judge, or by any other officers authorized to refer cases to the Sadar Fouzdari Adalat, and to revise all such cases tried by any officer or Court possessing criminal jurisdiction as were then subject to reference to or revision of by the said Court of Sadar Foujdari Adalat.

Now it seems to me clear that this clause preserved to the High Court the powers of the Sadar Fouzdari Adalat as a Court of reference from the decisions of the Agent in all cases which he was authorized to refer to the Sadar Fouzdari Adalat. It is true no appeal lay from his decisions to the Sadar Fouzdari Adalat, or subsequently to the High Court; but the express provision that the High Court should have power to hear and determine all such cases referred to it by any officer possessing criminal jurisdiction as were subject to reference to the Court of Sadar Fouzdari Adalat, when read with section 9 of the High Court Act, makes it plain that this jurisdiction was retained. If the clause had stood by itself it might perhaps have been argued that the word "and" was explanatory, and that the High Court was only a Court of reference and revision in respect of Courts from which an appeal lay to it. But looking to section 9 of the Act, such a construction becomes impossible, for it cannot be said that the Letters Patent have made any direction curtailing the jurisdiction so as to exclude a class of cases formerly dealt with by the Sadar Fouzdari Adalat. Such a curtailment would be most unlikely, for it could hardly be intended to leave such cases wholly unprovided for, and if it had been so intended the matter would have doubtless been expressed in clear terms so as distinctly to remove it from the comprehensive provisions of section 9. Moreover, there was no appeal to the High Court from the decisions of Magistrates, and yet certain Magistrates were under section 404 of Act XXV of 1861 empowered to refer cases to the Sadar Fouzdari Adalat, and no question was ever raised as to the continuance of such references after the establishment of the High Court. The amended Letters Patent of 1865 made no change. They simply continued the powers conferred by the earlier Letters Patent on the High Court as a Court of reference. The situation was not altered by the enactment of the Criminal Procedure Code of 1872. It extended to the whole of British India, but preserved all special forms of procedure prescribed by any law not expressly repealed. Act XI of 1846 remained in force, and the arrangements under it were not altered. Then came Act XIV of 1874, which was introduced in the Mehwasi

Digitized by Google

villages in the manner explained in *Queen Empress* v. *Saryu*. It repealed Act XI of 1846, but by section 7 preserved the rules under it. For the purposes of this case the repeal of the Act is immaterial. The rules prescribing the procedure to be followed by the Agent thenceforward derived their validity not from Act XI of 1846 but from section 7 of Act XIV of 1874. They authorized him to make a reference like the present, and clause 28 of the Letters Patent gave the High Court jurisdiction to hear and determine the case when referred. The High Court's jurisdiction never rested immediately either on Act XI of 1846 or on the rules made under it, but simply on the Letters Patent based on section 9 of the High Court Act 24 & 25 Vict., c. 104.

The only other enactment to which it is necessary to refer is the existing Code of Criminal Procedure. It like its predecessor applies to the whole of British India, but as in the absence of specific provision to the contrary it does not affect any special or local law, or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law now in force (see section 7 of Act XIV of 1874), it does not touch the Agent's jurisdiction to refer the case, or the power conferred on us by the Letters Patent to hear and determine it.

From the foregoing review of the course of legislation on this subject, it appears to me that the High Court has jurisdiction to hear and determine the present reference. The case itself is of a simple nature, and presents no special difficulty, but as probably the accused, whose petition is addressed to the Governor in Council, is unaware that we are going to deal with it, I think it would be desirable to direct notice to be given to him before we finally dispose of it.

Note:—After giving notice to the accused the High Court considered the reference, confirmed the conviction and sentence and rejected the appeal.

1901 *April* 9. **I. L. R. 25 Bom. 675.**

Before Mr. Justice Candy and Mr. Justice Fulton.

KING-EMPEROR *v.* BALA AND NARAYAN.*

Criminal Procedure Code (Act V of 1898), sections 337 and 339—Criminal Procedure—Pardon tendered and accepted—Evidence given and pardon withdrawn by Magistrate—Forfeiture of pardon must be proved—When may forfeiture be declared and pardon withdrawn—Practice.

A committing Magistrate, having, under section 337 of the Criminal Procedure Code (Act V of 1898), tendered a pardon to one of three accused persons, examined him as a witness. Subsequently, however, the Magistrate, under section 339 of the Code, withdrew the pardon on the ground that the accused had wilfully concealed a certain fact connected with the offence, and he committed him along with the other accused for trial at the Court of Sessions, where he was found guilty. In giving judgment the Sessions Judge expressed his opinion that the withdrawal of the pardon by the Magistrate was illegal, (1) because such withdrawal could not be made until the close of the trial and should be made by the Court of Sessions, and (2) because the fact, the alleged concealment of which was the ground of the withdrawal, had not been proved. The accused, however, was found guilty and sentenced. On appeal to the High Court—

Held, that the conviction and sentence should be set aside on the ground that it had not been proved that the pardon had been forfeited under section 339 of the Criminal Procedure Code. (Act V of 1898). The alleged fact, the concealment of which was the ground for withdrawing the pardon, had not been proved. If the pardon which had been granted had not been forfeited under section 339, it was still in force and the accused should be discharged.

As the law stands the question in such cases is whether the accused has forfeited his pardon by some act of his own. The question is one of fact in which the Magistrate may hold one

* Criminal Appeal No. 56 of 1901.

Digitized by Google

opinion and the Sessions Judge another as may happen in the case of any other question of fact in issue in the case. The Sessions Court has to determine for itself on the evidence whether the pardon has been forfeited: for if not, the accused, who has accepted such pardon, cannot be tried.

Quære,—Whether the examination at the committal proceedings before the Magistrate of a person who has accepted a pardon satisfies clause 2 of Section 337 of the Code which provides that every such person shall be examined as a witness "in the case" or whether such person must be examined as a witness at the "trial."

Queen-Empress v. *Bhau* (1) doubted.

APPEAL against the conviction and sentence recorded by E. M. Pratt, Sessions Judge of Sholapur-Bijapur, in criminal case No. 49 of 1900.

The accused (1) Bala Narsagavda and (2) Narayan Davlat were charged with the murder of one Meera. The deceased's wife Ameena was charged with abetment of the offence.

In the course of the investigation before the Magistrate on the 4th September, 1900, Narayan Davlat (accused No. 2) was tendered a pardon under section 337, of the Criminal Procedure Code (Act V of 1898) on condition of his making a full and true disclosure of all the facts within his knowledge, and he was examined as a witness on the same day.

On the 6th September the pardon was withdrawn by the Magistrate on the ground that Narayan had not disclosed a certain fact within his knowledge, and Narayan was committed for trial along with the other two accused to the Court of Sessions at Sholapur-Bijapur.

The Sessions Judge, however, was of opinion that it was necessary under section 337 (2) of the Criminal Procedure Code (Act V of 1898) that Narayan should be examined as a witness at the trial, and that the Magistrate was wrong in withdrawing the pardon before the trial in the Sessions Court had begun. He therefore referred the matter (No. 114 of 1900) to the High Court, requesting that Narayan's commitment might be quashed. On that reference the High Court passed the following order:

The Sessions Judge should proceed with the case. The accused Narayan Davlat was examined as a witness by the Magistrate, who withdrew the pardon, as in his opinion the condition on which it was granted was not complied with.

The Sessions Judge thereupon proceeded with the trial, and agreeing with the assessors found Bala and Narayan (accused Nos. 1 and 2) guilty of murder and sentenced them each to transportation for life. Ameena was found not guilty of the offence charged and she was discharged.

In passing judgment the Sessions Judge expressed his opinion that the withdrawal by the Magistrate of the pardon which had been tendered to Narayan and accepted by him was illegal: (1) because in his view the Magistrate had no power to withdraw it, such withdrawal not being legally possible until the close of the trial of the other accused, and only to be made by the Court of Sessions, (2) because the fact, the non-disclosure of which by Narayan was the ground of the withdrawal, had not been proved and was certainly not within Narayan's knowledge. In his opinion Narayan's evidence was true.

In his judgment the Sessions Judge made the following observation with regard to the case of Narayan:

I may add that I propose at the expiry of the period of appeal to move Government to grant accused No. 2 a pardon. The committing Magistrate tendered him a pardon and withdrew it as soon as he had given his evidence on the ground that he had concealed Nimgaoda's share in the murder. It seems to me and—with due submission to the ruling of the High Court—it seems to me that this procedure was illegal. The Code does not say by whose order a tender of pardon may be withdrawn or the person to whom pardon has been tendered ordered to be tried. Section 337 (2) requires, however, that he should be examined as a witness in the case. This.

(1) (1898) 23 Bom. 493.

Digitized by Google

cannot be done if the tender of pardon is withdrawn before the trial has begun. The inference is that the law intends that the pardon should not be withdrawn by the Magistrate but by the COurt of Session, or at any rate that the order for the trial should not be made until the close of the trial of the other accused. It is obvious that until the close of the trial all the materials by which the truth of the evidence given can be tested are not exhausted. Taking this view of the law I addressed the High Court to quash the commitment of accused No. 2, but I was directed to proceed with the trial.

Now I do not concur with the reason given by the Magistrate for withdrawing the pardon. I think it probable that Nimgaoda was an accomplice, but I do not think it proved that he was. The assessors do not think that he was an accomplice at all. There is certainly no reason for supposing that he was an accomplice to the knowledge of accused No. 2. I think the evidence given by accused No. 2 was true, and if that evidence had been given before me, I should not have withdrawn the pardon. It is, however, not open to me to acquit him on this ground, for he does not plead that he gave true evidence.

The procedure followed has therefore led to this surprising result, that I am passing sentence on a man who I think ought to-day to be at liberty. The only way out of this *impasse* will be to address Government to give accused No. 2 the benefit of the pardon that the Magistrate tendered him. But perhaps the High Court may in appeal see their way to reconsider its order and quash his commitment and conviction.

Bala and Narayan appealed.

There was no appearance on either side.

CANDY, J.:—I concur with Mr. Justice Fulton in holding that the appeal of No. 1 Bala, should be dismissed, and that the conviction of No. 2, Narayan, should be set aside, and that he should be discharged. As I was a party to the order of this Court, dated 29th November 1900, declining to quash the commitment of accused Narayan, I may add that the case of *Queen-Empress* v. *Bhau*(1) was not brought to our notice nor were the numerous cases which are quoted in Sohoni's Criminal Procedure Code. Whether our order was correct or not, we cannot now reconsider it and quash the commitment. But it does not follow that the conviction of Narayan must stand. If it appears that his pardon has not been forfeited under section 339, then obviously it is still in force, and he must be discharged. I agree with the view taken by the Sessions Judge that the pardon has not been forfeited.

FULTON, J.:—I think that accused No. 1, Bala, has been rightly convicted and that his appeal should be dismissed.

As regards accused No. 2, Narayan, I am of opinion that the conviction must be set aside and that he must be discharged on the ground that it is not proved that the pardon granted to him by the Magistrate has been forfeited under section 339 of the Code of Criminal Procedure.

The learned Sessions Judge considered that the Magistrate who had tendered the pardon had no jurisdiction to commit the accused before the close of the trial of the other accused. In this view the Judge is supported by the decision of this Court in *Queen-Empress* v. *Bhau*(1) But so far as the present case is concerned, the matter has been settled by the order of this Court of the 29th November, 1900, and cannot be reopened: *Imp* v. *Fox* (2). For the purposes of this case then, the commitment must be held to be good: and on the general question of the proper construction of section 337 it is sufficient to point out that I do not wish to be understood as concurring in the decision in *Queen--Empres* v. *Bhau*(1) The section says that every person accepting a tender under this section shall be examined as a witness in the case, and I am doubtful whether it is correct to treat the word "case" as equivalent to "trial." A person accepting a pardon who is examined in the committal proceedings may be said, without inaccuracy, to be examined in the case; and it is not by any means

(1) (1898) 23 Bom. 493. (2) (1885) 10 Bom. 176.

Digitized by Google

certain that the Legislature was referring to his examination at the trial in the Sessions Court, when it said that he shall be examined in the case. In many instances it would obviously be unsafe for the Magistrate to hold that such person had forfeited his pardon until the trial of the co-accused had been concluded, but in other cases the perjury before the Magistrate might be so clear and palpable as to make it useless to delay the committal. It seems to me therefore impossible to lay down any rule applicable to all cases to determine at what stage it is expedient to commit an accused, who has in the opinion of the Magistrate forfeited his pardon; and I am inclined to think that the Legislature by using a general term like "case" instead of the word "trial" meant to abstain from laying down any such rule. It will be observed that in section 339 the word "withdrawn" in the former Code has disappeared and been replaced by the word "forfeited." As the law now stands, the question is whether the accused has forfeited his pardon by some act of his own—not whether the Magistrate has validly withdrawn it. This question is one of fact on which it is clear that the Magistrate may hold one opinion and the Sessions Court another, just as may happen on any other question of fact at issue in the case. The Sessions Court has to determine for itself on the evidence before it whether the pardon has been forfeited: for if not, the accused, who has accepted such pardon cannot be tried. Here the Sessions Judge thought that Narayan was not proved to have wilfully concealed any thing essential or to have given false evidence, differing on this point from the Magistrate, who thought that he had given false evidence and therefore committed him. I agree with the Sessions Judge. There may be some suspicion against Nimgouda, but the evidence does not disclose any case against him, in regard to which it can be said with any certainty that Narayan has wilfully concealed anything essential or given false evidence. His conviction therefore must be reversed and he must be discharged.

Order accordingly.

1901. *April* 15. I. L. R. 25 Bom. 680.

FULL BENCH.

Before Sir L. Jenkins, Chief Justice, Mr. Justice Candy, Mr. Justice Fulton, Mr. Justice Crowe, and Mr. Justice Chandavarkar.

KING-EMPEROR *v.* PARBHUSHANKAR.*

Criminal Procedure Code (Act V of 1898), sections 269 and 418—Offence triable with the aid of assessors tried in fact by a jury—Trial by jury—Appeal on a matter of fact—Practice—Procedure.

Under section 418 of the Criminal Procedure Code (V of 1898) no appeal lies on matters of fact where an accused person is convicted by a jury on a charge which ought to have been tried with the aid of assessors.

An accused person was charged with and tried for offences under sections 302, 304 and 325 of the Penal Code (Act XLV of 1860). Under the first of these charges he was triable by a jury. Under the latter two he was triable with the aid of assessors. He was, however, tried for all three offences by a jury who found him guilty on the third charge. The Judge accepted the verdict and sentenced the accused to four years' rigorous imprisonment. The accused appealed.

Held, by a Full Bench that under Section 418 an appeal lay in this case on matters of law only and not on matters of fact.

Per Jenkins, C. J.—The words in section 418 of the Criminal Procedure Code, 1898, "when the trial was by jury" mean "when the trial in fact was by jury" and not "when the trial should have been by jury."

---

* Criminal Appeal No. 4 of 1901.

Digitized by Google

APPEAL from the conviction and sentence recorded by F. X. DeSouza, Sessions Judge of Ahmedabad.

The accused was committed to the Court of Session at Ahmedabad for trial on a charge of murder under section 302 of the Indian Penal Code (Act XLV of 1860).

At the commencement of the trial which was by jury the charge was amended by the addition of counts under sections 304 and 325 of the Code.

The latter offences were triable with the aid of assessors and not by a jury at Ahmedabad.

The Sessions Judge, however, proceeded with the trial on all the charges. The jury unanimously acquitted the accused of offences under sections 302 and 304 of the Indian Penal Code (Act XLV of 1860); but convicted him under section 325 of the Code. The Judge thereupon sentenced him to four years' rigorous imprisonment and a fine of Rs. 1,000.

Against this conviction and sentence the accused appealed to the High Court.

The appeal at first came on for hearing before a Division Bench (Candy and Chandavarkar, JJ.), who referred to a Full Bench the question " Whether an appeal in the present case lies on a matter of law only.

The following was the referring judgment.*

CANDY, J.:—A preliminary point of considerable importance has arisen in this appeal. The question is, whether an appeal lies on matters of fact. Section 418 of the Criminal Procedure Code provides that " where the trial was by jury the appeal shall lie on a matter of law only." This trial was by jury. The accused was committed to the Court of Session of Ahmedabad on a charge of murder (section 302, Indian Penal Code). That was apparently the only charge framed by the Magistrate.

When the trial in the Sessions Court began, before the accused was called on to plead, the charge was amended (presumably by direction of the Sessions Judge) by the addition of counts under section 304 and 325 of the Indian Penal Code. Such offences are not triable by a jury at Ahmedadad. Therefore, under section 269 (3) of the Criminal Procedure Code, the accused should have been tried for these latter offences by the Court of Session with the aid of the jurors as assessors.

This provision of the law was apparently not followed by the Sessions Judge. He charged the jury on all three counts, and indicated the circumstances under which it was, he said, open to the jury to convict of culpable homicide not amounting to murder or of voluntarily causing grievous hurt. The jury returned the unanimous verdict that accused was not guilty of murder, nor of culpable homicide not amounting to murder, but that he was guilty of voluntarily causing grievous hurt under section 325 of the Indian Penal Code, and that he was sane when he committed the act. On this the Sessions Judge, accepting the unanimous verdict of the jury, found the accused guilty of an offence under section 325 of the Indian Penal Code, and sentenced him.

Section 536 of the Criminal Procedure Code provides that if an offence triable with the aid of assessors is tried by a jury, the trial shall not, on that ground only, be invalid.

So here the trial was not invalid because the Sessions Judge did not ask the jurors as assessors for their opinions on the charges under sections 304 and

Digitized by Google

325. But still the fact remains that "the trial was by jury," in which case the appeal shall lie on a matter of law only. To apply the language of Parsons, Acting C.J., in *Queen-Empress* v. *Jeyram*(1) "the procedure of the Sessions Judge was clearly most irregular, but it appears on the authorities that we must accept the trial by jury as a legal one," and, if the Sessions Judge disagrees with the verdict of the jury on the charge of an offence which should properly have been tried with the aid of the jurors as assessors, he should submit the case under section 307. In other words, as "the trial was by jury," and was a "legal trial," the Sessions Judge could not treat the verdict of the jurors as the opinion of assessors, and record a finding in opposition to that verdict and opinion.

In the above case, Parsons, Acting C. J., referred to the decision of this Court in *Imp* v. *Dev Vithu*.(2) In this latter case the second accused was tried on charges under sections 457 and 380 of the Indian Penal Code. The first charge was triable by jury; the second with the aid of the jurors as assessors. The Sessions Judge took the verdict of the jurors on both charges (which was one of acquittal), and did not require each of the jurors as assessors to state his opinion orally on the charge under section 380, but referred the whole case to the High Court under section 307. The High Court upheld the verdict of acquittal on the charge of an offence under section 457, and then proceeded to deal with the charge of the offence under section 380. The learned Judges (Jardine and Telang, JJ.), relying on the Calcutta decision in *Bhootnath Dey's* case, (3) held that there had been a trial by jury of the charge of an offence under section 380, and that therefore the Sessions Judge had jurisdiction to refer the verdict to the High Court, and thus that the High Court could convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it. Their Lordships then convicted the accused of an offence under section 380. In other words, the second accused was deprived of his right of appeal, which he would have been able to exercise had the Sessions Judge been directed to record a judgment, after considering the opinions of the jurors as assessors. Their Lordships did not directly refer to this point, but they remarked: "Any prejudice which prisoner might incur is prevented by our practice of giving him notice of the hearing of the reference, and so great is the respect of the High Courts for verdicts of juries that a prisoner so acquitted has an advantage, as a general rule, over one in whose favour there are only the opinions of assessors."

Their Lordships also remarked that the decision in *Bhootnath Dey's* case was passed after consideration of *Empress* v. *Mohim Chunder Rai*,(4) in which the opinion was expressed by Maclean, J. (Mitter, J. *dubitante*) that "the prisoners who would have been entitled to an appeal on the facts, if the case had been tried with assessors are not debarred from that merely by the fact that their trial by jury is not invalid. An error of procedure not affecting the merits of the case ought not to affect the prisoners' right of appeal."

In our opinion the question is not what ought to be the case, so much as what is the law. Nothing would have been easier than for the Legislature to insert in clause 1 of section 536 a provision preserving the right of appeal on facts. If, following the Bombay ruling above quoted, we must hold here distinctly that the case under section 325 was tried by a jury, then the law says that there shall be an appeal on a matter of law only.

(1) (1899) 23 Bom. 696, p. 697.
(2) (1892) Cr. R. No. 19.
(3) (1879) 4 Cal. L. R. 495.
(4) (1878) 3 Cal. 765.

Digitized by Google

Bhootnath Dey's case was followed by the Calcutta High Court in *Surja Kurmi* v. *Queen-Empress*,(1) in which the Sessions Judge, treating the verdict of the jury as the opinion of assessors, recorded a judgment, convicting the accused of an offence which was triable with the aid of assessors. The High Court (Hill and Stevens, JJ.) set aside the conviction and remanded the case to the Sessions Judge in order that he might deal with it according to law by passing an order either under section 306 or 307 of the Criminal Procedure Code. The Court held that the case was "tried by a jury" within the meaning of section 536. If so, then it was equally a "trial by jury" within the meaning of section 418. Conviction or acquittal cannot make any difference in the fact that the trial was by jury. If in a case which should have been tried with the aid of assessors, there is in fact a valid trial by a jury, and in such a case the Sessions Judge cannot (as shown in the rulings quoted above), treating the verdict of jurors as opinions of assessors, record a judgment, but must, if he disagrees with the verdict, refer the case to the High Court, then it is difficult to see how in a similar case the High Court can treat the verdict of the jury as their opinion as assessors.

In the case of *Imperatrix* v *Lalbu*(2) the Sessions Judge tried the accused by jury, the charges being of offences under sections 302 and 318 of the Indian Penal Code. The charge under section 318 was not triable by Jury. The jury acquitted accused on both charges. Government appealed. This Court (Parsons and Ranade, JJ.), taking the verdict of the jury to be their opinions as assessors, went into the facts, and found that accused had committed an offence under section 318, and convicted and sentenced her. Obviously, if the law allows an appeal on facts in such a case when there is an acquittal, there should equally be an appeal on facts where there is a conviction. The difficulty is that the words of the law (Section 418) are "where the trial was by jury." If the words were "except where the conviction or acquittal was of an offence triable by jury," then there would be no difficulty. And this would meet the case of a conviction under the provisions of section 238 of the Criminal Procedure Code, according to which an accused may be convicted of a minor offence, though he is not charged with it. In the present case before us, if the Sessions Judge had not added the counts under sections 304 and 325, would it not still have been open to the jury to convict of an offence under either of those sections? Would there then have been an appeal on facts as the law now stands? The "trial was by jury."

In the case of *Queen-Empress* v. *Jeyram*,(3) noted above, Parsons, Acting C.J., remarked that the decision of this Court in *Imperatrix* v. *Lalbu*—also noted above—as to the right of appeal in a case so tried (namely by jury when it ought to have been tried with the aid of assessors) in no way conflicts with the decisions of the Bombay and Calcutta High Courts that a case so tried must be treated as a valid trial by jury, so that if the Judge disagrees with the verdict, his only course is to make a reference under section 307.

With the greatest respect it may be pointed out that the decisions are inconsistent. If such a case must be distinctly treated as a trial by jury, so much so that the Judge is not entitled to regard the verdict of the jurors as their opinions as assessors then the principle of trial by jury must apply that there is an appeal on a matter of law only.

In our opinion the mistake has arisen in supposing that the decision in *Bhootnath Dey's* case is applicable to the present law. That decision was passed under Act X of 1872, which contained no provision as to the procedure

(1) (1898) 25 Cal. 555. (2) (1898) Cr. R. No. 15. (3) (1899) 23 Bom. 696.

Digitized by Google

to be followed, when the accused is charged at the same trial with several offences of which some are and some not triable by jury. Then came Act X of 1882, section 269, which provided that in such a case the accused should be tried on all the charges by jury. Then came the amendment made by Act X of 1886, section 9, which is the law at present In *Imperatrix* v. *Dev* (*supra*), Jardine, J., expressed the opinion that the amendment made by section 9 of Act X of 1886 restored the procedure of 1872, section 233, as interpreted in *Bhootnath Dey's* case.

We are unable to concur in that opinion. When *Bhootnath Dey's* case was decided in 1879, there was no provision in the law applicable to such a case except that if an offence triable with assessors is tried by a jury, the trial shall not, on that ground merely, be invalid. The learned Judges, Mitter and Prinsep, JJ., held that the whole case must be taken as having been tried by jury. This decision was embodied in Act X of 1882, section 269, and was the law till section 269 was amended by Act X of 1886, section 9. Under the law so amended, we think that it may be taken as open both to the Sessions Judge and to the High Court in such a case, in which the opinion of each juror as an assessor has not been taken, to treat the verdict as those opinions, and to proceed to Judgment, just as if the case had been tried with the aid of assessors. In such a view of the law an appeal would lie on a matter of fact. But as this view is not free from doubt, having regard to the language of section 418, and as, moreover, it is in direct conflict with the decisions above noted of the Bombay and Calcutta High Courts, we think that the question, whether an appeal in the present case lies on a matter of law only, is one which should be decided by a Full Bench; and we therefore direct that the papers of this appeal be laid before the Chief Justice.

This reference was argued before Jenkins, C. J., Candy, Fulton, Crowe, and Chandavarkar JJ.

Rao Bahadur *V. J. Kirtikar*, Government Pleader, for the Crown:—In this case no appeal lies on matters of fact. Section 418 of the Criminal Procedure Code (Act V of 1898)—*Surja Kurmi* v. *Queen-Empress*. (1) The accused ought no doubt to have been tried at Ahmedabad for the offence of which he has been convicted, not by a jury but with the aid of assessors. But the irregularity does not make the trial invalid—Section 536 of the Criminal Procedure Code (Act V of 1898); *In the matter of Bhootnath Dey* (2); *Queen Empress* v. *Jeyram*.(3)

P. M. Mehta (with *L. A. Shah*) for the accused.

Sections 418, 269 and 536 are the sections to be considered. Reading section 269 with section 418, it is clear that section 418 which deprives the accused of an appeal on matters of facts applies only when the offence with which he is charged is exclusively triable by jury. It does not apply where the offences charged are partly triable by jury and partly with the aid of assessors. In the Code (Act X of 1872) there was no provision similar to section 269 of the present Code. Nevertheless the ruling in the *Queen* v. *Doorga Churn* (4) shows that an appeal would lie on matters of fact where an offence which was not triable by jury was in fact tried by jury. *Queen-Empress* v. *Lalbu* (5) shows that in a case like this an appeal on facts will lie—see also *Queen-Empress* v. *Jeyram*. (6) Section 536 of the Code does not cure an irregularity which changes the whole character of the proceedings. We submit that the present case, though tried by a jury, ought to be taken as if tried with the aid of assessors, and thus an appeal on matters of fact will lie.

(1) (1898) 25 Cal. 555. (2) (1879) 4 Cal. L. R. 405. (3) (1899) 23 Bom. 696.
(4) (1875) 24 Cal. W. R. 30. (5) (1898) Cr. Rul. No. 15. (6) (1899) 23 Bom. 696.

Digitized by Google

JENKINS, C. J.:—The accused was at the trial of this case charged with several offences, of which one is, and two are not, triable by jury. A jury was chosen, the trial proceeded, and at the end the Judge charged the jury, who by their verdict found the accused guilty of an offence under section 325 of the Indian Penal Code. This offence is not triable by jury. The finding and sentence of the Sessions Judge is thus recorded : "Accepting the unanimous verdict of the jury, I find the accused guilty of an offence under section 325 of the Indian Penal Code, and I sentence him to rigorous imprisonment for a period of four years and to pay a fine of one thousand rupees, &c. &c."

From this finding and sentence the accused has appealed, and the question referred for our decision is whether an appeal will lie on the facts.

I propose to confine myself to the words of the Code, though, in doing so, I will bear in mind what has been held in the several cases mentioned and dircussed in the referring judgment Section 404 of the Criminal Procedure Code provides that "no appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force," and under section 418 "an appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal will lie on a matter of law only." At the same time it is provided by section 536 that "if an offence triable with the aid of assessors is tried by a jury the trial shall not on that ground be invalid."

These sections are clear and need no paraphrase. The first question they suggest is, whether in this particular case the trial was by jury. The record leaves no doubt in my mind on this point; for the events of the trial absolutely negative the view that the accused was tried by the Court of Sessions with the aid of the jurors as assessors.

The offence therefore, though triable with the aid of assessors, was in fact tried by a jury. This irregularity did not invalidate the trial: but did it attract the consequences of section 418? This turns on the precise force in that section of the words "where the trial was by jury". Do they mean "where the trial should have been by jury" or "where the trial in fact was by jury"? In my opinion the words are themselves the clearest answer to this question : they relate to what actually occurred, not to what should have occurred. An adoption of the rival view would lead to the result that a reversal of the conditions would leave an accused, who was wrongly tried with the aid of assessors, without any right of appeal, though the scheme of the Code shows that in the view of the Legislature it is less advantageous to an accused to be tried with the aid of assessors than by a jury. I would under the circumstances answer the reference by saying that in the present case no appeal lies on a matter of fact.

CANDY, J. :—I have but little to add to what I have said in the referring judgment. Possibly if, before final orders are passed, a Sessions Judge treats the verdict of the jurors as their opinions as assessors, and proceeds to judgment just as if the case had been tried with the aid of assessors, then it may be said that the case was not "tried by a jury," and that therefore an appeal would lie on a matter of fact.

But that is not the present case in which the Sessions Judge has recorded no judgment beyond accepting the verdict of the jurors. In such a case it seems impossible to avoid the distinct terms of section 418. Thus, as the trial was by jury, the appeal shall lie on a matter of law only. It is evident that in section 418 the Legislature deliberately used the words "the trial was

Digitized by Google

by jury" instead of "offence triable by jury" as in section 536. Trial by jury is regarded as a privilege, carrying with it certain liabilities. If an offence triable by a jury is tried with the aid of assessors, then, provided objection is taken before the Court records its finding, the trial will be invalid. The accused has been deprived of a valuable privilege which it is open to him up to the last stage in the case to preserve.

But the converse is different. If the accused obtains the privilege to which, strictly speaking, he is not entitled, it is not presumed that he will take any objection. He has the chance of a verdict in his favour, a verdict which can only be upset under exceptional circumstances. If the verdict is against him, he cannot turn round and claim an appeal on matters of fact.

With reference to the mention of section 439, I would remark that the fact that an accused has obtained the privilege to which he was not strictly entitled, and has taken the chance of an adverse verdict, is no ground *per se* for the High Court exercising its power of revision under section 439. No doubt when the case is before it, the High Court can act under section 439, and in doing so will be guided, not I think by errors of procedure in the Sessions Court, which have not affected the facts of the case, but by the well-known principles according to which all the High Courts in this country in non-appealable cases have limited their interference with findings of fact on appreciation of the evidence.

Also I am not prepared, without further consideration, to assent to the opinion that when an appeal to the High Court on a point of law (misdirection) in a case which was tried by jury is successful, the High Court can assume the functions of a jury and find on the facts without the necessity of a re-trial.

I would answer the question referred to the Full Bench in the affirmative.

FULTON, J. :—My answer to the question whether in this case an appeal lies on a matter of law only must be in the affirmative.

On the charge in respect of which the accused has been convicted he was tried by a jury, though the offence was triable with the aid of assessors. Section 536 of the Crimimal Procedure Code provides that in such circumstances the trial shall not on that ground only be invalid. There was therefore a valid trial. That trial was by jury; and according to section 418, where the trial was by jury, the appeal shall lie on a matter of law only.

Mr. Mehta urged that we should read section 418 with section 269 and treat the words "where the trial was by jury" as meaning "where the trial was by jury according to the provisions of section 269." But we cannot put this construction on section 418 without materially altering, its language, which I do not think we are justified in doing. The words "where the trial was by jury" are plain enough and cannot be read as meaning where the offence was triable by jury under section 269. Moreover, this construction might be found very inconvenient in the converse case where an offence properly triable by jury was by mistake tried with the aid of assessors.

It may seem hard that a prisoner, who, if he had not been irregularly tried in the Court of Session would have had an appeal to the High Court on the facts, should by reason of that irregularity be deprived of his appeal. But the grievance is more apparent than real. Under section 439 the High Court has the widest powers of revision, and, if it finds that owing to an irregularity in the Court below the prisoner is in danger of being wronged, it will, I think, exercise those powers even to the extent of considering the correctness of the verdict, just as, sometimes in proper cases, it reviews Magisterial decisions which are not open to appeal.

Digitized by Google

It may be argued that this view enables an accused person to secure the effect of an appeal in cases in which by law no appeal is allowed. But a similar objection may be urged in almost every case in which the revisional powers of the High Court are used, for it is only when there is no appeal that the necessity ever arises for the exercise of such powers. The Court, no doubt, always keeps in view the finality intended by the law, and only interferes when it is satisfied that a miscarriage of justice will result if revision is refused. But at the same time, whilst it recognizes that finality in certain cases is intended, it has also to bear in mind that the Legislature has conferred on it powers of revision, which it is intended to exercise where wrong will otherwise pass unredressed. No general rule can be laid down determining the cases in which the Court ought to exercise these powers. No such rule has been prescribed by the Legislature, and no opinion of this Court can supplement or take away from the provisions of the law. In the present case it seems to me that it is entirely for the learned Judges of the Division Bench to determine in their discretion whether they will go into the facts or not.

I have not thought it necessary to discuss the various decisions so fully set forth in the reference of my learned colleagues. But I wish to point out that although the opinion that in a case like the present no appeal lies may be at variance with some of the *dicta* in *Imp.* v. *Lalbu*,(1) it is in no way inconsistent with the result, for in that case there had been a clear misdirection to the jury which in itself was sufficient to give ground for appeal.

CROWE, J.:—The accused was charged before the Sessions Court at Ahmedabad with an offence under section 302 of the Indian Penal Code triable by jury. During the trial other charges were added under sections 304 and 325, of offences which are not triable by jury at Ahmedabad.

The law provides—section 269, clause 3, Criminal Procedure Code—that in a mixed trial where some of the offences charged are triable by jury and some are not, the accused should be tried by jury for such offences as are triable by jury and by the Court of Sessions with the aid of the jurors as assessors for such of them as are not triable by jury. This course was not followed by the Sessions Judge. His summing up had reference to all the offences with which the accused was charged, and at the conclusion of the trial the jury returned a unanimous verdict that the accused was guilty of an offence under section 325 of the Indian Penal Code. This verdict was accepted by the Sessions Judge, who forthwith found the accused guilty and sentenced him accordingly. The question which now arises and which has been referred for decision to a Full Bench, is whether the accused has a right to appeal on the facts. Section 418 of the Criminal Procedure Code provides that when the trial was by jury an appeal shall lie on a matter of law only. In the present case it seems impossible to hold that the trial was not by jury. The jurors were chosen by lot, the verdict of the majority (in this case it was unanimous) was given by the foreman, and was accepted and acted on by the Sessions Judge. In no respect was the procedure prescribed by law for the trial of cases with the aid of assessors followed. Assessors were not chosen, nor were they required each to state his opinion orally, nor did the Sessions Judge pronounce judgement according to the provisions of section 367 of the Criminal Procedure Code. Section 536 of the Criminal Procedure Code was apparently designed to meet the actual circumstances of cases like the present, and it lays down that if an offence triable with the aid of assessors is tried by a jury the trial shall not on that ground only be invalid.

(1) Cr. R. 15 for 1898.

Digitized by Google

The trial being a valid trial by jury, the provisions of section 418. if that section is read in its natural and ordinary sense, are a bar to an appeal on matters of fact.

The question arises whether the accused has been prejudiced by the procedure followed by the Sessions Judge. I think clearly not. He has had the advantage of the opinion of the jury on all matters of fact, by which the judge is bound. It seems clear from the wording of section 536 that that is the view entertained by the Legislature, because although a trial is not invalid on the mere ground that an offence triable with the aid of assessors is tried by a jury, in the converse case when the offender is entitled to be tried by a jury and has been tried with the aid of assessors, the trial on that ground alone may be declared invalid, if the objection be taken before the Court records its finding, the law apparently holding that the accused has been deprived of a right or privilege by an error of procedure.

For these reasons I am of opinion that in the case stated no appeal lies.

CHANDAVARKAR, J.:—I venture to think that there is an apparent deficiency in the language used by the Legislature in section 536 of the Code of Criminal Procedure, and whether we construe it singly or along with section 418, it is as open to the construction for which Mr. Mehta contended as tha pressed on us by the learned Government Pleader. The negative form of the language used in section 536 lends some support to the contention that where an accused person, who ought to have been tried with the aid of assessors, it tried by a jury, the Legislature says merely that the trial shall not on thas ground only be invalid, *i. e.* the trial shall not be treated as a nullity, not that it shall be treated for all purposes as a valid jury trial. The wording of section 418 is also, in my view, not altogether precise It is also capable of more than one meaning. No doubt that section says that where an accused person "was tried by jury," an appeal shall lie on a matter of law only. But the words "was tried" may be construed to mean "where an accused person was, according to law, tried by a jury," as much as they may be taken to mean "where as a matter of fact, whether according to law or not, an accused person was tried by a jury." Where the language used by the Legislature is capable of more than one construction, I should lean in favour of that which is beneficial to the accused. If the result of the construction which the learned Government Pleader has asked us to put upon these sections were simply to deprive the accused of the right of appeal he would have had on facts, had he been, as he ought to have been, tried with the aid of assessors, I should have held that more clear and positive language was necessary in the sections of the Code to justify that construction as the only one possible and to impute to the Legislature the intention to deprive the accused of that right. But it is not a case where the accused is simply deprived of the right of appeal on facts given to him by the Code. It is rather a case where he loses one right and gains another instead. If, as a result of being tried by a jury, when he ought to have been tried with the aid of assessors, his right of appeal on facts ceases, he at the same time secures the privilege of a trial by jury, and the whole scheme of the Code of Criminal Procedure is to treat trial by jury as a privilege, as valuable as, if not more valuable than, the other rights. This is rendered even more clear by the distinction which is made by the Legislature in section 536 between a case where an accused person who ought to have been tried with the aid of assessors is tried by a jury, and a case where an accused person who ought to have been tried by a jury is tried with the aid of assessors. In the former case the Legislature says that the trial shall not be invalid; whereas in the latter

Digitized by Google

the trial shall not be invalid unless objection is taken to the trial before the Court records its finding. It is obvious that in the former case the accused gets a privilege, whereas in the latter the accused has given to him the option of waiving the privilege he has. These considerations make the intention of the Legislature clear in spite of the apparent deficiency of the language used. I would therefore answer the question referred to us in the affirmative.

1901 *April* 18. I. L. R. 25 Bom. 694.

Before Mr. Justice Candy and Mr. Justice Fulton.

KING-EMPEROR *v.* JAYRAM. *

Criminal Procedure Code (Act V of 1898): sections 284, 285 and 537—Trial with assessors—Trial with the aid of one assessor only—Legality of such trial—Assessors.

In a case triable by a Court of Session with the aid of assessors, one of the assessors being ill, the trial commenced and ended with only one assessor.

Held, that there was no legal trial, that the proceedings must be set aside and a new trial directed.

Section 537 of the Criminal Procedure Code (Act V of 1898) had no application to such a case, as the Court was not properly constituted.

APPEALS from the convictions and sentences recorded by E. M. Pratt, Sessions Judge of Sholapur-Bijapur,

The accused, Jayram and Sakhya (with seven others), were tried on a charge of dacoity under section 395 of the Indian Penal Code (XLV of 1860) before the Sessions Judge with the aid of assessors.

As one of the assessors was ill, the trial commenced and ended with one assessor only.

The Sessions Judge gave the following reasons for this procedure :

" The penal of the assessors is a very small one, and it is very difficult to secure their attention. The procedure adopted is perhaps not warranted by the terms of sections 284 and 285 of the Criminal Procedure Code, but it saved the delay and expense of an adjournment and was not objected to."

The Sessions Judge disagreeing with the assessors convicted two of the accused, Jayram and Sakhya, of the offence charged and sentenced them each to one year's rigorous imprisonment. The other accused were acquitted.

Thereupon Jayram and Sakhya preferred two separate appeals to the High Court.

R. W. Desai for the Crown:—No doubt the trial commenced with only one assessor. This was irregular and opposed to the rulings in *Queen-Empress* v. *Bastiano* (1) and *Queen-Empress* v. *Babu Lal* (2). But in this case section 537 cures the irregularity, especially as the accused were represented by pleaders who could have objected to the course followed by the Judge, but did not. The irregularity was acquiesced in by the accused, as it did not prejudice them in their defence.

There was no appearance for the accused.

CANDY, J.:—As the Sessions Judge reports that the trial commenced

---

* Crminal Appeals Nos. 88 and 89 of 1901.

(1) (1890) 15 Bom. 514. (2) (1898) 21 All. 106.

Digitized by Google

with only one assessor, we must hold that there was no legal trial (sections 284, 285, Criminal Procedure Code). See the cases of *Queen-Empress* v. *Bastion* (1) and *Queen-Empress* v. *Babu Lal.* (2) The error is one which vitiates the proceedings. The Government Pleader drew our attention to section 537, Criminal Procedure Code, but in our opinion the provisions of that section are not applicable to this case in which the Court of Sessions was not properly constituted and thus there was no legal trial.

We must set aside the proceedings and direct a trial before a properly constituted Court.

As the Sessions Judge of Sholapur has already expressed an opinion on the merits of the case, we direct that the case be transferred to the Court of Sessions at Bijapur.

Re-trial ordered.

1901 *June* 10. I. L. R. 25 Bom. 702.

Before Mr. Justice Candy and Mr. Justice Chandavarkar.

IN RE MATHUR LALBHAI.*

Criminal Procedure Code (Act V of 1898), sec. 517—Disposal of stolen property on conviction of the thief--Babashahi coin--Legal tender--Customary coin.

A witness for the prosecution in a case of theft produced a sum of money in Babashahi (Baroda) coin (part of the stolen property) which the accused had paid to him in satisfaction of a debt. The accused was convicted, and at the close of the trial the Court, under section 517 of the Criminal Procedure Code (Act V of 1898), ordered the money to be restored to the complainant from whom it had been stolen.

Held, that the order was right. The stolen coins were not current coin of the realm and was neither by Statute nor by the law of merchants in British India a legal tender. The property in them did not therefore pass by mere delivery but remained in the complainant.

Collector of Salem (3) and *Empress* v. *Joggesseur Mochi* (4) distinguished.

THIS was an application for revision under section 520 of the Code of Criminal Procedure (Act V of 1898).

The applicant was a witness for the prosecution in the case of *Queen-Empress* v. *Parbhudas Javerdas*, tried by the Additional Session Judge at Ahmedabad. The accused in that case had stolen a large sum of money from the complainant consisting of Babashahi (Baroda) coin and had used it in paying his creditors, of whom the applicant was one.

At the trial the applicant produced a sum of Rs. 2,555 in Babashahi (Baroda) coin which the accused had paid him.

The accused was convicted, and at the close of the trial the Judge ordered the stolen money which had been produced by the witnesses to be restored to the complainant from whom it had been stolen. He said:

A difficulty has been suggested as to the disposal of the money contained in the bag, Exhibit N. 1. All of it, it will be noted, was money recovered from the creditors of the accused. My finding amounts to holding that it formed part of the proceeds of theft. There is not, it is true, and there cannot be, evidence that it was the identical money stolen and distributed by the accused. But under the terms of the explanation to the amended section 517, Criminal Procedure Code, it seems to me that the Court is empowered to order its restoration to the complainant.

---

* Criminal application of revision No. 41 of 1901.

(1) (1890) 15 Bom. 514. (2) (1898) 21 All. 196. (3) (1873) 7 Mad. H. C. Rep. 233. (4) (1878) 3 Cal. 379.

Digitized by Google

The property, including the sum of money produced by the applicant, was accordingly handed over to the complainant.

The applicant applied to the High Court under section 520 of the Criminal Procedure Code (Act V of 1898) to set aside the order passed by the Sessions Judge for the restoration of the property to the complainant and praying that the Rs. 2,555 might be returned to him.

Notices were issued to the District Magistrate and the complainant calling upon them to show cause against the application.

Rao Bahadur *Vasudeo J. Kirtikar* Government Pleader, for the Crown, showed cause :—The money produced before the Court is found to be the identical money stolen by the accused. The lower Court had therefore jurisdiction to deal with the property.

R. V. Desai for the complainant showed cause :—The order of the lower Court is right. The complainant from whom the coins were stolen is still the owner and is entitled to them. The fact that they were paid over by the thief to the applicant does not make the applicant the owner. The cases of *Collector of Salem* (1) and *Empress* v. *Joggessur Mochi*(2) do not apply. These were cases in which stolen currency notes were paid away by the thief. Currency notes are legal tender and must be accepted as payment by the payee and the property in them passes by mere delivery. But Babashahi (Baroda) coins are not legal tender, and therefore the property in them did not pass by mere delivery.

L. A. Shah for the applicant :—Assuming that the money produced is part of the stolen property, the applicant became the owner on his accepting it from the accused in satisfaction of his debt. The ownership in cash is transferred by mere delivery, even if it be stolen property. We rely upon *Collector of Salem*(1) and *Empress* v. *Joggessur Mochi*. (2) These cases no doubt deal with the case of a currency note; but the *ratio decidendi* applies to the present case. The amended section 517 does not empower the Court to deal with such property.

CHANDAVARKAR, J. :—This is an application by Mathur Lallubhai asking us to revise the order passed by the Additional Sessions Judge of Ahmedabad on the conviction of the accused in Sessions case No. 218 of 1900, directing, under section 517 of the Criminal Procedure Code, that the amount of Rs. 2,355 in Babashahi (Baroda) coin produced by the applicant before the Police and brought into Court subsequently as part of the stolen property in that case, should be returned to its original owner, from whom it had been stolen.

It is contended before us in support of the application, on the authority of the cases of *Collector of Salem*(1) and *Empress* v. *Joggessur Mochi*(2) that the property in dispute, which consists of *Babashahi* rupees, being money, the title to it passed to the applicant by mere delivery as soon as he received it *bond fide* in satisfaction of a legal debt due to him. Those rulings have been followed by the Panjab Chief Court in two cases—*Kanshi Ram* v. *Secretary of State for India*(3); *Mathra Dass* v. *Ramanand*,(4) and must be accepted as good law. But the principle of the rulings in question is that a currency note, like money which is current coin of the realm, is a *legal tender*, and a person receiving it acquires a perfectly valid title to it. But money, to come

(1) (1873) 7 Mad. H. C. 233.
(2) (1878) 3 Cal. 379.
(3) (1890) 25 P. R. No. 83. p. 259.
(4) (1878) 13 P. R. No. 73 P. 235.

Digitized by Google

within the rule, should be *current* coin. "There are no doubt cases in which money cannot be recovered by the rightful owner from a person who has obtained possession of it. This is one of the incidents attaching to a payment of current coin" (Per Cave, J. in *Ex parte Wolverhampton Banking Co. In re Campbell* (1)). That rule, however, cannot apply where the money passing from one hand into another is not current coin of the realm and is neither by statute nor by the law of merchants in British India shown to be a legal tender or, (to use the language of the Editors of Smith's Leading Cases in their notes to *Miller* v. *Race*), "accustomably transferable in the country in the same manner as *cash*." In the language of Fry, L. J., in *Picker* v. *London and County Banking Co.*, (2) a question such as the one which arises in this case must be determined with reference to the law and custom prevailing where it arises, for, if it were otherwise, "if it were proved that cowrees are part of the currency of Africa, they must be treated as money in this country, though there were no custom here to treat them as money."

We must look to the law and custom of British India to determine the question. That law does not make *Babashahi* coin a legal tender, and therefore the title to it cannot pass by mere delivery. As to custom, there is no suggestion or proof of it in this proceeding. If there is any custom, it may be set up if the parties choose, in a civil proceeding. But on the present application we do not think we can interfere with the discretion exercised by the Sessions Judge under section 517 of the Criminal procedure Code. We reject the application.

Application rejected.

1901 *June* 24. I. L. R. 25 Bom. 712.

Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Candy, Mr. Justice Fulton and Mr. Justice Chandavarkar.

KING-EMPEROR *v.* BABYA BHIVA.*

Whipping Act (VI of 1864 as amended by Act III of 1895), section 4--Whipping--Dacoity--Penal Code (Act XLV of 1860), section 395--Previous conviction--Sentence.

Under section 4 of the Whipping Act as amended in 1895, a sentence of whipping in addition to imprisonment is not legal in the case of a conviction of dacoity which was committed prior to the previous conviction of a similar offence.

Reg. v. *Surya* (1) and *Reg.* v. *Kusa* (2) followed.

APPEAL from the conviction and sentence passed by A. Lucas, Sessions Judge of Ahmednagar.

The accused was charged with dacoity and also with the offence of belonging to a gang of persons associated for the purpose of committing dacoity, under sections 395 and 400 of the Indian Penal Code ; and was committed to the Court of Session at Ahmednagar.

At the trial the charge under section 400 was withdrawn, as the accused had already been convicted under that section in a previous case.

The accused was then tried for dacoity under section 395, and was found guilty. He was sentenced to undergo rigorous imprisonment for five years,

---

(1) (1884) 14 Q. B. D. 32 at p. 36. (2) (1887) 18 Q. B. D. 515. p. 520

* Criminal Appeal No. 170 of 1901.

(1) (1866) 3 B. H. C. R. Cr. C. 38. (2) (1870) 7 B. H. C. R. Cr. C. 70.

Digitized by Google

the sentence to run concurrently with another sentence of imprisonment, and to receive thirty stripes.

In passing the sentence of whipping the Sessions Judge said :

I have already convicted him of another offence of dacoity, and according to the letter of the law as found in the Whipping Act III of 1895, he is liable on a second conviction for dacoity to whipping in addition to any other punishment. For that there is a Calcutta High Court ruling: *Queen* v. *Udai Patnaik*, [1] that in a case like this whipping should not be given but only when an accused person is again convicted after he has completed his sentence for the former offence. I can find no Bombay ruling in support of such a view, nor does the wording of the Act, in my humble opinion, warrant such a view. In a case like this when the accused has been with a gang notorious throughout this district for brutalities in the way of nose-cutting, &c., I think that a sentence of whipping is peculiarly suitable.

The case was heard by a Division Bench (Candy and Fulton, JJ.) who made the following reference to a Full Bench :

Having regard to the decision in *Queen* v. *Udai Patnaik and others*, [2] *Reg.* v. *Surya bin Krishna Mandavkar* [3] and *Reg.* v. *Kusa valad Lakshman*, [4] the Court refers to a Full Bench the question whether under section 4 of the Whipping Act a sentence of whipping in addition to imprisonment is legal in the case of a conviction of dacoity which was committed prior to the previous conviction of a similar offence.

The reference came before a Full Bench (Jenkins, C.J., Candy, Fulton and Chandavarkar, JJ.).

There was no appearance either for the Crown or for the accused.

Per Curiam :— Having regard to the fact that a full Bench of this Court in 1866 in *Regina* v. *Surya* [5] decided this question in the negative, and that this ruling was followed in 1870 in *Regina* v *Kusa* [6] by two other Judges, and that the Legislature in their amending Acts of 1895 and 1900 apparently accepted that ruling, which is also that of the Calcutta High Court, we answer the question referred to us in the negative.

1901 *August* 21. I. L. R. 26 Bom. 50.

VOLUME XXVI.

Before Mr. Justice Candy and Mr. Justice Fulton.

KING-EMPEROR *v.* SAKHARAM PANDURANG AND ANOTHER. *

Criminal Procedure Code (Act V of 1898), section 350—Sessions Judge—Magistrate—Trial—Evidence recorded partly by another Judge—Consent of the prisoner—Jurisdiction.

Under the Code of Criminal Procedure (Act V of 1898) a Sessions Judge is not authorised to try a case partly on evidence not recorded by himself ; and he cannot do so although the prisoner has given his consent to such a trial.

Section 350 of the Criminal Procedure Code applies solely to Magistrates.

APPEAL from a conviction and sentence recorded by G. C. Whitworth, Sessions Judge, Satara.

The accused were charged with fabricating false evidence and with forgery.

The case came up for trial in the first instance before S. Padamji, Additional Sessions Judge, Satara, and evidence for prosecution was recorded on the 14th, 15th, and 16th March, 1901, on which last date the case was postponed till the 22nd May, 1901.

---

[1] [1869] 4 Ben. L. R. Ap. Cr. 5.
[2] [1869] 4 Beng. L. R. [Cr.] 5; 12 Cal. W. R. Cr. 68.
[3] [1866] 3 B. H. C. R. Cr. C. 38.
[4] (1870) 7 B. H. C. R. Cr. C. 70.
[5] (1866) 3 B. H. C. R. Cr. C. 38.
(6) (1870) 7 B. H. C. R. Cr. C. 70.

* Criminal appeal No. 225 of 1901.

Digitized by Google

On the 22nd May, 1901, the trial was continued by G. C. Whitworth, who appended the following remark to the proceedings:—"The depositions already taken by the Additional Sessions Judge are accepted on both sides."

On the 27th May, 1901, the Sessions Judge agreeing with the assessors convicted the accused under section 467 of the Indian Penal Code (Act XLV of 1860), and sentenced them each to three years' rigorous imprisonment.

The accused appealed to the High Court.

P. M. Mehta (with him *B. A. Bhagwat*) for the accused.

Rao Bahadur *Vasudeo J. Kirtikar*, Government Pleader, for the Crown.

R. R. Desai for the complainant.

CANDY, J.:—Sakharam Pandurang No. 1, Ganesh Antaji No. 2, and Ganu bin Vithu No. 3, were on the 30th March, 1900, committed for trial to the Sessions Court, Satara, by the First Class Magistrate, Mr Dalaya, on charges against Nos. 1 and 2 in the alternative of fabricating false evidence in a judicial proceeding or committing forgery of a valuable security in respect of a rent-note dated 31st January, 1895, said to have been executed in favour of the accused Nos. 1 and 2 by Laxman bin Nagu and three others, and attested by the said Ganu bin Vithu, No. 3, who was charged with the abetment of the said forgery.

The main grounds in the Magistrate's reasons for commitment were that the land to which the rent-note referred had been for many years in the possession of the family of the complainant, who from the time of the first production of the rent-note had protested that the document was forged, and the complainant had proved by a certain receipt, bearing the same date (31st January, 1895) that he was on that date in the Indapur Taluka of the Poona District, and could not have executed the rent-note in the Satara District.

A fourth person, one Ravlo Kulkarni, who was said to have attested the document and identified the complainant before the Sub-Registrar, before whom the rent-note was executed on 31st January, 1895, could not be found; and he was therefore not re-committed for trial.

The Magistrate in committing the case remarked that on the strength of the rent-note orders for assistance in the recovery of rent under section 87 of the Land Revenue Code had been in three successive years obtained by accused Nos. 1 and 2 from the Mamlatdar who told the complainant to prosecute accused Nos. 1 and 2 if the rent-note was forged. The Magistrate suggested that this order might be regarded as a sanction.

When the case came before the Additional Sessions Judge, Satara, objection was raised that a formal sanction was necessary under section 195 of the Criminal Procedure Code. This objection was upheld, and the suggestion that Mr. Dalaya, being the Mamlatdar of the taluka, when he committed the case, could be taken to have given sanction, was overruled. The case was therefore returned to the Magistrate that it might be recommitted after the necessary sanction had been obtained.

On the 29th June, 1900 the case came on again before the Additional Sessions Judge. Mr. Dalaya having been transferred, application had been made to his successor, Mr. Hardikar, to grant the necessary sanction, but he had refused, holding that though looking to the evidence produced before the Magistrate it was probable that a serious offence—forgery—had been committed, complainant's proper course was to file a civil suit and prove the forgery. It also appeared from the reasons recorded by the Mamlatdar, Mr. Hardikar, that

Digitized by Google

the rent-note had been produced as evidence in a summary suit for possession filed by accused 1 and 2 in the Mamlatdar's Court in 1899.

On these facts the Additional Sessions Judge on 29th June, 1900, adjourned the case before him to enable the complainant to move the appellate Court to quash the Mamlatdar's order refusing to grant sanction. This was done, and on 16th August, 1900, the Assistant Collector, Mr. C. S. Campbell, reversed the order of the Mamlatdar refusing sanction, and directed that sanction should be given to prosecute the accused Nos. 1 and 2 under sections 467 and 109 of the Indian Penal Code.

Against Mr. Campbell's order accused Nos. 1 and 2 applied to the Sessions Judge, who held that he had no jurisdiction in the matter.

Then they applied to the High Court (application for Revision No. 268 of 1900), and on 16th January, 1901, a Divisional Bench dismissed the application for revision of the sanction granted by Mr. Campbell.

The Sessions case was then taken up again in the Sessions Court, Satara, on 14th March, 1901. For the accused it was objected that the case should be sent back to the Magistrate to be re-committed; but this objection was overruled by the Additional Sessions Judge.

The trial commenced; and evidence was led for the prosecution on 14th 15th and 16th March, 1901, on which latter date the Additional Sessions Judge, Mr. S. Padamji, postponed the case till 22nd May, 1901. No reason for such a prolonged postponement was recorded in the proceeding; but from a letter found among the miscellaneous papers, it would seem that the reason was that the pleader for the accused asked for a date to be fixed subsequent to the Civil Courts' vacation.

On 22nd May, 1901, the case was called on before the Sessions Judge, Mr. Whitworth, who recorded the following note in his proceedings:

"The depositions already taken by the Additional Sessions Judge are accepted on both sides (but Nos. 3, 16, 18 and 19 are still to be cross examined). It appears from the Marathi proceedings of the 30th July that the third accused person was then reported to be dead."

The case was heard by Mr. Whitworth on 22nd, 23rd and 25th May; and on 27th May he gave judgment agreeing with the assessors convicting the accused Nos. 1 and 2 of an offence under section 467 of the Indian Penal Code, and sentencing them each to three years' rigorous imprisonment. Against that conviction and sentence the accused 1 and 2 have appealed.

On the above facts we think that the proceedings before the Sessions Judge, Mr. Whitworth, must be quashed on the ground that the Criminal Procedure Code does not empower a Sessions Judge to try a case partly on evidence not recorded by himself. Section 350 applies solely to Magistrates. It is true that the accused by their pleader consented to the procedure being followed, and that the point has not been taken by the learned counsel in the appeal before us; but we agree with the Calcutta High Court with reference to the corresponding section (328) of Act X of 1872 that the prisoner's consent will not give jurisdiction (*Queen* v. *Rughoonath Dass.* (1)) We regret the delay which has occurred in this case and the further delay which will ensue. No course, however, is open to us but to set aside the convictions and sentences and order a re-trial in the Sessions Court.

We do not think it necessary, having regard to the provisions of section 537 (*b*), to order a re-commitment. We have examined the proceedings of

(1) (1875) 3 W. R. Cr. 59.

Digitized by Google

the Committing Magistrate, and cannot find that objection was taken to the jurisdiction of the Magistrate on the ground that sanction had not been obtained. The Sessions Judge at one time was of opinion that re-commitment would be necessary. But when sanction was produced he accepted the commitment, and it has not been suggested to us that the accused have been injured, nor has the point been taken by the learned counsel in the appeal before us.

The point of law which was taken by the learned counsel was that the Sessions Judge on 23rd May, 1901, when the witness, Tuljaram (18), was re-called by the defence, refused to allow a certain document to be shown to the witness on the ground that "being unstamped and not registered the document is not admitted."

The document is not before us nor has a copy been shown, so we are unable to say whether the document would be relevant; but we may call the attention of the Sessions Judge to the proviso in section 35 of the Indian Stamp Act, 1899, and to the provisions of sections 56 and 63A of the Dekkhan Agriculturists' Relief Act.

Re-trial ordered.

1901 *August* 28. I. L. R. 26 Bom. 150.

FULL BENCH.

Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Candy and Mr. Justice Chandavarkar.

KING-EMPEROR *v.* SADA.*

Criminal Procedure Code (Act V of 1898), sections 4 (h), 250—Complaint—Report of Police officer—Complaint by a Police officer in a non-cognizable case—False complaint—Compensation.

There is no section in the Criminal Procedure Code, 1898, which empowers a Police officer to make, of his own motion, any report to a Magistrate in a non-cognizable case; hence, where he files a formal complaint in such a case, he cannot be said to 'make a report' and his complaint falls within the definition of 'complaint' in section 4 (*h*) of the Criminal Procedure Code, 1898.

Where a Police officer appears before a Magistrate and makes a formal complaint of a non-cognizable offence, which is found to be false, the Magistrate can order him, under section 250 of the Criminal Procedure Code, to pay compensation to the accused.

REFERENCE made by Frederick Pratt, District Magistrate of Kaira, under section 438 of the Criminal Procedure Code (Act V of 1898).

The complainant Tatia Hariba, a constable in the Kaira District Police, filed a complaint against Sada for committing a nuisance on the public road, under section 61 of the Bombay District Police Act (Bom. Act IV of 1890).

The Police Constable appeared before the Third Class Magistrate of Matar and stated the facts on solemn affirmation.

The Magistrate, after hearing the evidence adduced in the case, discharged the accused; and, finding that the complaint against the accused was vexatious, ordered the complainant to pay to the accused Sada Rs. 10 as compensation under section 250 of the Criminal Procedure Code (Act V of 1898).

The District Magistrate of Kaira made a reference to the High Court on the following ground:

---

* Criminal Reference No. 26 of 1901.

Digitized by Google

Section 250, Criminal Procedure Code, is restricted to cases instituted by 'complaint' as defined in the Code, or upon information given to a Police officer or a Magistrate. It has no application to a case instituted upon a Police report, or upon information given by a Police officer —I. L. R. 22 Bom. 984.

The reference came on for hearing before a Division Bench (Candy and Fulton, JJ.), who, on the 1st August, 1901, made the following reference to a Full Bench:

CANDY, J :—The District Magistrate of Kaira has referred this case, stating that "the complainant," a Police Constable, "filed a complaint" against one Sada of an offence under section 61 (*j*) of Bombay Act IV of 1890 (obeying a call of nature in a street), and that the Third Class Magistrate discharged the accused, and considering that the complain was vexatious, ordered the complainant to pay Rs. 10 as compensation under section 250, Criminal Procedure Code.

The District Magistrate is of opinion that the order awarding compensation should be reversed on the following ground:

Section 250, Criminal Procedure Code, is restricted to cases instituted by complaint as defined in the Code, or upon information given to a Police officer or a Magistrate. It has no application to a case instituted upon a Police report, or upon information given by a Police officer---I. L. R. 22 Bom. 984.

The case upon which the District Magistrate relies, *Queen-Empress* v. *Sakar Jan Mahomed*, (1) was one in which a Police Constable filed a complaint of an offence punishable under section 160, Indian Penal Code (affray). The trying Magistrate was of opinion that the complaint as against one of the accused persons was vexatious, and awarded that accused Rs. 5 as compensation from the complainant.

The District Magistrate referred the case to the High Court, submitting that—

(*a*) The complainant was a public servant acting in his official capacity. (*b*) It is admitted by the Magistrate that there was public loud abuse and a crowd collected. (*c*) There is nothing whatever to show that complainant was actuated by any wrong motives in making the complaint.

At the most there is a want of sufficient evidence against accused No. 4, who is admitted to be a man of means and position. The witnesses all appear to have said as little as possible. I think this fine is wrongfully inflicted on the facts, and it is contrary to the interests of justice and good administration.

The reference came on for hearing before a Division Bench (Parsons and Ranade, JJ.) of this Court. There was no appearance for the Crown or for the complainant.

The Court did not deal with the merits of the case as stated by the District Magistrate, but passed the following order:

Following the decision in the case of *Ramjeevan Koormi* v. *Durga Charan Sadhu Khan* (1) we reverse the order passed under section 560 of the Code of Criminal Procedure (Act X of 1882).

Section 560 of Act X of 1882 is now section 250 of Act V of 1898.

In the Calcutta case just quoted a Police Constable found a cart untended in a bazar, and when the driver appeared arrested him and caused his prosecution under clause 3 of section 34 of Act V of 1861. The trying Magistrate acquitted the accused, and, under section 560 of the Criminal Procedure Code, ordered the arresting Constable to pay Rs. 20 compensation to the accused.

The District Magistrate, in referring the case, submitted that it was of the first importance that it should be decided whether section 560 is applicable to a Police officer arresting for an offence for which he has power to arrest.....

(1) (1897) 22 Bom. 984.

Digitized by Google

The case was instituted neither on complaint nor upon information given. The accused was arrested by the Police officer, in whose view the offence was committed, and therefore there was neither complaint nor information.

The Division Bench of the Calcutta High Court (Beverley and Banerji, JJ.) reversed the order awarding compensation on the ground that section 560 was not applicable to a Police officer arresting an accused person for a cognizable offence.

It is thus manifest that the Calcutta case was entirely different from the case reported at 22 Bom. 984 (in which a complaint was filed of a non-cognizable offence), and also from the present case, in which a complaint was filed of an offence which by the present law is non-cognizable.

Having regard to the fact that the reason given for the decision at 22 Bom 934 does not apply to the circumstances of that case or to the circumstances of the present case, and that there is apparently some doubt in regard to the point which is of general importance, we refer to a Full Bench the question whether in the present case the Magistrate was empowered under the provisions of section 250, Criminal Procedure Code, 1898, to award compensation to the accused person.

This reference was heard by a Full Bench (Jenkins, C. J., Candy and Chandavarkar, JJ.) on the 20th August, 1901.

Rao Bahadur *Vasudeo J. Kirtikar*, Government Pleader, for the Crown:—No compensation can be awarded in this case, because section 250 of the Criminal Procedure Code, 1898 only applies to proceedings instituted on complaint or on information but not on the information of a Police officer. That information should be deemed a "report" within the meaning of section 190 of the Code.

[JENKINS, C. J. :—How are the proceedings initiated here ?]

Here an information is lodged by a Police officer, and such an information should be considered a " report " only. The term " report " is nowhere defined in the Code. It does not require any particular form : see *Queen-Empress* v. *Polavarapu*(2) and *In the matter of the complaint of Ishre* v. *Bakshi*.(3) The case of *Ramjeevan Koormi* v. *Durga Charan Sadhu Khan*,(4) no doubt, was a case of a cognizable offence, where the Police had arrested without a warrant, but the reason of the decision did not turn upon that fact ; the exclusion comprises cases instituted " on information given by a Police officer " (see page 984 of the Report), the object being to protect Police officers acting under colour of their duty. Parsons and Ranade, JJ., also took that view of the law in *Queen-Empress* v. *Sakar Jan Mahomad* (1) and applied the principle to the case of a non-cognizable offence in which the Police officer had " filed a complaint " and in which there was no report in the literal sense of the term. The Magistrate also in that case had based his reference on the ground that " the complainant was a public servant acting in his official capacity. "

G. K. Parekh for the accused :—The report of a Police officer is expressly excluded from the definition of " complaint. " The Code of Criminal Procedure does not contain any definition of Police report ; but it shows in what case the Police have to make reports. Sections 157, 168 and 170 show circumstances under which the Police are charged with the duty of submitting reports. These are confined to matters which the Police are entitled to investigate. Under section 155 a Police officer cannot investigate a non-cognizable offence and cannot

(1) (1894) 21 Cal. 979.
(2) (1884) 7 Mad. 563.
(3) (1883) 6 All. 96.
(4) (1894) 21 Cal. 979.

Digitized by Google

submit report with reference to it. The offence under section 61 of the Bombay District Police Act is not cognizable. The case of *Queen-Empress* v. *Sakar Jan Mahomad*(1) was not argued before the Court, and attention of the Judges was not called to the circumstance that no Police report could be made in non-cognizable cases. Other public officers complaining are not exempted from penalties of section 250 of the Criminal Procedure Code, and there is no reason why a Police officer complaining should be exempted. Again, in cognizable cases the Police officer has a statutory duty to obey, and hence in such cases a protection is thrown around him. In non-cognizable cases he is under no such duty; there is, therefore, no necessity to extend to him the protection in such cases. He acts merely as a private person and must be treated as such.

CANDY, J. :—I would answer the question in the affirmative.

It must be noted that the question is solely with reference to the interpretation of the word "complaint" in the Criminal Procedure Code. We are not concerned with the question whether the summary procedure of section 250 was intended to be applied to cases in which the complaint is maliciously false. Nor have we to consider whether it is contrary to good administration that a Police officer, who files a complaint of a non-cognizable offence, may be liable to pay compensation under section 250, whereas if he sends a report of the commission of a cognizable offence, section 250 can have no application. The law provides that in cases instituted by complaint compensation can be awarded under section 250. The District Magistrate, in referring the case, says that "the complainant Tatia Hariba, Constable in the Kaira District Police, filed a complaint," etc. The proceedings show that the Police Constable purported to file a complaint, and in fact did file a complaint, on which the case was instituted against the accused person. The Magistrate to whom the complaint was made, and who took cognizance of the alleged offence, is a Third Class Magistrate. Therefore section 190 (1) (*c*) is inapplicable (see schedule IV of the Criminal Procedure Code), and thus the Third Class Magistrate could only have taken cognizance under section 190 (*a*) or (*b*), that is, upon receiving a complaint, or upon a Police report.

Now the only way in which it can be suggested that the proceedings were not instituted by complaint is by contending that a Police officer can never in his official capacity make a complaint under the Criminal Procedure Code; the ground for this contention being that, as under section 4 (1) (*h*) "complaint" does not include the report of a Police officer, it follows that when a Police officer brings any facts to the knowledge of a Magistrate, although he may do so in the form of a sworn complaint, he is really making a "Police report," and thus he is not making a "complaint"; and so in the present case the proceedings were really instituted, not by complaint, but upon a Police report, and thus section 250 is inapplicable. In my opinion this argument is untenable.

Thirty years ago the opinion was expressed by the Bombay High Court that when a Magistrate was "empowered, under section 66A of the then Code of Criminal Procedure, to entertain cases on the report of a Police officer, by the words 'report of a Police officer' are intended, not any communication made by a Police officer, but the formal report forwarded to the Magistrate in cases in which the Police may arrest without warrant." (1) I have not been able to find any contrary opinion in any authoritative decision. The course of legislation seems to point to the correctness of that opinion as applied to the present Criminal Procedure Code.

(1) (1897) 22 Bom. 934.

Digitized by Google

Under Act X of 1872, section 140, a Magistrate might take cognizance of an alleged offence:

(a) upon a Police report under Chapter X (powers of the Police to investigate, answering to Chapter XIV of the present Code);

(b) upon information or report by a Police officer as to non-cognizable offence: *such information or report was to be regarded as a complaint*;

(c) upon complaint;

(d) upon suspicion;

and under Chapter XVI the Magistrate might in a summons case dismiss the complaint as frivolous or vexatious and award compensation.

There was no definition of "complaint," but it is clear that whether a Police officer made a formal complaint or a report of a non-cognizable summons case, his report was to be regarded as a complaint which could be dismissed as frivolous or vexatious, compensation being awarded. The Code of 1882 did away with the report of a Police officer in a non-cognizable case, except by the order of a Magistrate. Under the Code of 1882, as also under the present Code, in the case of a non-cognizable offence the informant is referred to a Magistrate. There is no section empowering a Police officer to make a report in such a case without the orders of a Magistrate. If there is no informant, and the Police officer has himself seen the alleged offence committed, there is no obstacle to his making a complaint according to law, and asking for the issue of process. But there being no provision by which he can in such a case make a Police report, it became necessary since 1882 to exclude from the definition of "compaint" the report of a Police officer. There is, in my pinion, a close connection between—

(a) "the report of a Police officer" which is by section 4 (1) (*h*) of the Code excluded from the definition of "complaint";

(b) the report of a cognizable offence, which a Police officer is to send to a Magistrate empowered to take cognizance of such offence upon a Police report (sections 157, 173); and

(c) the cognizance of any offence, which a Magistrate may take upon a Police report of the same (section 190 (1) (*b*)).

If the alleged offence is a non-cognizable one, there is no section in the Code which empowers a Police officer of his own motion to make any report to a Magistrate: and therefore there is no ground for holding that when he does file a formal complaint he is, in fact, making a report, and so what purports to be complain is by the definition not a complaint at all.

In the present case the alleged offence was one punishable under section 61 of Bombay Act IV of 1890. Under section 73 of the same Act it was not incumbent on the Police to prosecute. But it is not alleged that the Police Constable was debarred from prosecuting in the present case. How was he to prosecute? The answer is given in section 51 of the same Act. Every Police officer shall lay such information and take such other steps, consistent with law and with the orders of his superiors, as shall be best calculated to bring offenders to justice or to prevent the commission of offences. What is laying an information but filing a complaint under the Criminal Procedure Code? The complaint of a public officer is an "information."

(1) (1871) 8 Bom. H. C. (Cr. Cas.) 113 (*Reg.* v. *Jafar.*)

Digitized by Google

For these reasons I am of opinion that the proceedings before the Third Class Magistrate were instituted by complaint and not on a Police report, and on that ground the Third Class Magistrate had jurisdiction under section 250.

JENKINS C.J. :—I take the same view as to the answer to the reference.

CHANDAVARKAR, J. :—I would also answer the question referred to the Full Bench in the affirmative for the reasons given in the judgment just delivered by Mr Justice Candy. It is true that the word "report" is not defined in the Code of Criminal Procedure, but it appears to me that the Legislature has studiously attached to the expression "Police report" a peculiar meaning throughout the Code wherever the expression occurs, and pointed out the occasions when and the purposes for which such reports should be made. Where a Police report goes beyond those occasions and purposes it must fall within the definition of "complaint" in section 4, clause (*h*), of the Code. The argument that the word "report" occurs in sections outside Chapter XIV of the Code only strengthens this view, because the only sections outside that chapter where the expression "Police report" occurs are sections 62 and 114. As to section 62, it provides that the Police are to report the cases of all persons arrested without warrant to the District Magistrate, or, if he so directs, to the Sub Divisional Magistrate. That means that where the Police have by law the power to make an arrest without a warrant, i.e. in cognizable cases, the Police must report such arrest. So also section 114 points in the same direction. It enables a Police officer to report to a Magistrate when there is reason to fear the commission of a breach of the peace. That section must be read with Chapter IV, which entails upon the public the duty of assisting Magistrates and Police officers whenever a breach of the peace is apprehended In no other section does the expression "Police report" occur, and the fact that the word "report"—not the expression "Police report"—occurs in section 438, section 466, section 472, section 474 and section 510, is beside the question, because those are sections which deal with reports other than those of a Police officer. It appears to me that the Code has carefully specified the purposes for which and the occasions when the Police are empowered to make reports as to offences committed or threatened, and when they travel beyond them their reports cease to have the privilege conferred upon them by the Code and can only come within the definition of "complaint," which is wide enough to include them.

1901. *September* 30. **I. L. R. 26 Bom. 193.**

Before Mr. Justice Fulton. and Mr. Justice Crowe.

KING-EMPEROR *v.* MALHAR MARTAND KULKARNI. *

Accomplice—Evidence—Corroboration—Bribery—Evidence Act (I of 1872), sections 114, ill, (b), and 133—Indian Penal Code (Act XLV of 1860), section 161.

It is generally unsafe to convict a person on the evidence of accomplices unless corroborated in material particulars. But, in considering whether this general maxim does or does not apply to a particular case, it must be remembered that all persons coming technically within the category of accomplices cannot be treated as on precisely the same footing: the nature of the offence and the circumstances in which the accomplices make their statements must always be considered. No general rule on the subject can be laid down.

A person who gives bribes is an accomplice of the person who receives them; and, while it is usually unsafe to convict a public servant of receiving bribes on the uncorroborated evidence of persons who say they have given them, the question as to the amount of corroboration depends on the circumstances of each case.

---

* Criminal Application for Revision, No. 136 of 1901.

Digitized by Google

(Note), this case is Ref: 6 Bom. L. R. 443. 33 cal 649.

THIS was an application for revision under section 435 of the Code of Criminal Procedure (Act V of 1898).

The applicant, Malhar Martand Kulkarni, was charged with an offence under section 161 of the Indian Penal Code (Act XLV of 1860). It was alleged that he being a Kulkarni, a public servant, obtained from three persons, *viz.*, Gangaram, Mohan and Sakharam, the sums of Rs. 3, Rs. 4 and Rs. 2, respectively, other than legal remuneration for doing an official act.

Gangaram, Mohan and Sakharam were witnesses for the prosecution and deposed that they had received *tagai* * from Government in the Kutchery at Chopda, and that when they left the Kutchery the accused followed them and obtained the above sums from them by threatening that he would have them deprived of their *tagai*.

G. D. French, the First Class Magistrate of Sindkheda, convicted the accused.

On appeal, Thakuradas, Mathuradas, Acting Sessions Judge of Khandesh, confirmed the convictions, but reduced the sentence on each charge to one month's simple imprisonment and fine Rs. 25; the three sentences to run concurrently. The learned Sessions Judge in the course of his judgment stated:

It is stated on behalf of the appellant that the Magistrate having taken cognizance of the offences upon information under section 190 (1) (c), he (the appellant) should have been informed under section 191, Criminal Procedure Code, that he was entitled to have his case tried by another Court, and that as the Magistrate did not do so his proceedings are irregular. It is not asked that his proceedings should on this account be set aside, but it is represented that this irregularity should be weighed in considering the evidence. The original complaint was made not to him as a Magistrate, but to him as Assistant Collector. He made some sort of preliminary investigation and got a sanction for the prosecution of the appellant, who being a Kulkarni could not be prosecuted without the sanction of the Commissioner.

It is argued that the Magistrate having held an investigation for the purpose of obtaining a sanction, should not have himself tried the case, but should have caused it to be transferred to some other Magistrate. I find, however, that the Magistrate took cognizance of the case, not upon information, but upon complaint made to him in writing. It is true that the complaint was addressed to him as Assistant Collector, but that circumstance would not turn it into information.

. . . I hold for the purpose of this case that the Magistrate took cognizance of this case on a complaint and not upon information, and that it was not necessary for him to inform the accused under section 191 that he was entitled to have his case tried by another Magistrate. The Magistrate has done nothing wrong in making a preliminary inquiry, in obtaining the Commissioner's sanction and in then trying the case. He never initiated the proceedings on his personal knowledge and information.

* * * * *

I would only say that the evidence of the persons who gave the bribes is sufficiently corroborated by other witnesses, namely 6, 12 and 13, also by Nos. 8, 14 and 17. The evidence is overwhelming, and it is clear therefrom that the appellant, being a Kulkarni, received the items referred to in the charges from the village men for the purpose of keeping favour upon them in the performance of his official duty, viz., in examining boundary marks and in allowing them to enjoy their *tagai*.

Against this conviction and sentence the accused moved the High Court under its criminal revisional jurisdiction, contending that the evidence against him was that of accomplices which could not be accepted, and that the Magistrate was incompetent to try the applicant as he had started the departmental inquiry against him.

Hamilton (with him *Daji A. Khare*) for the applicant—The Magistrate, who had received information from certain persons and held an inquiry into

* Advances made out of the public treasury to agriculturists in time of famine.

Digitized by Google

these charges as Assistant Collector, should have informed the accused under section 191, Criminal Procedure Code, that he might claim to be tried by another Magistrate. His failure to do so avoids the trial as made without jurisdiction.

The evidence shows money was obtained by threats: this would be 'extortion' and not 'bribery'; but it is impossible to suppose the threat caused fear, and therefore it is not extortion. If the offence is bribery, the evidence in support of it is that of accomplices, namely, of other bribers on the same day and on other days. A strong feeling of hostility exists against the accused among the villagers. The Court should not uphold the conviction based on the uncorroborated testimony of accomplices and of tainted witnesses: *Queen-Empress* v. *Maganlal* (1) and *Queen-Empress* v. *Chagan Dayaram.* (2)

Rao Bahadur *Vasudeo J. Kirtikar*, Government Pleadar, for the Crown:—The objection on the ground of sections 190 and 191 of the Criminal Procedure Code cannot now be taken. It was waived in the Court below by the defence; and if it were entertained now, the result would be that the whole of the proceedings would be *ultra vires* and would have to be annulled and a new trial directed. The defence entirely declined, in the Court below, to have such effect given to that objection The objection, however, is not tenable; the Court of first instance took the initiative upon complaint made to it, within the meaning of clause (*a*) of section 190 of the Criminal Procedure Code, and not under circumstances referred to in clause (*c*) of that section. Section 191 has accordingly no application.

As to the second objection, it is not correct to say that the persons who independently of each other gave bribes to the accused were accomplices of each other; the evidence shows there was no concert between them. Moreover, the conviction in the present case is based not on the evidence of such people alone, but on the independent testimony of persons who were not concerned in giving any bribe to him. This evidence is sufficient to support the conviction. The objections taken below to its credibility have been fairly discussed and carefully considered by both the Courts, and their concurrent finding as to the guilt of the accused ought not to be disturbed in revision.

FULTON, J.:—In this case the accused was found guilty by Mr. French, First Class Magistrate, of receiving bribes in three instances from cultivators to whom *tagai* advances had been made. On appeal the conviction was confirmed by the Sessions Judge.

The first objection made was that the Magistrate had taken cognizance of the case under section 190 (*c*) of the Criminal Procedure Code, and had omitted to inform the accused, as required by section 191, that he was entitled to have the case tried by another Magistrate. It was not seriously pressed. The Sessions Judge who dealt with it considered that the information on which Mr. French commenced his enquiry was, in fact, a complaint. We think this view was correct. The accused was defended by pleaders, who appear to have taken no objection to the procedure.

Secondly, it was contended that the evidence was insufficient, as the convictions were based entirely on the uncorroborated evidence of accomplices; and the cases of *Queen-Empress* v. *Maganlal and another* (1) and *Queen-Empress* v. *Chagan Dayaram and another* (2) were referred to. The leading case on this subject is that of *Elahee Buksh*, (3) decided in 1866 by a Full Bench

(1) (1889) 14 Bom. 115. (2) (1890) 14 Bom. 331. (3) (1866) 5 Cal. W. R. Cr. Rul. 99

Digitized by Google

of the Calcutta High Court, presided over by Sir Barnes Peacock, C. J. That case may well be studied by all Judges and Magistrates who have to deal with such evidence, for though it was decided before the enactment of the Evidence Act, the existing law embodied in section 133 and section 114 seems to be entirely in accordance with it.

Illustration (*b*) to section 114 directs attention to the general principle that it is unsafe to convict on the evidence of accomplices unless corroborated in material particulars. But along with this principle must be borne in mind the qualifications, taken apparently from Chief Justice Peacock's judgment, contained in the further illustrations which the Court is directed to consider when determining whether the general maxim does or does not apply to a particular case. They show that all persons coming technically within the category of accomplices cannot be treated as on precisely the same footing. The nature of the offence and the circumstances in which the accomplices make their statements must always be considered. No general rule on the subject can be laid down. The Legislature has not done so; and the Courts, whose function it is to interpret the law, cannot do so; The decisions, however, show the principles on which Judges have acted in particular cases, and it is the duty of their successors to consider those principles and determine to what extent they are applicable to the circumstances of other cases.

Now the cases of *Maganlal* (1) and *Chagan* (2) show beyond doubt that persons who give bribes are accomplices of persons who receive them. They also show that the learned Judges who dealt with those cases felt strongly how unsafe it usually would be to convict public servants of receiving bribes on the uncorroborated evidence of persons who said they had given them. We share that feeling. In this country false accusations are numerous, and public servants who fearlessly discharge their duties are likely to make many enemies. It is, therefore, most necessary for their protection that the Courts shall be vigilant in requiring strong and convincing evidence before hastily accepting charges brought against them. The humbler classes of public servants are especially in need of this protection.

But when the question arises what amount of corroboration will suffice, it is obvious that the answer in each case must depend on the circumstances. In *Maganlal's case*, the convictions on certain charges were maintained while on others they were reversed. In the case now before us the persons who say that they were persuaded to give bribes were, if their stories are true, acting quite independently of each other. There was no previous concert amongst them and there is nothing to show that they were in any sense abettors of each other. It was urged that their stories were highly improbable, but neither the Sessions Judge nor the Magistrate seems to have thought so. *A priori* there seems nothing very incredible in their statements, which, moreover, were supported by the evidence of persons other than those who say they were persuaded to pay money to the Kulkarni. Doubtless there may be a good deal of hostility to the accused; but the Sessions Judge and the Magistrate both considered the evidence overwhelming. With such a conclusion arrived at in both Courts after considering the inherent weakness of accomplice evidence it is impossible for us to interfere. We think that on the facts found, the provisions of section 161, Indian Penal Code, were rightly applied. We reject the application.

Application dismissed.

(1) (1889) 14 Bom. 115. (2) (1890) 14 Bom. 331.

Digitized by Google

1901. *November* 25. I. L. R. 26 Bom 289.

Before Mr. Justice Candy and Mr. Justice Fulton.

RADHA KRISHNA JOSHI (ORIGINAL COMPLAINANT) APPLICANT. *v.* KISSONLAL SHRIDHAR (ORIGINAL DEFENDANT), OPPONENT.*

Trade mark—Trade description—Title of a book—Unauthorised publication—Indian Penal Code (Act XLV of 1860), sections 478, 482—Merchandise Marks Act (IV of 1889), sections 4, 6.

The complainant, as a descendant of one Shri Chandu, had for many years prepared calendars bearing the name of "Shri Chandu Panchang" at Jodhpur and had sent each year a copy of such calendar to publishers in different parts of India, and from the copy so furnished these publishers, issued and published calendars bearing the name "Shri Chandu Panchang," thus denoting them as calendars prepared in Jodhpur by the descendants of Chandu. The defendant, a publisher in Bombay, prepared a calendar and put the name "Shri Chandu Panchang" on the outside, although the calendar was not prepared by the descendants of Shri Chandu. The complainant thereupon filed an information against the defendant under sectioin 482 of the Indian Penal Code (Act XLV of 1860, and section 6 of the Merchandise Marks Act (IV of 1889.)

Held, (1) that the defendant had committed no offence under section 482 of the Indian Penal Code (Act XLV of 1860), for the title "Shri Chandu Panchang" did not come within the definition of "trade mark given in section 478 of the Code;

(2) That the defendant's act did not fall under section 6 of the Merchandise Marks Act (IV of 1889), as it was not alleged that the defendant's calendars differed as to text from the complainant's or were compiled on different principles; the allegation was simply that they were unauthorized.

APPLICATION under section 435 of the Criminal Procedure Code, 1898, for the revision of an order made by T. J. Strangman, Acting Chief Presidency Magistrate, dismissing the applicant's complaint.

On 10th September, 1901, the applicant (complainant) filed an information in the Court of the Acting Chief Presidency Magistrate against the defendant, charging him under section 482 of the Indian Penal Code (XLV of 1860) and section 6 of the Merchandise Marks Act (IV of 1889) with using a false trade mark and a false trade description.

It appeared that the applicant (complainant) was himself a descendant and was the constituted attorney of the other descendants of one Joshi Shri Chandu, who had a high reputation in India as an astronomer and an astrologer about 300 years ago. His descendants, in order to perpetuate his name, had for many years prepared calendars at Jodhpur bearing the name of "*Shri Chandu Panchang*" and had supplied copies each year to publishers in different parts of India, and from the copy so furnished these publishers issued and published calendars bearing the name of "Shri Chandu Panchang." The defendant, who was a publisher in Bombay, had hitherto been supplied with a copy from Jodhpur and had issued and published calendars compiled from it.

In the beginning of 1901 the applicant decided not to supply the defendant with a copy of the calendars then issued and he called upon the defendant not to print or publish any other calendar under the name of "Shri Chandu Panchang."

Notwithstanding this notice, the defendant did print and publish a calendar under the name of "Shri Chandu Panchang."

Thereupon the applicant filed the information as above stated. The case came on for hearing on the 23rd September, 1901, when the Magistrate without taking any evidence dismissed the complaint, recording the following reasons.

Inasmuch as complainant has never applied the name "Shri Chandu" to any property at all, the charges under the Penal Code must fail. The accused will be discharged in respect of the charge under section 482, Indian Penal Code, under the provisions of section 253 (2) of the Criminal Procedure Code.

With regard to the charge under section 6 of Act IV of 1889, the complainant seeks to

* Criminal Revision No. 188 of 1901.

Digitized by Google

bring his case under section 4 (2) i. e., he alleges that "Shri Chandu" is a false name. Unfortunately, however, for this contention the complainant has never dealt in calendars. All he has done has been to give leave to various persons to apply the name "Shri Chandu" to their productions. It seems to me, then, that complainant is not a person carrying on business in connection with goods of the same description as accused. The accused must therefore be acquitted under section 245 (1), Criminal Procedure Code.

Against this order of acquittal the complainant applied to the High Court under its criminal revisional jurisdiction.

Branson, with Messrs. *Payne, Gilbert, Sayani and Moos* for the petitioner.

Raikes, with Messrs. *Smetham, Bland and Noble*, for the opponent.

CANDY, J. :—We are asked to revise the order of the Presidency Magistrate, who held that on the facts alleged in the information there was no offence disclosed, either under section 482, Indian Penal Code, or under section 6 of the Indian Merchandise Marks Act, 1889.

The Magistrate was of opinion that, as complainant had never applied the name "Shri Chandu" to any property at all, the charge of using any false trade mark must fail; nor could accused be said to have applied a false description to goods, as the complainant had never dealt in calendars.

Though I am unable to follow the reasons given by the Presidency Magistrate, I do not think that this is a case in which we should interfere. It seems to me impossible to say that the words "Shri Chandu Panchang" used by various publishers on calendars prepared by descendants prepared of the astrologer Chandu, and which the publishers have from year to year been issuing, are "a mark used for denoting that the goods (calendars) are the manufacture or merchandise of a particular person." Manufactured by or the merchandise of what particular person? So much for the trade mark. The question of property mark or copyright does not arise.

Then, as to trade description: to what clause of section 2 of Act IV of 1889 can a reference be made? The words in question are not a statement or other indication as to the mode of manufacturing or producing the calendars. Chandu may have been a famous astrologer 300 years ago, and for many years calendars may have been issued by different publishers bearing his name. But that would not give Chandu's descendants a right to say that the words are a trade-mark or trade-description, in regard to which the publishers can be criminally prosecuted because they continue to use the words without the consent of the descendants of Chandu.

We return the record and proceedings.

FULTON, J. :—The question involved in this application is whether the allegations in the complaint disclose the offence of using a false trade mark or of applying a false trade description.

The complainant states that the present descendants of Shri Chandu used to prepare calendars bearing the name of Shri Chandu Panchang at Jodhpur, and send each year copies of such calendars to the publishers in different parts of India, allowing them to use the name of Shri Chandu Panchang to denote calendars prepared in Jodhpur by the descendants of Chandu. They further say that when such calendars were published under the name of Shri Chandu Panchang the public knew that they were prepared by them and under their authority. Then they go on to state that the defendant has recently used the words "Shri Chandu Panchang" on the outside of a calendar prepared and published by him and not prepared by the descendants of Chandu, and, using

Digitized by Google

the name Shri Chandu Panchang, has been trying to pass off his own work as the work of the descendants of Chandu in order to benefit by the reputation acquired by their calendars.

Looking to the definition of "trade mark" given in section 478, Indian Penal Code, as amended by section 3 of Act IV of 1889, it seems to me impossible to say that the title "Shri Chandu Panchang" comes within that definition. It may be that the descendants of Chandu are the authors of the calendars usually sold under his name and entitled to protection on the principles applied in *Kelly* v. *Morris*(1), but it does not appear that they can properly be described as the manufacturers. Assuming that books are "goods" as held in *Kanai Das Bairagi* v. *Radha Shyam Basack*,(2) it cannot, I think, be said that they are "manufactured" by their authors. The word "manufacture" is not a term usually applied to books, but even if it may correctly be applied to the whole process by which books are prepared, it certainly seems impossible to apply it to that portion of the process known as authorship, which, though most important, is ineffectual without printing and publication. Similarly it cannot be argued successfully that these calendars were the "merchandise" of the descendants of Shri Chandu, as it is not alleged that they were ever sold by them. We must construe section 478 in its ordinary grammatical sense, and if this test be applied it will, I think, be found that the definition of "trade mark" is not sufficiently elastic to protect the rights of authors. Copyright Acts and the general Civil Law may or may not be sufficient to protect them, but, however this may be, we cannot distort the language of the Penal Code, so as to bring within its provisions literary piracy as alleged in this complaint.

Turning next to the definition of "trade description," we are met perhaps with greater difficulty. Mr. Branson for the complainant contended that the name "Shri Chandu Panchang" is a trade description indicative of the mode in which the calendars are manufactured or produced. Eliminating the word "manufactured" as inapplicable, the question remains whether it can fairly be said that the title "Shri Chandu Panchang" indicates the mode in which the calendars were produced. The title of a book doubtless often indicates the author, but does not usually suggest the mode of production. The mode of production surely does not depend either on the fact that a book is the work of a particular author or that its publication has been duly authorized. A pirated edition may be produced in exactly the same mode as an edition properly sanctioned by the author. A garbled edition may perhaps be described as produced in a mode different from a correct edition, inasmuch as the contents are different, but there is not necessarily any difference in the mode of producing an authorized and unauthorized edition which may be word for word the same. Here it is not alleged that the defendant's calendars differ as to text from the complainant's or are compiled on different principles. All that is asserted is that they are unauthorized. This defect, however, does not seem to me to bring the case within the definition under consideration, for I think that if the Legislature had intended to include the unauthorized publication of books in the section relating to the application to goods of false trade descriptions, it would have used language more clearly appropriate for the purpose. If the facts alleged by the complainant are true, the law may give him redress, but his remedy does not appear to be contained either in section 482, Indian Penal Code, or in section 6 of Act IV of 1889.

For these reasons I concur in rejecting the application.

Application rejected.

(1) (1865) L. R. 1 Eq. 697. (2) (1898) 26 Cal. 233.

Digitized by Google

1902 *January* 6. I. L. R. 26 Bom. 418.

Before Mr. Justice Candy and Mr. Justice Fulton.

EMPEROR *v.* PURSHOTTAM KARA AND FOUR OTHERS;

EMPEROR *v.* DHARAMSHI GHELA AND THREE OTHERS.*

Criminal Procedure Code (Act V of 1898), sections 257, 177, 110—Security for good behaviour—Witness—Magistrate—Summons—Refusal to summon—Procedure.

Section 257 of the Criminal Procedure Code (V of 1898) is imperative in its terms. It leaves to a Magistrate no discretion to refuse to issue process to compel the attendance of any witness, unless he considers that the application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice; such ground however, must be recorded by him in writing. The descretionary power of refusing to summon any particular witness is vested in the Magistrate, but the order of refusal must be such as to show in writing the ground of refusal as applied to each individual.

APPLICATION for revision under section 435 of the Criminal Procedure Code (Act V of 1898).

In December, 1900, information was lodged by the police against the accused twenty-four persons in the Court of the First Class Magistrate at Bhiwndi, praying that action be taken against them under section 110, clauses (*d*) and (*e*), of the Criminal Procedure Code (Act V of 1898). The allegations against them were that they formed a gang under the leadership of one Kara Devraj (accused No. 1), that accused Nos. 1 to 7, being the *Sawkar* (merchant) members of the gang were in the habit of cheating their customers and getting valuable property from them, using the rest of the gang to terrorise such persons as endeavoured to resist them.

The Magistrate issued warrants for the arrest of the twenty-four persons, and proceedings were instituted before the District Magistrate of Thana under section 110 of the Criminal Procedure Code (Act V of 1898).

Accused Nos. 13, 16, 17, 18, 19, 20, 23 and 24 were discharged on the 29th June, 1901, as "it was found that the evidence for the prosecution showed no cause for holding them to belong to the alleged gang, or to have done anything to call for action against them under Criminal Procedure Code Chapter VIII."

Kara Devraj accused No. 1, died during the proceedings.

The remaining accused presented an application praying that thirty-three persons be summoned as witnesses to prove their respectability. On this application the Magistrate made the following order:

A list of thirty-three witnesses. On inquiry as to the kind of evidence these witnesses are to give, it is found that twenty-eight are to be called simply to depose to the respectability of the accused. Many of them are officials with important duties, and many now reside at distant places. The Court declines to call more than five witnesses on this point, and accused No. 2 selects Nos. 1, 2, 3, 4 and 9, who are to be summoned with Nos. 11, 12, 26, 28 and 32.

On the 11th July, 1901, the District Magistrate discharged six of the accused. Finally, on the 5th August, 1901, he required the remaining accused to execute bonds for keeping peace and for maintaining good behaviour for a period of one year in varying amounts and sureties.

Against this order the accused applied to the High Court under its Criminal Revisional Jurisdiction.

Branson (with him *H. C. Coyaji*) for the accused in application No. 183.

M. B. Chaubal for the accused in application No. 184.

---

* Criminal Applications for Revision, Nos. 183 and 184 of 1901.

Digitized by Google

Rao Bahadur *Vasudeo J Kirtikar*, Government Pleader, for the Crown, in applications Nos. 183 and 184.

Per curiam :—In this case proceedings commencing in December, 1900, were taken against one Kara Shet and twenty-three others under section 110, Criminal Procedure Code, on the information that they habitually committed cheating or attempted so to do, and that they habitually abettedthe commission of breaches of the peace. In other words, it was said that those men formed a gang of which the *sawkar* members were in the habit of cheating, and kept a retinue of bullies to beat and assault people who opposed them.

After some action by another Magistrate, the case was begun before the District Magistrate at Kalyan on the 19th January, 1901. On the 29th January eight of the persons whose conduct was being inquired into were discharged. On the 11th July six more were discharged, Kara Shet having died in June. Finally, on the 5th August, the Magistrate directed nine persons to give security for good behaviour. These nine persons have now applied to this Court to exercise in their favour its powers of revision and have based their applications on two principal grounds, namely, that their witnesses were not examined and that the evidence for the prosecution was insufficient to justify the order.

After the examinition of the persons, whom for brevity's sake we may call the accused, a list of thirty-three witnesses, signed by accused No. 2 on behalf of himself and others, was put in. The Magistrate disposed of this application in the following order.

A list of thirty three-witnesses. On inquiry as to the kind of evidence these witnesses are to give, it is found that twenty-eight are to be called simply to depose to the respectability of the accused. Many of them are officials with important duties and many now reside at distant places. The Court declines to call more than five witnesses on this point, and accused No. 2 selects Nos. 1, 2, 3, 4 and 9, who are to be summoned with Nos. 11, 12, 26, 28 and 32.

The law on the subject is contained in section 257 which, under clause 2 of section 117, is applicable to this case. The section is as follows:

If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process, unless he considers such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such grounds shall be recorded by him in writing.

Now it will be observed that this section is imperative. The Magistrate has no discretion to refuse to issue process to compel the attendance of any witness, unless he considers that the application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing. The Magistrate, therefore, must issue the summons for each witness named in the list, unless he takes the responsibility of recording his ground for believing that any particular name is entered for the purpose of vexation or delay or for defeating the ends of justice. The case of each witness must be dealt with individually. Here no reason at all is assigned for refusal to summon any particular witness, and it is clear that in regard to any individual the Magistrate was not prepared to say that his name had been entered for purposes of vexation or delay or of defeating the ends of justice, as he allowed the accused to select five out of the twenty-eight expected to testify as to respectability. It is impossible now for us to treat such an order as a compliance with the provisions of the section, for the limitation of the number of witnesses on a particular point was purely arbitrary and cannot be upheld. The discretionary power of refusing to summon any particular witness is doubtless vested in the Magistrate, but

Digitized by Google

the order, we think, must be such as to show in writing the ground of refusal as applied to such individual.

The Magistrate treated this as a test case, and it is, therefore, unfortunate that an error of this sort should have occurred. At present all we need do is to set aside the order on the ground that the applicants have not had a trial in the manner prescribed by law. We do not think in expedient to direct the Magistrate to re-open the case and proceed to hear the rest of the witnesses for the defence. Already the applicants have been severely harassed. We think that proceedings of this kind against such a large body of men should not have been undertaken unless the police had evidence ready to prove that all the persons named were members of a gang in the habit of acting together for one of the purposes mentioned in section 110. Gangs, no doubt, do exist sometimes, and proceedings for their suppression may be desirable. But where a large number of persons are to be proceeded against, great care must be taken not to mingle together persons against whom there is evidence with persons against whom there is hardly any. Exhibit 29, being the order of discharge of eight persons on the 29th January, shows that against these persons at least the proceedings were instituted without sufficient preparation. Moreover, it is obvious that in a case of this kind, involving a large number of accused persons, besides pleaders and witnesses, the trial should have been conducted at some central place as near as possible to the place where the accused and the witnesses lived. The diary shows that the trial began at Kalyan and was carried on at Ghorbandar, Bassein, Thana, Andheri, Thana, Andheri, Bordi, Umbargaon, Gunjawli, Bandra, Thana, Bandra, and Thana. At most of these places all the accused who had not been discharged were present, and the inconvenience on some occasions must have been great. The District Magistrate has, of course, many duties to perform which require his presence in many different places; but we feel that this fact was a great disqualification for the trial by him of a case like the present. It is always much to be regretted, when necessity compels the parties and witnesses in a criminal case to follow Magistrates from camp to camp; but in a case like the present case, which was somewhat novel in the attempt to apply section 110 towards the prevention of malpractices such as were here alleged, it was specially desirable that the proceedings should be conducted by a stationary Magistrate. We do not say that the section might not be used against persons combining together for purposes of cheating and bullying, but we think that in the peculiar circumstances of the present case, every effort should have been made to prevent any unnecessary hardship from the method of its application, for until it was judicially proved that the accused parties were addicted to cheating or abetment of breaches of the peace, they were entitled to consideration.

We set aside the orders of the District Magistrate and direct that the security bonds be cancelled.

Order accordingly.

1902 *March* 26. I. L. R. 26 Bom. 533.

Before Mr. Justice Candy and Mr. Justice Fulton.

EMPEROR *v.* TRIBHOVANDAS BRIJBHUKANDAS.*

Gambling—Bombay Act IV of 1887, sections 3, 4 and 5—Instruments of gaming—Books and

* Criminal Application for Revision No. 1 of 1902.

Digitized by Google

telegrams—Game—Procedure—Police officer investigating offence not to conduct prosecution—Criminal Procedure Code (Act V of 1898), sections 495 (clause 4) and 537.

The accused was partner in a shop at Surat in which he ostensibly carried on the business of cloth selling, but in which he also actually carried on a *Satta* or wagering business. The wagers were made with regard to the last unit of the figures denoting the prices for which opium was sold at Calcutta on a given day. Information as to these sales was received by telegraph from Calcutta. The firm kept books in which the wagers were recorded. The accused was convicted and sentenced under sections 4 and 5 of Bombay Act IV of 1887.

Held by Candy and Fulton, JJ. (confirming the conviction under section 4), that the books kept by the firm for the purpose of recording the wagers were instruments of gaming within the definition of section 3 of Bombay Act IV of 1887.

Held by Candy, J., that the telegrams received and used for the purpose of determining the result of the bets were also within the definition.

Held, also, (setting aside the conviction under section 5) that the wagering with which the accused was charged was not a " game " and the presumptions under section 7 and clause 2 of section 5 of the Act did not apply.

A Police Inspector, who has taken part in the investigation into an offence, is not qualified to conduct the prosecution of the person charged with that offence (Criminal Procedure Code, Act V of 1898, section 495, clause 4).

Note This case is Ref. 5 Bom. L. R. 130, 6 Bom. L. R. 249, 1091.

APPLICATION under section 435 of the Criminal Procedure Code, 1898, to set aside the conviction and sentence passed on the accused by Rao Bahadur J. P. Lakhia, City Magistrate of Surat.

The accused was partner in a shop at Surat, in which ostensibly the business of cloth selling was carried on, but which was actually used for the purpose of carrying on a *satta* or wagering business. The wagers made were on the figures denoting the prices at Calcutta of opium at auction sales there. This information was received by the firm by telegraph from Calcutta and the details of the betting were entered in the books of the firm.

The accused were convicted and fined by the City Magistrate of Surat under sections 4 and 5 of Bombay Act IV of 1887. The Magistrate held that the *satta* business carried on by the accused fell within the definition of " gaming " in Bombay Act IV of 1887, that the telegrams and books used by the firm were " instruments of gaming " within the meaning of the Act, and that the shop of the accused was a common gaming house. The accused was sentenced to a fine of Rs. 100 under section 4 of the Act and to a fine of Rs. 50 under section 5.

Against these convictions and sentences the accused applied to the High Court under its revisional jurisdiction.

Scott (Advocate General) (with the Government Pleader) for the Crown.

H. C. Coyaji for the accused.

CANDY, J. :—The applicant, accused No. 2, before the Magistrate is admittedly a partner in a firm ostensibly engaged in cloth selling, and also actually engaged in managing an extensive and elaborate *satta* business, which may be briefly described as wagering on the figures which denote the prices in Calcutta of the auction sales of opium chests.

The main argument before us was whether the books of the firm kept and used in the premises of the firm for the purpose of this wagering, and the telegrams received from Calcutta by the firm giving the necessary information as to the winning numbers, are articles used as a subject or means of wagering within the definition shown in the amended section 3 of the Bombay Prevention of Gambling Act of 1887.

I am of opinion that they are within definition. We have nspe

Digitized by Google

some of the books which were seized when the house was entered by the Police officers under section 6 of the Act, and it is evident that they are not merely helps to the preservation of evidence relating to the contemplated wagering transactions. The different pages have the various units recorded at the top of each page, and bettors were evidently invited to inscribe their names under the various units, stating the amount of their wagers and so on. The books were, in short, the means used for inviting the bettors to lay their wagers. To borrow the language of Mr. Justice Jardine in *Queen-Empress* v. *Govind*, (1) the books and the telegrams were only "means" used to stimulate the betting or decide the bet.

In *Queen-Empress* v. *Kanji* (2) Mr. Justice Parsons held that books (which were among the articles mentioned) might be instruments of wagering if they were actually kept or made use of in the place as a subject or means of wagering.

I am of the same opinion and think that the *satta* described in the present case is clearly within the mischief against which the amendment of Bombay Act IV of 1887 was directed.

As to the profit or gain of the partners in the firm there can be no question. The item of brokerage described by the Magistrate is quite sufficient for the purpose. The fraudulent telegrams alluded to by the Magistrate do not add to or detract from this aspect of the case.

The conviction, therefore, under section 4 of the Act was correct.

But as to section 5, the Magistrate, though he was aware of and quoted from the decision of this Court in *Queen-Empress* v. *Govind*, did not apprehend the distinction shown in that decision between wagering and playing any game not being a game of mere skill. It is obvious that the *satta* described in the present case was not in any sense a "game." The presumption, therefore, allowed by section 7 of the Act was not applicable to the present case. And as it is clear that accused No. 2 was not found "during any wagering," the presumption under the second paragraph of section 5 is also inapplicable. The conviction and sentence under section 5 must be set aside and the fine, if paid, refunded.

It only remains to notice the contention that the City Police Inspector had taken part in the investigation into this offence, and that, therefore, he should not have been permitted by the Magistrate to conduct the prosecution. I do not agree with the Magistrate on his reference to clause (*m*) of section 4 of the Criminal Procedure Code. It is clear that the Inspector did take *some* part in the investigation, for on information received by him he applied for the warrant, arrested the accused, seized the books, *&c.*, and named the witnesses to be summoned by the Magistrate. But he alleged, and his allegation has not been contradicted, that he did not examine any of the witnesses, and that his investigation was confined to an inspection of the books and papers which had been seized, and from which he gained all the necessary information. Though, therefore, the case does technically fall within the provisions of section 495 (4) of the Criminal Procedure Code, it is clear that the irregularity in the Magistrate's proceedings in no way prejudiced the accused persons, and we cannot interfere with the finding and sentence on this ground.

FULTON, J. :—I concur.

I think it is clear that the books in which the bets were inscribed were

(1) (1891) 16 Bom. 283 at p. 290. (2) (1892) 17 Bom. 184.

Digitized by Google

"instruments of gaming" within the meaning of section 3 of Bombay Act IV of 1887 as amended by Bombay Act I of 1890. They were articles used as a means of wagering. They were books in forms ready prepared for the purpose of the bets being recorded therein, and were apparently the only means whereby the nature of those bets was communicated to the keepers of the house with whom the bets were made. Even if the bets were made orally before being entered in the books, I should still hold that those books were the means of wagering, inasmuch as they were prepared and used for the purpose of facilitating the system of betting that was carried on.

It is unnecessary, then, to express any opinion whether the telegrams received and used for the purpose of determining the result of the bets come within the definition of "instruments of gaming."

Tha house where these books were found was a common gaming house, inasmuch as the Magistrate has found on ample evidence that it was a house in which instruments of gaming were kept and used for the profit or gain of the persons owning or occupying it.

The Magistrate has further found on sufficient evidence that the applicant was one of the owners or occupiers of the said house and kept it for the purpose of a common gaming house.

The conviction, therefore, under section 4 (*a*) must be confirmed.

I concur, for the reasons given by my learned colleague, in thinking that the conviction of the applicant under section 5 cannot be upheld.

I also concur in holding that the applicant was not prejudiced by any irregularity there may have been in allowing the Police Inspector to examine the witnesses and conduct the prosecution notwithstanding the provisions of section 495, clause (4), of the Criminal Procedure Code. I do not think that a contravention of this clause in itself invalidates the trial altogether even though no failure of justice has occurred within the meaning of section 537. Here it seems impossible to dispute the facts as affecting the applicant or to suggest that the method of conducting the prosecution can have led to any erroneous decision. The case of *Subrahmania Ayyar* v. *King-Emperor* (1) turned on the provisions of section 233. It was there held that a trial contrary to the terms of that section was not a trial constituted in the manner prescribed by law. The trial was prohibited in the mode in which it was conducted. This, however, cannot be said in a case in which there is a violation of section 495. The trial is within the jurisdiction of the Court albeit the Magistrate may have been guilty of a grave irregularity in permitting the prosecution to be conducted by an unauthorised person. It seems to me that there is a distinction between a case in which the trial itself is contrary to law, in which event it is no trial at all under the Code, and a case in which the trial is one within the jurisdiction of the Magistrate and irregularities occur in the method of conducting it. In the latter case the provisions of section 537 are applicable and the finding can only be reversed if the irregularity has in fact occasioned a failure of justice. In the case now under consideration it is obvious that, however irregular the proceedings may have been, the applicant was not prejudiced, for his pleader has not pointed to a single witness whose evidence can have in any way been affected by the fact of his being examined by the Inspector who had taken part in the investigation.

At the same time I think the Magistrate should clearly understand that

(1) (1901) 25 Mad. 61.

Digitized by Google

we consider that in allowing Mr. Pranshankar to conduct the prosecution he was contravening the provisions of clause (4) of section 495. The definition of the term "investigation" in section 4 is not exhaustive. It would, I think, be placing an undue limitation on the simple meaning of words to hold that a Police Inspector who had got information that persons were carrying on wagering business, and having satisfied himself had obtained a warrant under section 6 of the Gambling Act and effected the arrest of the accused and the seizure of their books, had not taken any part in the investigation into the offence in respect of which the accused was being prosecuted. Having regard to these facts, it is clear to my mind that before the institution of the prosecution there was an investigation into the circumstances of the offence, and that the Police Inspector who took part in it was not qualified to conduct the prosecution.

1902 *April* 2. I. L. R. 26 Bom. 552.

Before Mr. Justice Candy and Mr. Justice Fulton.

IN THE MATTER OF LAKSHMAN GOVIND NIRGUDE.*

Criminal Procedure—Procedure in Magistrate's Court—Information filed against an accused, but no summons issued—Case must be disposed of by Magistrate although no summons applied for by complainant—Search warrant—Property seized by police under warrant—Claim by third party—Inquiry by Magistrate as to claim of third party—Criminal Procedure Code (V of 1898), section 592.

Where an information is filed against a person, the Magistrate is bound to dispose of the case, and if no evidence is offered against the person accused, he must be discharged. The complainant, by omitting to take out a summons against such person, cannot keep a charge hanging over him for an indefinite time. The summons is merely the means of procuring the attendance of the accused, but if he appears of his own accord without a summons, he is entitled to require that the complaint shall either be proceeded with or dismissed.

Where property is seized under a search warrant, the Magistrate must proceed to make enquiry so as to enable him to dispose of it. If a third party appears and alleges that the property seized is his and is not the subject-matter of the offence charged, the Magistrate is bound to hear that party, and, if necessary, restore the property to its owner.

Magistrates must take care that the proceedings in their Courts are conducted with such reasonable expeditions as will prevent the parties from being improperly harassed by undue delay.

In re Ratanlal Rangildas(1) doubted.

APPLICATION under section 435 of the Criminal Procedure Code (Act V of 1898) for revision of an order made by J. S. Dracup, Fourth Presidency Magistrate of Bombay.

The petitioner, against whom an information had been lodged on the 9th September, 1901, had applied to the Magistrate to have the case against him proceeded with. The Magistrate, however, declined on the ground that no process had been issued against the petitioner.

The petitioner accordingly applied to the High Court under section 435 of the Criminal Procedure Code, contending that the Magistrate was bound to dispose of the case against him. He also prayed that certain printing materials belonging to him which had been seized under a search warrant issued against his brother should be restored to him (the petitioner).

The facts of this case were as follows:

On the 9th September, 1901, the complainant, Mrs. Graham, filed an information charging the petitioner Lakshman Govind and his brother Pandurang

* Criminal Application for Revision, No. 21 of 1902. (1) (1892) 17 Bom. 748.

Digitized by Google

Govind with criminal breach of trust and criminal misappropriation in respect of certain printing materials of the value of Rs. 2,000.

On the same date the Magistrate ordered the issue of a summons against the accused and a search warrant for the seizure of the property mentioned in the information; but as the complainant only paid the process fee for the process against Pandurang Govind Nirgude and failed to pay the fee for the summons against the petitioner Lakshman, no process was issued against him.

The search warrant was issued on the 12th September, 1901, and executed on the 17th September, on which day the property was produced before the Magistrate.

On the 10th October, 1901, the date fixed for the hearing of the case, complainant did not appear, and the case was struck off, and the property seized under the search warrant ordered to be returned to the persons in whose possession it was found. This person was admittedly the petitioner Lakshman.

On the same day the petitioner Lakshman appeared in Court and applied that the complainant should be compelled to go on with the case against him, but as no process had been taken out against him and the case had been struck off owing to the absence of the complainant, the Magistrate considered himself unable to comply with the request.

On the 27th November, 1901, the complainant, Mrs. Graham, again appeared before the Magistrate and applied that the case against Pandurang Govind should be restored to the file, and that a fresh search warrant should issue. The Magistrate granted both applications.

The second search warrant was excuted on the 30th November, 1901, and the property was produced before the Magistrate the same day.

The petitioner Lakshman again appeared before the Court and requested that the case against him should be proceeded with; but as the complainant had applied for the restoration of the case against Pandurang Govind only, the Magistrate declined to comply with the petitioner's request.

The case against Pandurang Govind Nirgude was not proceeded with as he absconded from Bombay and the warrant issued against him could not be executed.

The petitioner now applied to the High Court, contending (*inter alia*) that the Magistrate was bound to dispose of the case against him and praying that the printing materials, which the petitioner alleged belonged to him, should be restored to him.

Kolah (with him *R. R. Desai*) for the petitioner.

C. J. Ashbury and *G. S. Mulgaonkar* for the opponent.

CANDY, J.:—On the 9th September, 1901, Mrs. Graham filed an information in the Court of the Fourth Presidency Magistrate (headed as against one Pandurang) for criminal breach of trust in respect of certain printing materials. In the body of the information "two accused" were named, viz., Pandurang and his brother Lakshman.

The Magistrate endorsed the information "summons and search warrant."

A search warrant was issued requiring the police to search for the said articles in the house or shop of Pandurang. Accordingly six boxes of printing materials were seized. The Magistrate says that complainant paid process fee for process against Pandurang only and so no process was issued against Lakshman.

Digitized by Google

On the date fixed, 10th October, complainant did not appear. In the record under section 370, Criminal Procedure Code, in the column "name of accused" Pandurang only is mentioned.

In the column "final order" the entry is "P. A. S. O. (petitioner absent, struck off)—property to be returned to the person in whose possession it was found." This person was admittedly Lakshman.

On 27th November, Mrs. Graham petitioned the Magistrate that her information should be restored to the file and that a fresh search warrant should issue.

This was endorsed by the Magistrate on 27th November "Case ordered to be restored and a search warrant to issue."

On the same day a search warrant was issued requiring the police to search for the above-mentioned articles in the house or shop of Pandurang. Six boxes were again seized and brought before the Magistrate.

On 21st January, 1902, the Magistrate endorsed the record under section 370 "S. S. N. P. Warrant. Bail Rs. 1,000. Returnable on 6th February, 1902."

A warrant was accordingly issued for the arrest of Pandurang, but it has not been executed; as Pandurang has admittedly left Bombay.

The case against Pandurang stands adjourned in the Magistrate's Court.

Lakshman, with his counsel, appeared before the Magistrate, both on 10th October, 1901, and again after the case had been restored to the Magistrate's file begging that the case against him should be proceeded with. The Mrgistrate declined, on the ground that no process had been issued against Lakshman.

Lakshman has now applied to the High Court, complaining that Magistrate was bound to dispose of the case against him, and further that the printing materials which have been seized belong to him (the applicant), and that the Magistrate has no right to detain them for an indefinite time.

The first point presents no difficulty. Counsel who appears for Mrs. Graham admits that his client has no intention to prosecute Lakshman, and that she is willing that the case against him should be formally struck off.

It is not understood how the Magistrate required process fee for issue of process in a complint of criminal breach of trust.

When the record is returned to the Magistrate, he should call on the case against Lakshman and formally dispose of it. The fact that Mrs. Graham did not take out process against Lakshman is no valid reason for the Magistrate allowing the charge of criminal breach of trust to hang over him.

The case of the printing meterials is different.

On the one hand, Lakshman asserts that he is separate in estate from his brother Pandurang, that those materials belong to him and form no part of the materials entrusted to Pandurang by the late Mr. Graham, and that he suffers considerable injury by the detention of these materials by the Magistrate for an indefinite period. On the other hand, Mrs. Graham, by her counsel, alleges that these materials are part of the materials entrusted by the late Mr. Graham to Pandurang, that the brothers are united, and that if the materials are restored to Lakshman they will be made away with, and she will suffer considerable injury.

Under these circumstances Lakshman's counsel ask us to cancel the search warrant issued by the Magistrate and to order the restoration to his client of

Digitized by Google

the printing materials, or at any rate to direct the Magistrate to make some inquiry, so that the printing materials which Lakshman says belong to him and have no connection with the alleged offence may not be detained for an indefinite period in the Magistrate's Court.

I am of opinion that it is not open to us to cancel the search warrant. The Magistrate in the exercise of his discretion considered that the production of the printing materials, as the alleged subject of the original breach of trust with regard to which the information had been laid, was necessary or desirable. He had reason to believe that Pandurang would not produce them if required by a summons. He therefore issued a search warrant. But if a third party appears before the Magistrate and alleges that the things seized by the police under the search warrant are his property and are not the subject of the alleged criminal breach of trust, the Magistrate is, in my opinion, bound to hear that party and, if necessary, to restore the things to their owner. I base that opinion not on the provisions of section 523, Criminal Procedure Code, for I am not prepared to differ from the ruling of this Court in the case of *Ratanlal Rangildas*(1) as to the inapplicability of that section to property produced under a search warrant under section 96.

But there is, in my opinion, a power inherent in every Court to satisfy itself that the things produced before it under a search warrant are the things which it is necessary or desirable should be kept in its custody.

I have no doubt that the Magistrate was wrong in refusing a *locus standi* to Lakshman, declining to hear him as to his alleged ownership of the things which had been seized.

With the above directions I would return the record and proceedings to the Magistrate.

FULTON, J. :—I entirely concur in the order proposed by my learned colleague. Lakshman was included in the complaint of the 19th September and must be formally discharged if no evidence is offered against him. A complainant, by omitting to take out a summons, cannot keep a case hanging over a man for an indefinite time. The summons is merely a means of procuring attendance, but if the accused appears of his own accord without a summons, he is entitled to require that the complaint shall either be proceeded with or dismissed.

As regards the property which has been seized under the Magistrate's warrant, I am inclined to doubt the correctness of the decision in *In re. Ratanlal Rangildas.*(1) I think the words "seized by the police" apply equally whether the seizure is made under a Magistrate's warrant or without a warrant. I do not think the word "seized" can be limited in the way proposed in that decision. In the one case as in the other the seizure is made under the authority of some law requiring the police to execute the warrant or empowering them to seize property without warrant. In both cases the seizure must forthwith be reported to the proper Magistrate, who can then, according to my view, proceed in the manner prescribed by the section. It is obvious that when property is seized under a Magistrate's warrant, he must proceed to make inquiry to enable him to dispose of it. Otherwise grave wrong would result.

Here, on an information, property has been seized and kept apparently without any inquiry for nearly five months, though Lakshman has throughout

(1) (1892) 17 Bom. 748.

Digitized by Google

been insisting that it is his own. As no one can say when Pandurang may return, the detention may last for an indefinite time. Whether the inquiry is made in the exercise of inherent powers or, as I think, under the authority given by section 523, I entirely agree with Mr. Justice Candy in holding that immediate inquiry should be made in order to ascertain whether there is sufficient ground for believing that the property belongs to the complainant and has been the subject of criminal breach of trust or dishonest misappropriation, or should be returned to Lakshman from whose possession it has been taken, on such terms as the Magistrate may prescribe. Magistrates must take care that the proceedings in their Courts are conducted with such reasonable expedition as will prevent the parties from being improperly harassed by undue delay.

1902. *April* 10. **I. L. R. 26 Bom. 558.**

Before Mr. Justice Fulton and Mr. Justice Crowe.

EMPEROR *v.* LAKSHMAN RAGHUNATH.*

Penal Code (Act XLV of 1860), sections 441, 448—Criminal trespass—House-trespass—Entry into house-Intent to annoy.

The accused No. 1, who held a decree against a certain judgment-debtor, went with his son, accused No. 2, and a Civil Court bailiff to execute a warrant. Finding the door of the Judgment-debtor's house shut, they entered his compound by passing through the complainant's house without his consent and notwithstanding his protest.

Held, that the accused's act amounted to criminal trespass, for when they trespassed on the complainant's house notwithstanding his protest, they must, as reasonable men, have known that they would annoy him.

There is no presumption that a person intends what is merely a possible result of his action or a result which though reasonably certain is not known to him to be so; but it must be presumed that when a man voluntarily does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result.

Queen v. *Hicklin*,(1) *Queen* v. *Martin*,(2) *Reg.* v. *Lobett*, (3) *Freeman* v. *Pope*,(4) *Ex parte Mercer*, *In re Wise*,(5) referred to.

APPLICATION under section 435 of the Criminal Procedure Code (Act V of 1898) to set aside a conviction and sentence for house trespass recorded by Rao Saheb L. N. Bansing, First Class Magistrate of Poona City.

Lakshman (accused No. 1) obtained a decree against one Tulajirao Raje and in execution took out a warrant of arrest against him. Early in the morning of the 17th September, 1901, accompanied by his son (accused No 2) and some servants (Nos. 3 to 7) and a bailiff, he went to Tulajirao's house to execute the warrant. Finding the door of the house shut, they entered his compound by passing through the complainant's house without his consent and in spite of his protest.

The complainant thereupon filed a complaint against all the accused, and the Magistrate found accused Nos. 1 and 2 guilty of criminal trespass (see section 441, Indian Penal Code), and sentenced each of them to pay a fine of Rs. 10.

The accused Nos. 1 and 2 thereupon applied to the High Court under its criminal revisional jurisdiction to set aside the conviction.

---

* Criminal Application for Revision No. 29 of 1902.

(1) (1868) L. R. 3 Q. B. 375. (2) (1881) 8 Q. B. D. 58. (3) (1839) 9 C. & P. 466.
(4) (1870) L. R. 5 Ch. 538. (5) (1886) 17 Q. B. D. 290.

Digitized by Google

N. M. Samarth for the accused: -The entry into complainant's house at most amounted to civil-trespass. Sections 441 contemplates the entry as a means to another act and regards the intention with which it is made in relation to that act. In the present case the accused's intent was not to annoy the complainant: his object was merely to effect an entry into the house of the complainant's neighbour. See *In the matter of Jotharam Davay*(1); *Queen-Empress* v *Rayapadayachi*(2); *Chunder Narain* v. *Farguharson*(3); *Reg.* v. *Vujeer*(4); *Imperatrix* v. *Ganpat Ramshet.*(5)

G. S. Dandavate for the complainant:—Here it is found as a fact that the entry was with intent to annoy, and the complainant was in fact annoyed, for he at once repaired to the police station and lodged a complaint. As the entry was in spite of complainant's protest, the accused must be presumed to have intended the annoyance caused by his entry.

FULTON, J.:—This is an application to set aside a conviction for house trespass on the ground that the acts proved do not constitute that offence.

The Magistrate has found that accused No. 1, who held a decree against a certain judgment-debtor, went with his son, accused No. 2, and a Civil Court bailiff to execute a warrant. Finding the door of the judgment-debtor's house shut, they entered his compound by passing through the complainant's house without his consent and notwithstanding his protest. On these facts the Magistrate has held that the act of the accused amounted to criminal trespass with intent to annoy the complainant.

In support of the application Mr. Samarth has contended that there was no intent to annoy, and that though the act may have constituted a trespass which might form the basis of a civil action, it did not amount to criminal trespass as defined in section 441 of the Indian Penal Code. He relied on the decision of the Madras High Court in *Queen-Empress* v. *Rayapudayachi*,(2) and pointed out that, to constitute the offence, there must be an intent to annoy and not mere knowledge that the act was likely to annoy.

Now, it cannot be disputed that mere knowledge of the possibility of annoyance resulting from an act of trespass is not sufficient to bring the case within the definition, but, at the same time, it must be remembered that the word "intent" cannot be read as if it were identical with "wish" or "desire". There may be no wish to annoy, but if annoyance is the natural consequence of the act, and if it is known to the person who does the act that such is the natural consequence, then there is an intent to annoy. Most acts in the common course of natural events and human conduct lead to a series of results, and if these results are foreseen by the person doing the acts they cannot be said to be caused unintentionally. The ultimate object may be something different, but the person intends all the intermediate results which he knows will happen in the natural course of events, even though he may regret that they should happen. When it is uncertain whether a particular result will follow (as in the Madras case in which the accused hoped to keep his conduct secret), there may be no intent to cause that result even though it may be known that the result is likely. But it seems impossible to contend, when an act is done with a knowledge amounting to practical certainty that a result will follow, that it is not intended to cause that result. In the case of *Queen* v. *Hicklin* (6) Mr. Justice Blackburn said: "I take the rule of law to be as stated by Lord Ellenborough in *Rex* v. *Dixon* (7) in the shortest and clearest

(1) (1878) 2 Mad. 30. (2) (1896) 19 Mad. 240, (3) (1879) 4 Cal. 817.
(4) (1868) Bombay Unreported Criminal Cases, p. 10. (5) (1888) Cr. Rul. No. 4
(6) (1868) L. R. 3 Q. B. 375. (7) 3 M. & S. at p. 15.

Digitized by Google

manner: 'It is a universal principal that when a man is charged with doing an act (that is, a wrongful act without any legal justification) of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act.' And although the appellant may have had another object in view, he must be taken to have intended that which is the natural consequence of the act." Reference may also be made to similar remarks of Lord Coleridge, C.J., in *Queen* v. *Martin* (1) and to *Reg* v. *Lobett*(2) in which Littledale, J., said: "With respect to the intent of the defendant, a man must be taken to intend the natural consequences of what he has done." Again in *Freeman* v. *Pope*, (3) Lord Hatherley, L.C., said: "It would never be left to a jury to find *simpliciter* whether the *settlor* intended to defeat, hinder or delay his creditors without a direction from the Judge that, if the necessary effect of the instrument was to defeat, hinder or delay the creditors, that necessary effect was to be considered as evidencing an intention to do so." This decision was referred to in *Ex parte Mercer, in re Wise* (4) the effect of which was to show that the presumption is not conclusive, but may be rebutted But the result of these authorities seems to me to be that, although there is no presumption that a person intends what is merely a possible result of his action or a result which though reasonably certain is not known to him to be so, still it must be presumed that when a man voluntarily does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result.

In the present case when the applicants trespassed on the complainant's house not withstanding his protest, they must, as reasonable men, have known that they would annoy him. They were, therefore, in our opinion, rightly convicted of house trespass.

We dismiss the application.

Application dismissed.

1902. *April* 14. I. L. R. 26 Bom. 609.

Before Mr. Justice Candy and Mr. Justice Crowe.

CAWASJI MERWANJI SHROFF. (COMPLAINANT) v. THE GREAT INDIAN PENINSULA RAILWAY COMPANY (ACCUSED).*

Animals—Cruelty to animals—Prevention of Cruelty to Animals Act (Act XI of 1890), section 3—Police Bombay Town (Act XLVIII of 1860), section 21—Railway Company—Master and servant—Criminal liablity of master for his servant's acts—Goods yard of a railway—Public place.

The G. I. P. Railway Company carried twenty-seven head of cattle from Talegaon to Bombay. These cattle were put in one truck by their owner under the supervision of the Company's goods clerk at Talegaon, and were so allowed to be put by the Company's servants at Talegaon, in spite of a circular issued to them by the Traffic Manager to prevent the overcrowding of cattle. When the cattle were detrained at the goods yard of the Company at Wadi Bundar, they were found suffering from the effects of overcrowding. The Bombay Society for the Prevention of Cruelty to Animals prosecuted the Railway Company under section 21 of Act XLVIII of 1860 and section 3 (b) of the Act for the Prevention of Cruelty to Animals (Act XI of 1890). The Presidency Magistrate, who tried the case, referred to the High Court the following two questions:

---

(1) (1881) 8 Q. B. D. 58.
(2) (1839) 9 C. & P. 462 at p. 466.
(3) (1870) L. R. 5 Ch. 538.
(4) (1886) 17 Q. B. D. 290.

* Criminal Reference No. 24 of 1902.

Digitized by Google

(1) Is the Company liable, under the above circumstances, for the acts of the owner of the cattle and the goods clerk at Talegaon under section 3 (*b*) of Act XI of 1890, though they may have no knowledge as to how the animals were carried ?

(2) Is the Wadi Bunder goods station a place accessible to the public, when the Company's orders are that men on business alone should be admitted there ?

The High Court answered the first question in the negative and the second in the affirmative.

Act XI of 1890 is aimed at the individual who actually practises the cruelty, and it was not intended by the Legislature to make a master penally liable for the act of his servant done in the course of the servant's employment, and certainly not when the act is done contrary to the orders of the master.

REFERENCE made by P. H. Dastur, Seosond Presidency Magistrate of Bombay, under section 432 of the Criminal Procedure Code (Act V. of 1898).

The following were the facts as set forth in the judgment of the Magistrate :

On the 31st January, 1902, the complainant Cawasji Merwanji Shroff, the Secretary and Treasures to the Society for the Prevention of Cruelty to Animals, saw at the Wadi Bundar goods station of the Great Indian Peninsula Railway a wagon laden with twenty-seven cattle, which had been carried in that truck all the way from Talegaon to Bombay. The cattle were packed tightly together : one was found lying down on the floor, unable to rise on its legs, and was being trampled upon by the other cattle. It appeared that the cattle, when detrained, were found to be suffering considerably, and were so dazed, weak and emaciated as to walk with difficulty.

These cattle had been put into the truck at Talegaon by their owner in the presence and under the permission of the goods clerk at the Talegaon railway station.

The Company's servants at Talegaon allowed the twenty-seven cattle to be put into one truck, in spite of the following circular issued by the Company to its servants on the 29th October, 1901.

A complaint having been received that merchants despatching cattle at the wagon rate are in the habit of overcrowding the animals to such an extent as to amount to cruelty, station masters are instructed that this must not be permitted, and further, any station master *en route* who may see cattle loaded in a wagon in such numbers as to cause him to believe that the cattle are suffering therefrom, must report the matter to the District Traffic Superintendent in whose district the loading station is situated, giving the stations from and to which the cattle were being carried and the number of cattle in the truck. Should a station master be found to be permitting overcrowding which will amount to cruelty, he will be dealt with.

The complainant charged the Railway Campany under section 21 of the Police Act (XLVIII of 1860) with cruelty to the said cattle and with causing and procuring the said cattle to be cruelly ill-treated and abused, and also under section 3, clause (*b*), of Act XI of 1890 with carrying the said cattle in such a manner and position as to subject them to unnecessary pain and suffering.(1)

---

[1] the following are the sections :

Act XI of 1890, *section* 3.

If any person in any street or in any other place, whether open or closed, to which the public have access, or within sight of any person in any street or in any such other place [*a*] cruelly and unnecessarily beats, overdrives, overloads or otherwise ill-treats any animals, or [*b*] binds or carries any animal in such a manner or position as to subject the animal to unnecessary pain or suffering, or [*c*] offers, exposes or has in his possession for sale any live animal which is suffering pain by reason of mutilation, starvation or other ill-treatment, or any dead animal which he has reason to believe to have been killed in an unnecessarily cruel manner, he shall be punished with fine which may extend to one hundred rupees, or with imprisonment for a term which may extend to three months, or with both.

Act XLVIII of 1860. *section* 21.

Whoever cruelly beats, ill-treats, abuses or tortures, or causes or procures to be cruelly beaten, ill-treated, abused or tortured, any animal, shall for every such offence be liable to a fine not exce-

Digitized by Google

The Presidency Magistrate found it proved that the cattle were carried in such a manner as to amount to cruelty; but referred the following two questions for the decisions of the High Court:

1. Is the Company liable, under the circumstances narrated in the judgment, for the acts of the owner of the cattle and of the goods clerk at Talegaon station, under section 3 *(b)* of Act XI of 1890, though the Company may have had no knowledge as to how the animals were carried?

2. Is Wadi Bundar goods station a place accessible to the public, within the meaning of section 3 of Act XI of 1890, when the Company's orders are that men on business alone should be admitted there?

Branson and *Jinnah*, with *Little & Co.*, for the Railway Company:—An accused person cannot be criminally punished unless the *mens rea* is proved; nor can he be found guilty of a crime committed by his servant: *Elliot* v. *Osborne* [1]; *Swan* v. *Sanders* (2); *Brown* v. *Foot* (3); *Massey* v. *Morriss* (4); *Derbyshire* v. *Houliston* (5); *Coppen* v. *Moore* (No 2 (6); *Chisholm* v. *Doulton* (7); *Chundi Churn* v. *Empress.* (8) A Railway Company cannot, therefore, be penally liable for the acts of its servants; and the first question ought, therefore, to be answered in favour of the Railway Company.

As to the second question, we submit that the Company's goods yard at Wadi Bundar is a public place: *Langrish* v. *Archer* (9); *Case* v. *Storey.*(10)

Young, with *Roughton and Byrne*, for the complainant:—On the first question our contention is that the Company is responsible for the acts of its servants: Smith on Master and Servant, page 309; Mayne, Criminal Law of India, 2nd Edition, page 252. In the present case the Railway Company has delegated to its servants (*i.e.*, the station master and goods clerk at Talegaon railway station) the responsibility of deciding how many cattle could be put in a truck without any infringement of the law, and if these servants make a mistake the Company is liable: see Smith on Master and Servant, page 310; Maxwell on Interpretation of Statutes, pages 144-145; *Rex.* v. *Medley* (11) *Rex.* v. *Marsh.*(12)

CANDY, J,:—The Second Presidency Magistrate has, under section 432, Criminal Procedure Code, referred two questions of law under the following circumstances. He has found as a fact that, in January last, twenty-seven head of cattle were carried by the G. I. P. Railway from Talegaon (Poona District) to Bombay in such a manner as to subject the animals to unnecessary pain or suffering.

The information was laid by the Secretary and Treasurer of the Society for the Prevention of Cruelty to Animals under section 21 of Act XLVIII of 1860 and section 3 (*b*) of Act XI of 1890. The Magistrate found that there could be no conviction under section 21 of Act XLVIII of 1860, because the cattle were put in the truck at Talegaon by the owner of the cattle under the supervision of the goods clerk, and the Company could not be liable for the acts of its servants when done in spite of a circular issued by the Traffic Manager to station masters to prevent the overloading of cattle, and contrary to the express directions it contained. The Magistrate, therefore, held that unless it could be established that the Company either encouraged the overloading of the truck, or knew that it was probable that the truck would be overloaded, no *mens rea* could be established. The Magistrate proceeded:

---

eding one hundred rupees, and in default thereof to imprisonment with or without hard labour for a period not exceeding three months.

(1) (1891) 65 L. T. 378. (2) (1881) 50 L. J. (M. C.) 67. (3) (1892) 66 L. T. 649.
(4) (1894) 2 Q. B. 412. (5) (1897) 1 Q. B. 772. (6) (1898) 2 Q. B. 306.
(7) (1889, 22 Q. B. D. 736. (8) (1883) 9 Cal. 849. (9) (1882) 10 Q. B. D. 44.
(10) (1869) L. R. 4 Ex. 319. (11) [1834] 6 C. & P. 293. [12] [1824] 2 B. & C. 717.

Digitized by Google

Looking also to the wording of section 21, it appears to be the intention of the Legislature to make the individual who actually abuses or ill-treats an animal liable ; and separate provision has been made for the punishment of abettors in the latter part of the same section. Section 3 [*b*] of Act XI of 1890 is, however, altogether different. A person includes a company or corporation, and the only question that the Court has to consider is who carried the cattle.

Then after quoting the case of *Rex.* v. *Marsh*(1) mentioned in Mayne's Criminal Law, the Magistrate concluded :

It is clear, therefore, that under the second section no *mens rea* need be established, and the second point must be decided against the Railway Company.

The third point before the Magistrate was whether the goods yard at Wadi Bundar is such a place as is mentioned in section 3 of Act XI of 1890. Section 3 relates to cruelty in public places. The magistrate decided this point in the affirmative. But his judgment was contingent on the opinion of the High Court on the following two points :

1st—Is the Company liable under the above circumstances for the acts of the owner of the cattle and the goods clerk at Talegaon under section 3 (*b*) of Act XI of 1890, though they may have no knowledge as to how the animals were carried ?

2nd—Is the Wadi Bundar goods station a place accessible to the public, where the Company's orders are that men on business alone should be admitted there ?

On the second point we stated our opinion in the affirmative at the close of the hearing. There is clearly a distinction in the Act between private places, for entering which a warrant would be necessary (see sections 4, 5 and 6), and public places (see sections 3 and 7). The goods yard is, no doubt, a public place. The public may have a limited right of access, but, as a fact, no one is prevented from going inside the yard (compare the case of *Ex parte Kippins* (2).

The first point is, however, more difficult ; and we took time to consider what our opinion should be. At the outset we may remark that by the terms of the reference we consider that our opinion must be confined to the question set out by the Magistrate, which is briefly whether the Railway Company is criminally liable under section 3 (*b*) of Act XI of 1890, " though they may have no knowledge as to how the animals were carried. " We express no opinion as to whether " cruelty " was legally established in this case, or as to whether there is anything repugnant in the Act to the word " person " including a corporation like the Railway Company. The Magistrate has formed an opinion on these points without seeking our advice. Also we must take it that the Magistrate has found as a fact that the company did take action to prevent improper loading of cattle on its trucks. We cannot, therefore, accede to the argument of Mr. Young for the prosecutor, that the Company must, in the eyes of the law, be taken to have *mens rea* because it had delegated to its servants the responsibility of deciding how many cattle can be put into a truck without cruelty. The reason given by the Railway official in his evidence for not making a hard and fast rule is apparently a sensible one. No doubt there are cases in which a master may be penally responsible for the act of his servent, unless he can show that what was done was in contravention of his orders. In the present case we take it that the cattle were put into the truck at Talegaon in such a manner as to subject the animals to unnecessary pain or suffering " in spite of the circular and contrary to the express direction it contained. " There thus being an absence of *mens rea*, direct or implied, the question is, can the carriers of the cattle be convicted under section 3 (*b*) of Act XI of 1890 ? The Company were the carriers ; there can be no doubt about that. And the Magistrate has found as a fact that the cattle were carried in such a manner as to subject the

(1) (1824) 2 B. & C. 717. (2) [1897] 1 Q. B. 1.

Digitized by Google

animals to unnecessary pain and suffering, owing to the fact that the owner of the cattle and the goods clerk at Talegaon put too many cattle into one truck.

With a view to assisting the Court in forming an opinion on this point the learned counsel have quoted many cases. We do not think it necessary to go through these in detail. The principle which must govern the point will be found in such text-books as Maxwell on the Interpretation of Statutes (3rd Edition) and Mayne's Criminal Law of India (2nd Edition), in which reference to many of the cases quoted will be found. Speaking generally, the principle is that a man cannot be convicted of a criminal offence unless he has a guilty mind. But in many cases knowledge (*scienter mens rea*) is not necessary and the true test is to look at the object of the Act, and to see how far knowledge is of the essence of the offence created. Act XI of 1890 was passed because it was deemed expendient to make "further provision for the prevention of cruelty to animals" But there is no indication in the Act that any part of the further provision was to create an offence apart from any knowledge on the part of the offender. The object of the Act apparent on the face of it, was to consolidate and bring into one enactment the provisions of various local Acts, and to remove the anomaly in the general provision of the law (section 34 of Act V of 1861) which was confined to roads or streets in towns, and to acts which caused obstruction, inconvenience, &c., to residents and passengers.

The first penal section is section 3. Clause (*a*) was apparently with some slight variation taken from section 21 of Act XLVIII of 1860 (which with certain unrepealed sections of Act XIII of 1856 formed the Police Act of the Presidency Towns), and it was apparently based on section 2 of the English Act for the prevention of cruelty to animals (Stat. 12 and 13 Vic., c. 92).

The Presidency Magistrate held that looking to the wording of section 21 of the Police Act it appears to be the intention of the Legislature to make the individual who actually ill-treats an animal liable. This is apparently a correct view, and there is no reason why it should not be equally good for clause (*a*) of section 3 of Act XI of 1890. The "causing or procuring" is not inserted in clause (*a*), because by the present definition of "offence" (which was not law in 1860) in section 40 of the Penal Code, this is covered by "abetment." The words of section 2 of 12 and 13 Vic., c. 92, touch only the person who actually does the act of cruelty: see *Powell* v. *Knight* (1) and *Elliot* v. *Osborne* (2). The same rule would hold good with reference to clause (*a*) of section 3 of Act XI of 1890, which was not made applicable to Bombay, because the corresponding section 21 of Act XLVIII of 1860 is applicable.

Then we come to clause (*b*) of section 3 of Act XI of 1890. That is apparently taken from section 12 of the English Act (12 and 13 Vic., c. 92), the wording of which is "if any person shall convey or carry or cause to be conveyed or carried in or upon any vehicle any animal, &c." The words of the Indian Act are "binds or carries any animal, &c." The addition of the word "binds" and the omission of all mention of "vehicle" at first sight seem to show that the framer of the Indian Act had primarily in his mind the notoriously cruel manner in which birds are sometimes tied up and carried. But he may have purposely used the general expression "binds or carries" in order to include any kind of carring, whether by hand or conveying in or on a vehicle. There

(1) (1878) 38 L. T. N. S. 607. (2) (1891) 65 L. T. N. S. 378.

Digitized by Google

is, however, no indication that as regards this "cruelty" he wished to draw a distinction between clauses (*a*) and (*b*) and to make a carrier penally liable under clause (*b*), though the cruelty was practised contrary to his explicit directions. Similarly clause (*c*) of section 3 seems to be aimed at the individual who actually offers, exposes, &c. Mr. Young argued that as regards the former part of this clause *scienter* would be immaterial, because by the word "which he has reason to believe" in the latter part *scienter* would be material. We do not agree with this argument. We do not think that a clause can be so split up, and that without express words the Legislature must be taken to have intended to make penally liable a person, who technically through his servants is in possession "of live animal which is suffering pain, &c.," though he may be ignorant of the fact, and the servants in so doing may have acted contrary to his explicit instructions.

Sections 4 and 5 are obviously aimed at the individual who does the cruel act. It was contended that because in the latter part of clause (1) of section 6 and in section 7 the words "permits" or "wilfully permits" are found, therefore in the sections in which these words are not found *scienter* is unnecessary. We cannot agree with this contention. Take section 4: suppose the owner of a large dairy, in which one of the employers, in the course of his employment, performs, the operation called *phuka*; the servant would be liable under section 4, but would the master also be liable? Our conclusion from a general consideration of the Act is that it is aimed at the individual who actually practises the cruelty, and that it was not intended by the Legislature to make a master penally liable for the act of his servant done in the course of the servant's employment, and certainly not when the act is done contrary to the orders of the master. Whether a corporation like the G I. P. Railway Company would be liable under section 3 (*b*), if it were proved that the Company had been negligent and had actually connived at the act of the servant, is a question which does not arise in the present case. But having regard to the circumstances and facts found by the Presidency Magistrate, we think that our opinion on the first point should be in the negative. Such an opinion does not render the Act ineffective for its avowed purposes. The very judgment on which the Presidency Magistrate relied (*Rex* v *Marsh* (1) in a passage quoted by Mr. Mayne but not copied by the Magistrate, shows that the defence in the present case might be good. And as Bayley, J., said in the same case, "under this enactment the party charged must show a degree of ignorance sufficient to excuse him." In short, the judgments clearly import that if the defendant could have satisfied the jury of his ignorance, it would have been a defence, though the word "knowingly" was not in the statute: see per Brett, J., in *Queen* v. *Prince*. (2)

Thus, the case relied on by the Presidency Magistrate is really against the view which he took. We direct the record and proceedings to be returned, with our opinion on the first point in the negative, on the second point in the affirmative.

1902. *May* 8. **I. L. R. 26 Bom. 641.**

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

EMPEROR *v.* WALLI MUSSAJI.*

Gambling—Prevention of Gambling Act [Bombay Act IV of 1887], section 8—power of seizing money 'found therein'—Interpretation.

(1) (1824) 2 B. & C. 717. (2) [1875] L. R. 2 C. C. 154 at p. 162.

* Criminal Application for Revision No. 36 of 1902.

Digitized by Google

The power of seizing money found in a gaming house under section 8 of Bombay Act IV of 1887 does not extend to money found on the persons of those who may at the time be in such gaming house.

APPLICATION under section 435 of the Criminal Procedure Code (Act V of 1898) for the revision of convictions and sentences passed by Rao Bahadur A. G. Kotwal, First Class Magistrate of Thana.

Walli Mussaji, accused No. 1, was charged under the Prevention of Gambling Act (Bombay Act IV of 1887) with keeping a common gaming house at Santa Cruz, and accused Nos. 1—37 with gaming in the said house.

The trial ended in the conviction of accused Nos. 1—5, 6, 9—28, and 37, who were variously sentenced and fined. the Magistrate also ordered " the money found on the persons of the accused convicted to be seized and forfeited to Government under section 8 of the Act."

The accused applied to the High Court under its Criminal Revisional Jurisdiction under section 435 of the Criminal Procedure Code (V of 1898).

R. R. Desai for the accused :—The Magistrate has no power to forfeit the money found on the persons of the accused under section 8 of the Prevention of Gambling Act (Bombay Act IV of 1887). Section 6 of the Act gives the power of seizure, and under section 6 (*c*) the power is limited to the seizure of money found in the gaming house and not on the persons of those found therein. Section 8 distinguishes between things " found therein " and " found on the persons of those found therein." Under section 6 (*d*) the persons of those found in the gaming house may be searched, but there is nothing in section 6 or section 8 to authorize the seizure of money found on them.

Rao Bahadur *Vasudeo J. Kirtikar*, Government Pleader, for the Crown:—The money found on the persons of those found in a gaming house would be money found therein : the words "with all money found therein" in the second paragraph of section 8 of the Prevention of Gambling Act, therefore, give power to a Magistrate to forfeit such money.

Per Curiam :—Following on a conviction under the Bombay Prevention of Gambling Act, 1887, the Magistrate has ordered the money on the persons of the accused to be seized and forfeited under section 8 of that Act, and we are asked to set aside this order in revision. Under that section a Magistrate may " on the conviction of any person for opening, keeping or using a common gaming house, or playing or gaming therein, or being present therein for the purpose of gaming, order all moneys seized therein to be forfeited." The power of seizure is conferred by section 6, which empowers any Magistrate " upon any complaint made before him on oath that there is reason to suspect any house, room or place to be used as a common gaming house," and upon satisfying himself, as the section prescribes, to authorize certain specified officers " to seize all instruments of gaming and all moneys and securities for money and articles of value reasonably suspected to have been used for the purpose of gaming which are found therein." The power of seizing money, therefore, is limited to " moneys which are found therein". But it is apparent from section 8 that the expression "found therein" is used in contrast with the phrase found " on the person of those found therein," so that on the phraseology of the section we hold that the power of seizing money does not extend to that found on the person. That this is so, is made clear beyond doubt by sub-section (*d*) of section 8, which gives the authorized officers power " to search all parts of the house, room or place which he shall have so entered when he shall have reason to believe that any instruments of gaming are concealed therein, and also

Digitized by Google

the persons of those whom he shall so find therein, or take into custody and to seize and take possession of all instruments of gaming found upon such search." This is the only power of searching the person, and it is clear there is no power to seize money found on the person in such search.

The Magistrate's order as to the moneys found on the person is, therefore, illegal, and must be set aside, and the money must be restored to those from whom it has been taken.

1902. *August* 19. I. L. R. 26 Bom. 785.

Before Mr. Justice Crowe and Mr. Justice Batty.

IN RE BAL GANGADHAR TILAK.*

Practice—Procedure—Sanction to prosecute—Stay of criminal proceedings pending disposal of civil suit—High Court—Revision—Criminal Procedure Code (Act V of 1898), sections 439, 195, 476.

The High Court is competent, in the exercise of its revisional power under section 439 of the Criminal Procedure Code (Act V of 1898), to interfere with an order made by a subordinate Court under section 476 of the Criminal Procedure Code (Act V of 1898) directing the prosecution of any person for the offences referred to in that section.

The High Court in this case refused to stay criminal proceedings directed by a subordinate Court under section 476 of the Criminal Procedure Code (Act V of 1898) until an appeal in the civil suit in connection with which the criminal charges were made had been decided.

(Note) This case is R: 26 All. 249; 1904 All. W. N. 15.

APPLICATION to stay criminal proceedings against the applicant pending an appeal in a civil suit.

The applicant, Bal Gangadhar Tilak, and others, obtained probate of a certain will. Subsequently a suit was brought against them in the District Court at Poona to have the probate revoked, and after a trial, the Judge passed a decree revoking the probate. He also, under section 476 of the Criminal Procedure Code (Act V of 1898), made an order sanctioning the prosecution of the applicant for offences under sections 196 and 211 of the Indian Penal Code (Act XLV of 1860) committed by the applicant in the course of the suit for revocation of probate.

The applicant appealed to the High Court against the decree of the District Court revoking the probate and then applied for a stay of the criminal proceedings sanctioned against him pending the disposal by the High Court of the appeal in the probate suit.

The High Court granted a rule *nisi*.

Branson (with him *D. A. Khare*) for the applicant, in support of the rule.

Scott (Advocate General) (with him the Government Pleader) for the Crown to show cause.

CROWE, J.:—The Advocate General, instructed by the Government Pleader, appeared to show cause against the rule granted by Candy and Fulton, JJ., for stay of criminal proceedings and *ad interim* stay until the hearing of the civil appeal (No. 38 of 1902) against the order in the miscellaneous application No. 112 of 1901 under Act V of 1881. Mr. Branson and Mr. D. A. Khare appeared to supoort the rule.

The first question which arises is whether the High Court has jurisdiction to interfere and direct a stay of proceedings. It was contended by the Advocate

* Criminal Application for Revision, No. 34 of 1902.

Digitized by Google

General on the authority of *Ram Persad Hazaree* v. *Soomuthra Dabee*, (1) which was decided by a Full Bench, that the High Court could not entertain an appeal against an order of a Court under section 170 of Act XXV of 1861, and that as a Court of Revision it could not reverse such order on the ground that it was not warranted by the facts, for as a Court of Revision it could not reverse an order except for error in law. Sir Barnes Peacock, who delivered the judgment of the Court, went on to say: If the Court as a Court of Appeal, or as a Court of Revision, cannot reverse or alter such an order, I cannot see any inherent authority which it has to stay proceedings." A similar view, as far as the power to reverse or alter such an order is concerned, was held on a Full Bench decision of the Allahabad High Court in *Barkat-ul-lah Khan* v. *Rennie* (2). These cases have reference to the law as it existed prior to the passing of the Criminal Procedure Code of 1882. The learned counsel further relied on *Queen-Empress* v. *Rachappa*,(3) where it was held that in the case where a complaint is made by the Court itself under section 476 of the Criminal Procedure Code a superior Court has no power to set it aside.

The recent decisions of all the High Courts, however, are unanimous in holding that the High Court is competent in the exercise of its revisional powers to interfere with an order of a subordinate Court made under section 476 directing the prosecution of any person for offences referred to in that section. It was held in *Khepu Nath* v. *Grish Chunder* (4) that, under the powers conferred by section 439, the High Court has jurisdiction to alter or reverse any such order. In exercising its powers of revision the High Court has the powers conferred on a Court of Appeal by section 423. This ruling was followed in *Chaudhari Mahomed Izharul Huq* v. *Queen-Empress*, (5) where it was held that "the High Court has jurisdiction to interpose in the case of an order made by a Court under section 476 of the Criminal Procedure Code, and has also the power to determine whether the discretion given by that section has or has not been properly exercised." To that judgment Rampini, J., was a party. In a later case, *Raj Kumari Debi* v. *Bama Sundari Debi*, (6) the High Court granted a rule to show cause why the criminal proceedings, initiated under the provisions of section 476, should not be stayed until the decision of a civil suit. The rule was argued before Ghose and Rampini; JJ. "The Court held that the rule should be discharged Rampini, J., was of opinion that it would not be right to postpone the criminal proceedings till after the termination of the civil suit, and following the Full Bench decision in *In the matter of Ram Prosad Hazra* (7) held that the Court had no power to direct that criminal proceedings should be stayed until the disposal of a civil appeal in which the question at issue in the criminal proceedings should be decided. Ghose, J., though agreeing in the view that the rule should be discharged, differed from his learned colleague as to the powers of the High Court to interfere with an order for prosecution made under section 476, having regard to the change of the law effected by section 439 of the Code of 1882 in respect of the revisional powers of the Court.

In the matter of the petition of *Mathura Das* (8) it was held by Aikman, J., dissenting from *Queen* v. *Rachappa*, (9) that the High Court has power under section 439 of the Code to consider the propriety of an order which purports to be passed under section 476 of the Criminal Procedure Code.

(1) (1866) 5 Cal W. R. 24 (Mis. R.) (2) (1875) 1 All. 17. (3) (1888) 13 Bom. 109.
(4) (1899) 16 Cal. 730. (5) (1892) 20 Cal. 349. (6) (1896) 23 Cal. 610.
(7) (1866) Beng. L. R. Sup. Vol. 426. (8) (1893) 16 All. 80. (9) (1888) 13 Bom. 109.

Digitized by Google

In *Queen-Empress* v. *Srinivasalu Naidu* (1) a Full Bench of the Madras High Court held that a High Court, as Court of Revision, has power under section 439 to revoke an order made by a subordinate Court under section 476 of the Code of Criminal Procedure.

To come now to the Bombay cases. The view taken by the Judges in *Queen-Empress* v *Rachappa*, (2) referred to above, was that the High Court had no power to revise an order under section 476. In *In re Shri Nana Maharaj* (3) the Bombay High Court disposed of an application to stay criminal proceedings pending civil litigation. The High Court declined to make any order interfering with the discretion of the Subordinate Judge; but Jardine, J., remarked that the Court had often acted on the principle that criminal proceedings should not go on during the pendency of civil litigation, following *Queen* v. *Ingham* (4) and *Rex* v. *Simmons*, (5) and added that the principles there enunciated ought, in their opinion, to guide the future action of the Subordinate Judge under section 476 and of any Magistrate to whom he may send the accused.

The latest ruling of the Bombay High Court is that in *Queen-Empress* v. *Nusserwanji*, an unreported case, but printed at page 895 of Mr. Ratanlal Ranchhoddas' volume of "Unreported Criminal Cases of the High Court of Bombay." The learned Judges, Ranade and Fulton, JJ., there held that the High Court had jurisdiction to deal in revision with an order passed by a subordinate Court under section 476, Criminal Procedure Code, directing an enquiry into an alleged offence punishable under section 193 of the Penal Code. The Court there pointed out that there had been conflicting decisions on the point of jurisdiction which it was not easy to reconcile, and after reviewing the cases followed the Calcutta and Allahabad High Courts in holding that they had jurisdiction, under section 439, to revise orders passed under section 476 to the same extent that they have in respect of orders passed under section 195 sanctioning prosecution for certain offences; which power of interference was to be exercised with a view to see if the discretion of the subordinate Courts has been properly exercised.

A review of all the rulings cited above shows that all of the High Courts concur in the view that the power of revision, conferred by section 439 of the Criminal Procedure Code, extends to orders passed under section 476 of the Criminal Procedure Code. On this point now it is clear that no conflict exists.

The next question for consideration is whether the High Court has power to order a stay of the criminal proceedings in a complaint respecting the offences of perjury, making and using false documents, and making a false complaint to a Magistrate, pending the disposal of the appeal preferred to this Court against the order in application No. 112 of 1901 under Act V of 1881. The petition also includes a prayer for stay of criminal proceedings pending the decision in the Court of the First Class Subordinate Judge, Poona, in suit No. 358 of 1901, but the last prayer was not pressed at all by Mr. Branson. Apart from the remarks of Jardine, J., in *In re Shri Nana Maharaj* (3) we have been unable to find any authority in the decisions of this Court bearing on the point. In the Full Bench Calcutta case, *In re Ram Prosad Hazra*, (6) Macpherson, J., while expressing his entire concurrence with the opinion of the Chief Justice, observed: "I may add that considering the Legislature has thought fit to empower Courts in their discretion to direct criminal prosecution of persons who

(1) (1897) 21 Mad. 124. (2) (1888) 13 Bom. 109. (3) (1892) 16 Bom. 729. (4) (1849) 14 Q. B. 396. (5) (1837) 8 C. and P. 50. (6) (1866) Beng. L. R. (Sup. Vol.) 426.

Digitized by Google

commit certain offences in the course of proceedings before those Courts, it would, as it seems to me, almost amount to an absurdity if a prosecution, so ordered to be had, were to be suspended merely because an appeal is pending from the decree made in the suit in the course of which the act or omission which is the subject of the prosecution was committed." In the recent case of *Raj Kumari Debi* v. *Bama Sundari Debi*, (1) Rampini, J., remarked: "The petitioner being the plaintiff has the command of the civil suit. She can prolong the proceedings in it at her pleasure, and if the prosecution of the Criminal proceedings against her are made dependent on the prosecution by her of the civil suit, it is scarcely to be expected, I think, that she will be expeditious in bringing this civil suit to an end. In these circumstances I do not think it would be right to postpone the criminal proceedings till after the termination of the civil suit." And Ghose, J., whose opinion stands alone that the Court has power to stay criminal proceedings having regard to the large powers it possesses under section 439 of the Criminal Procedure Code, under section 15 of the Charter Act and sections 28 and 29 of the Letters Patent, if a sufficient cause in that behalf is made out, goes on to observe: "At the same time I feel bound to say that when the Legislature has given to a Magistrate the power to regulate the proceedings in his own Court, the discretion should ordinarily be left to the Magistrate either to stay proceedings or not, as he in the circumstances of the case, may think it right and proper." Commenting on the decision of the Bombay High Court in *In re Devji valad Bhavani* (2) the same learned Judge remarks: "I am not myself prepared to say that, as a general rule, a proceeding in a Criminal Court should be stayed pending the decision of a civil suit in regard to the same subject-matter; but what I think I might properly say is that *ordinarily* it is not desirable, if the parties to the two proceedings are substantially the same and the prosecution before the Magistrate is but a private prosecution, and the issues in the two Courts are substantially identical, that both the cases should go on at one and the same time." In the case reported in *In re Devji valad Bhavani* (2) their Lordships said: "No doubt this Court has often acted on the principle that criminal proceedings should not go on during the pendency of civil litigation regarding the same subject-matter. But we do not think that this is an invariable rule"; and in that case this Court refused to interfere. Looking to the words of section 476 it is quite clear that a Magistrate is bound to proceed with the investigation of a case sent to him by a Civil Court. The words are peremptory "such Magistrate shall thereupon proceed according to law and as if upon complaint made and recorded under section 200."

To come now to the merits of this particular case, the question is whether any grounds have been shown why proceedings should be stayed. Section 435 of the Criminal Procedure Code is, no doubt, of the widest operation and enables the Court to examine the record of any proceeding before any inferior Criminal Court for the purpose of satisfying itself as to the correctness, legality or propriety of any order of such inferior Court. It is not contended that the order is incorrect or illegal, and the only ground on which its propriety is impugned is that it directs an inquiry into certain alleged offences, while, as a matter of fact, a civil appeal is pending. The Court, if such an offence as is described has been committed before it or is brought to its notice in the course of a judicial proceeding, is justified in taking immediate action; and it seems to us in the highest degree desirable that the inquiry should be conducted both in the interests of justice as well as of the accused and of all parties concerned as speedily as possible. It is open to the Magistrate in the exercise of his discretion

(1) (1896) 23 Cal. 610. (2) (1899) 18 Bom. 581.

Digitized by Google

to stay proceedings until the civil appeal is decided if he thinks that any advantage will be gained by doing so. In any case it is his duty to decide on the evidence before him whether any offence has been committed or not, and whatever conclusion he may arrive at cannot possibly affect the decision of the civil proceeding, nor, on the other hand, would the decision in the civil appeal be binding on him. We concur in the observations of Aikman, J., *In re Mathura Das*(1) that when offences against public justice are committed, it would be well if Courts availed themselves more fully of the provisions of section 476 instead of leaving the prosecution to private parties, who often use the sanction granted to them for gratification of private malice. The effect of such a course, however would be entirely frustrated if the proceedings were invariably allowed to be delayed pending the disposal of the civil litigation, which might be indefinitely protracted even up to a final decision on appeal to the Privy Council.

For these reasons we think that the rule should be discharged.

The conclusion at which we have arrived that no impropriety justifying any interference by way of revision has been made out, renders it unnecessary for us to discuss the question whether under section 435 empowering the High Court to "call for and examine the record of any proceeding before any inferior Criminal Court.....for the purpose of satisfying itself.....as to the correctness, legality or propriety of any finding, sentence or order, accorded or passed, and as to the regularity of any proceedings of such inferior Court," or section 439, sub-section 1, 3 and 4 of which contemplate a case in which sentence has been passed and final decision has been arrived at, the High Court at this stage can interfere with the action taken by a Civil Court in sending a case for inquiry and trial under section 476.

VOLUME XXVII.

1902. *September* 25. **I. L. R. 27 Bom. 84.**

Before Mr. Justice Crowe and Mr. Justice Aston.

EMPEROR *v.* VARJIVANDAS *alias* KALIDAS BHAIDAS.*

Jurisdiction—Revisional Jurisdiction of High Court—Criminal Procedure Code (Act V of 1898), sections 423, 439—Presidency Magistrate—Discharge of accused person under section 209 of Criminal Procedure Code (Act V of 1898)—Order of discharge set aside by High Court and order made that accused be arrested and committed for trial at the Sessions of the High Court—Practice—Procedure—Sufficient ground for committing for trial, what is.

Under sections 439 and 423 of the Criminal Procedure Code, the High Court has jurisdiction to set aside an order of discharge passed by a Presidency Magistrate, if such preliminary be necessary, and to direct that a person improperly discharged of an offence be arrested and forthwith committed for trial.

The fact, that by section 439 of the Criminal Procedure Code (Act V of 1898) the High Court in its revisional jurisdiction may exercise all the powers given to it as a Court of Appeal (by section 423), except (see paragraph 4) the power of converting a finding of acquittal into one of conviction, seems to point to the conclusion that all other powers not expressly excluded may be exercised by the High Court as a Court of Revision.

The words in section 209 of the Criminal Procedure Code "sufficient ground for committing" mean, not sufficient ground for convicting, but refer to a case in which the evidence is sufficient to put the accused on his trial, and such a case arises when credible witnesses make statements which, if believed, would sustain conviction. It is not necessary that the Magistrate should satisfy himself fully of the guilt of the accused before making a commitment. It is his

(1) (1893) 16 All. 80.

* Criminal Application for Revision, No. 142 of 1902.

Digitized by Google

duty to commit when the evidence for the prosecution is sufficient to make out a *prima facie* case against the accused, and he exercises a wrong discretion if he takes upon himself to discharge an accused in the face of evidence which might justify a conviction.

RULE granted under section 435 of the Criminal Procedure Code (Act V of 1898) to the Public Prosecutor, calling on Varjivandas *alias* Kalidas Bhaidas to show cause why the order passed by Mr. Binning, Acting Chief Presidency Magistrate, discharging him under section 209 of the Criminal Procedure Code, should not be set aside and why he should not be committed to the Court of Sessions for trial on charges under sections 471 and 109 of the Indian Penal Code (XLV of 1860).

The said Varjivandas (with four other accused) was charged before the Chief Presidency Magistrate with using and abetting the use of a forged document but, under section 209 of the Criminal Procedure Code, was discharged by the Magistrate, who was of opinion that there was no evidence against him.

The Public Prosecutor thereupon applied to the High Court under section 435 of the Criminal Procedure Code (Act V of 1898), contending that sufficient evidence had been given to justify the committal of the accused for trial. The High Court granted the rule as above set forth.

Scott (Advocate General) (with him *Nicholson*, Public Prosecutor) for the Crown.

Branson (with him *G. S. Rao*) for the accused.

CROWE, J. :—This was a rule granted to the Public Prosecutor calling on Varjivandas *alias* Kalidas Bhaidas to show cause why the order passed by Mr. Binning, Acting Chief Presidency Magistrate, discharging him under section 209 of the Criminal Procedure Code (Act V of 1898), should not be set aside and why he should not be committed to the Court of Sessions for trial on charges under sections 471 and 109 of the Indian Penal Code.

Mr. Branson, who has appeared to show cause against the rule, has contended that it is not competent to this Court to set aside the order and direct the commitment of the accused either under the provisions of the Code of Criminal Procedure or under the Charter or the Charter Act, and that the prosecution is not prejudiced in any way because it is open to them to make a fresh application, the order of discharge not amounting to an acquittal. The learned Counsel drew our attention to several Calcutta cases in which, he argued, there was considerable divergence of opinion, and submitted that there was no authority in any ruling of the Bombay High Court for the construction which had been placed on section 15 of the Charter Act and section 28 of the Charter by the Calcutta High Court.

The first case to which our attention was drawn is that of *Charoobala* v. *Barendra Nath* (1) in which the Court, consisting of Prinsep and Hill, JJ., differing from Ghose and Wilkins, JJ., in *Colville* v. *Kristo Kishore*,(2) held that the High Court has powers of revision in respect of an order of discharge passed by a Presidency Magistrate, by reason, not of section 28 of the Letters Patent, 1865, but of section 15 of the Charter Act (24 and 25 Vic., c. 104). Their Lordships added that the High Court had no power under the Code of Criminal Procedure to interfere in revision with an order of dismissal or discharge passed by a Presidency Magistrate In *Colville* v. *Kristo Kishore*(2) the Court had held that under sections 435 and 439, read with section 423 of the Criminal Procedure Code, it had power to revise the proceedings of a Presidency Magistrate

(1) (1899) 27 Cal. 126. (2) (1899) 26 Cal. 746.

Digitized by Google

and order a further enquiry to be made, and that it had the same power under clause 26 of the Letters Patent of 1165.

We do not think it is necessary to go so far afield as the Charter or Charter Act in order to find authority for the power to revise the proceedings of a Presidency Magistrate, as the provisions of the Criminal Procedure Code seem perfectly clear on the point. The sections which bear on the question of the revisional powers of the Court are sections 435-439. Under section 435 the High Court has power to call for and examine the record of any proceedings before any inferior Criminal Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence of order recorded or passed. It cannot be conteded that the Court of the Presidency Magistrate is not within the term "any inferior Criminal Court," as section 441 refers to certain proceedings which may be taken by explicitly any Presidency Magistrate when its record is called for by the High Court under section 435. Section 439 enumerates the powers which the Court may exercise in revision, and it declares that in *any* proceeding, the record of which has been called for, or reported for orders or otherwise comes to its knowledge, the High Court may in its discretion exercise any of the powers conferred on a Court of Appeal by certain preceding sections, among others by section 423. Now among the various powers specified in section 423 is the power of directing that an accused may be committed for trial. It is not necessary that the Court should be exercising its functions in an appeal from an acquittal. What the law says is that it may exercise the same power in revision, in any proceeding whatever, as it could have exercised in hearing an appeal from an acquittal. This was the view adopted by the Allahabad High Court in *Empress* v. *Ram Lal Singh and others*, (1) with which we express our concurrence.

But it was contended that this power could not be exercised in the case of an accused person who had been discharged, as special provision had been made for such cases in section 437, which did not include orders of discharge passed by Presidency Magistrates. The answer to that argument appears to be that it was the intention of the Legislature in framing section 439 to make the terms thereof sufficiently wide and comprehensive to cover all cases which were not included in section 437, and that it could never have been intended that the High Court should not possess the same powers with respect to the proceedings of Presidency Magistrates which are specially conferred on Sessions Judges and District Magistrates with respect to the revision of the sentences, findings or orders of the Courts subordinate to them. However that may be, it is clear in the wording of the section that in any proceeding the powers enumerated in section 423 may be exercised, subject only to the limitation set forth in paragraph 4, that nothing in the section shall be deemed to authorise a High Court acting in revision to convert a finding of acquittal into one of conviction. The fact that this particular power, which is conferred by section 423 on Courts in the exercise of their appellate jurisdiction, is excluded in express terms in section 439 seems clearly to point to the conclusion that all the other powers not expressly excluded may be exercised by the High Court as a Court of Revision. We notice in the Full Bench dicision in *Hari Dass Sanyal* v. *Saritulla*, (2) Wilson, J., whose judgment was concurred in by a majority of the Court, stated his opinion that the High Court, under section 423 embodied in section 439, could set aside an order of discharge and direct a charge to be framed and tried by the proper Court. After pointing out that sections 435 to 439 must be read together, and reciting

(1) (1883) 6 All. 40. (2) (1888) 15 Cal. 608.

Digitized by Google

the terms of section 435, he remarks: "This I read as an express enactment that every finding, sentence or order is liable to review, not only on the ground of illegality or irregularity, but also on the ground of incorrectness, that is to say, on the ground that it is wrong on the merits. And an order of discharge is no exception to the general rule. I do not mean to say that an order of discharge may not, under the subsequent sections, be set aside on other grounds, such as the discovery of fresh evidence, but only that it is liable to be so dealt with on any of the grounds here mentioned

"The second point for enquiry is, what tribunals have jurisdiction to set aside an order of discharge? This Court has power under section 439 to deal as a Court of Revision with any finding, sentence or order which comes under its notice." In consideration, then, of sections 439 and 423 of the Criminal Procedure Code when read together, we think it is clear that the Court has jurisdiction to set aside an order of discharge if such preliminary be necessary, and to direct that a person improperly discharged of an offence be arrested and forthwith committed for trial, and this view is covered by the authority.

The next point which arises is whether the order of discharge was illegal or incorrect or otherwise improper, *i. e.*, was it wrong on the merits? The order of the Presidency Magistrate is briefly expressed in these words: "No. 4 is discharged for want of evidence." The words in section 209, "sufficient ground for committing," have been explained to mean, not ground for convicting, but where the evidence is sufficient to put the accused on his trial, and such a case arises when credible witnesses make statements which, if believed, would sustain conviction. The weighing of their testimonies with regard to improbabilities and apparent discrepancies is more properly a function of the Court having jurisdiction to try the case. It is not necessary that the Magistrate should satisfy himself fully of the guilt of the accused before making a commitment. It is his duty to commit when the evidence for the prosecution is sufficient to make out a *prima facie* case against the accused, and he exercises a wrong discretion if he takes upon himself to discharge an accused in the face of evidence which might justify a conviction.

It is contended by the learned Advocate General that there was sufficient evidence before the Magistrate to justify the committal of the accused and he refers to the admissions made by accused himself before Mr. Karsandas Chhabildas, Third Presidency Magistrate, to the *prima facie* evidence of a conspiracy between all the accused and the evidence as to what was said, done or written by the other accused in reference to common intention as bearing on the guilt of the accused, and also to the evidence of several independent witnesses examined in the course of the enquiry as to the conduct of the accused. It seems hardly necessary to go beyond the statement made by accused to Mr. Karsandas Chhabildas who has been examined as a witness in the case. He states that accused was brought to his bungalow, and he asked him if he wished to make a statement, and if any inducement or threat had been used, or any police officer had told him to tell an untruth, and he said "No," but he wanted legal advice and asked the witness to give him advice, which he refused to do and also refused to take down his statement. After some futher conversation he went away and returned in the afternoon, when he made a statement, in the course of which he said that accused 2 asked him to have a copy made of the will the draft of which was produced by accused 2; that he got it copied in a book by a Brahman in a house in Barbhaya Moholla; that Vithal Jumakhram attested it in his presence; that he asked accused 2 why this was done as there was no singnature, and that accused 2 replied that Vithaldas might turn

Digitized by Google

round, it was better to take his signature at once. Accused 2 took away the book and two or three days later he returned to his house and said he wanted a jeweller's signature, whereupon accused told him to go and see Lakhmidas Nagardas, subsequently Lakhmidas Nagardas came to see him and asked what the signature was for and he said, "I do not know: accused 2 knows; go and ask him." The Magistrate has made a note on his deposition to the effect that Mr. Kapadia objected to the evidence, as he said there was an inducement to accused, and he adds: "On reading the evidence of Mr. Sloane and Mr. Carsandas I am of opinion there is no evidence of this, and I think that conversation may be admitted."

Without going into the question of the documentary and other evidence respecting which contentions as to its admissibility have been raised, we think it sufficient to say that there is on the record of the magisterial enquiry sufficient *prima facie* evidence to require the committal of the accused for trial by the Court of Session.

We therefore direct that the accused Varjivandas *alias* Kalidas Bhaidas be committed to the Court of Session on the charges under sections 471 and 109 of the Indian Penal Code.

ASTON, J.:—I am of the same opinion. Jurisdiction to order committal of an accused person who has been improperly discharged under section 209 of the Criminal Procedure Code is clearly given to a High Court by section 439, whether the inferior Court which discharged the accused be a Presidency Magistrate or not. It is not necessary that there should be a right of appeal in order that the High Court may exercise the revisional power conferred by section 439. Seeing that this power to order in revision that an accused who has been improperly discharged shall be committed is clearly given by section 439 by express words, it is more reasonable to treat the power conferred by section 437 on a High Court to order further inquiry in the case of any accused person who has been discharged as redundant, than to treat section 437 as restricting the power expressly conferred by section 439 to order committal for trial.

On the merits I concur that the evidence recorded by the Magistrate who made the magisterial enquiry and committed other accused persons for trial establishes as against the accused Kalidas Bhaidas a *prima facie* case such as to require the committal of this accused on the charges specified.

As to the form which this Court's order should take, I would add, because much was said at the hearing as to this Court's power to set aside an order of discharge, that I know of no warrant or authority in the Code of Criminal Procedure for the doctrine that an order of discharge under section 209 needs to be set aside before an order for committal of an accused person, held to be improperly discharged, can be made. Section 403 of the Criminal Procedure Code seems to be authority to the Contrary. The learned Advocate General, however, asked, I presume *ex majore cautela*, that this may be made part of this Court's order if the accused be ordered to be committed for trial, and such an order has accordingly been included.

Digitized by Google

1902 *November* 27. I. L. R. 27 Bom. 130.

Before Mr. Justice Crowe and Mr. Justice Aston.

IN THE MATTER OF GOVERDHANDAS MEGHJI.*

Small Cause Court—Registrar of Small Cause Court—Sanction to prosecute granted by Registrar—Revocation of sanction—Chief Judge can revoke it as a public officer—Jurisdiction of Small Cause Court to revoke the sanction—Presidency Small Cause Courts Act (XV of 1882), section 35—Criminal Procedure Code (V of 1898), section 195.

The Registrar of the Court of Small Causes has authority, under section 195, clause (1) (*a*) of the Criminal Procedure Code (Act V of 1898), to grant a sanction for the prosecution of an offence under section 182 of the Indian Penal Code (Act XLV of 1860) as the public officer concerned.

It is competent to the Chief Judge of the Court of Small Causes, to whom the Registrar is by law subordinate, acting as a public servant, to revoke the sanction granted by the Registrar. But it cannot be revoked by the Small Cause Court composed of one or more Judges.

APPLICATION under section 435 of the Criminal Procedure Code (Act V of 1898) to set aside an order passed by a Full Court consisting of the Chief Judge and the Second Judge of the Presidency small Cause Court at Bombay.

On the 12th July, 1902, the applicant, Goverdhandas Meghji, applied, under section 195 of the Criminal Procedure Code (Act V of 1898), to the Registrar of the Presidency Small Cause Court at Bombay for sanction to prosecute one Pragji Ramdas for the offence of giving false information to a public servant with intent to injure another person under section 182 of the Penal Code (Act XLV of 1860). The Registrar granted the sanction.

Pragji Ramdas applied on the 25th July, 1902, to the Chief Judge of the Presidency Small Cause Court at Bombay to revoke the sanction to prosecute granted by the Registrar. The Chief Judge caused a notice to be issued calling on Goverdhandas Meghji to show cause why this sanction should not be revoked.

On the 4th August, 1902, the notice came on before the Chief Judge for hearing, when Goverdhandas Meghji took the preliminary point that the matter was one for the Full Court and not for a single Judge to dispose of, relying upon sections 35 and 36 of the Presidency Small Cause Courts (Act XV of 1882).

The notice was accordingly argued before a Full Court consisting of the Chief Judge and the Second Judge on the 5th August, 1902. The Full Court revoked the order granting the sanction.

Goverdhandas Meghji thereupon applied to the High Court under its Criminal Revisional Jurisdiction to set aside the order of revocation.

P. N. Godinho for the applicant:—The Full Court had no power to revoke the sanction granted by the Registrar. It has no criminal revisional power. Its power is regulated by section 77 of the Presidency Small Cause Courts Act (XV of 1882). The Registrar of the Presidency Small Cause Court has judicial powers under section 35 and 36 of the Presidency Small Cause Courts Act (XV of 1882). He has power to grant sanction under section 195 (1) (*a*) of the Criminal Procedure Code (Act V of 1898). The granting of sanction is a judicial act (*Queen-Empress* v. *Zorawar* (1)), and an application to revoke a sanction is a criminal proceeding in revision: *Queen-Empress* v. *Ganesh* (2); *Mahdi Husan* v. *Tota Ram* (3); *Zahur Ahmad* v. *Muhammad Husan*. (4)

An application for a sanction must in the first instance be made to the Registrar: *In re Raja of Venkatagiri* (5); *Empress of India* v. *Sabsukh*. (6)

* Criminal Application for Revision No. 141 of 1902.

(1) (1890) All. W. Notes, 1890, p. 168. (2) (1897) 23 Bom. 50. (3) (1892) 15 All. 61.
(4) (1893) All. W. Notes, 1893, p. 147. (5) (1871) 6 Mad. H. C. R. 92. (6) (1879) 2 All. 533

Digitized by Google

That sanction having been given by him in his judicial capacity, neither the Chief Judge nor the Full Court of the Small Cause Court could interfere. It is only the High Court that has power to set aside the sanction under section 195 (7) (c) of the Criminal Procedure Code (Act V of 1898).

H. C. Coyaji for the opponent :—The sanction was rightly revoked. The Chief Judge has power to revoke a sanction granted by the Registrar. Section 13 of the Presidency Small Cause Courts Act (XV of 1882) shows that the Registrar is not a Judge but only the " Chief Ministerial Officer of the Court," and it enacts that " the Registrar.....shall exercise such powers, and discharge such duties, of a ministerial nature as the Chief Judge may from time, by rule, direct. " The Chief Judge has also the power to suspend the Registrar, and even to remove him subject to the orders of the Local Government. Section 14 empowers the Local Government to invest the Registrar with the powers of a Judge under this Act " for the trial of suits in which the amount or value of the subject-matter does not exceed 20 rupees." When he is invested with the powers of a Judge under section 14 he exercises those powers only in suits specified in that section. For all other purposes he is merely " the Chief Ministerial Officer of the Court." For the purpose of the present case, however, section 14 need not be considered at all, as the Local Government has not invested the present incumbent with the powers referred to therein. Reliance is placed on section 35, and it is contended that in execution proceedings the Registrar sits as a Judge. The section no doubt confers on him the power to " make any order in respect thereof which a Judge of the Court might make under this Act, " but it does not for that reason constitute him a Judge : *Queen-Empress* v. *Tulja.* (1) That was a case of a Registrar appointed under the Indian Registration Act (III of 1877), " as if he were a Court. " The Registrar's proceedings under section 35 are of the " non-judicial or quasi-judicial " nature referred to in section 33.

Assuming that the Registrar had power to grant a sanction, the case falls under section 195 (1) (c) of the Criminal Procedure Code. The Chief Judge is the authority to whom the Registrar is subordinate, therefore under section 195 (6) of the Code it is competent to the Chief Judge to revoke the sanction.

On the merits, we submit that the sanction was granted improperly, without notice to us and without any inquiry, and should be revoked. In *In re Bal Gangadhar Tilak* (2) their Lordships held : " It is true that notice is not legally necessary.....but.....it is desirable (and is generally so recognized) that notice should be given before sanction is granted. "

PER CURIAM :—This is an application to set aside an order purporting to be passed by a Full Court of the Small Causes Court, consisting of the Chief Judge and the Second Judge, revoking a sanction granted by the Registrar of the Court of Small Causes to prosecute one Pragji Ramdas for an offence under section 182 of the Indian Penal Code.

It is contended that the Registrar in granting the sanction acted in a judicial capacity, being authorized under section 25 of the Small Cause Courts Act to make any order in respect of the committal and discharge of judgment-debtors which a Judge of the Court might make under the Act, and that the order granting sanction was passed while acting as a Judge, that under the provisions of section 195, sub-section (6), of the Criminal Procedure Code a sanction given under that section can only be revoked by any authority to which the authority giving it is subordinate, that under sub-section (7) of the

(1) 1887) 12 Bom. 36 at p. 42. (2) (1902) 4 Bom, L. R. 750 at p. 753.

Digitized by Google

same section a Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, and that under clause (*c*) of of the same sub-section, where no appeal lies, such Court shall be deemed to be subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction such first-mentioned Court is situate. It was further urged that the Full Court had no appellate jurisdiction over the acts of the Registrar purporting to be done under section 35 of the Small Cause Courts Act and that it had no revisional criminal jurisdiction, that the only Court which could have revoked the sanction was the High Court under section 195, sub-section 7, clause (*c*) of the Criminal Procedure Code.

Assuming that the order was made by the Registrar in his judicial capacity, it seems to our minds quite clear that the Small Cause Court whether presided over by a single Judge or by two Judges, had no jurisdiction to revoke the sanction, having regard to the provisions of section 195 of the Criminal Procedure Code. But it is unnecessary to discuss that question any further, because we are of opinion that the order granting the sanction must be held to have been passed by the Registrar as a public servant. Section 35, as well as certain other sections of the Small Cause Courts Act, refers to what a Judge of the Court may do, but there is no mention throughout the Act of any powers being conferred on a single Judge of the Court. With the exception of duties which are specifically imposed on the Chief Justice or his *locum tenens*, there appears to be no provision regarding the powers which may be exercised by a single Judge, and no rule has been pointed out to us under section 9 of the Act providing for the exercise by one or more of the Judges of any of the powers conferred on the Small Cause Court by the Act. The Act all along speaks of the powers of the Small Cause Court. We hold that the Registrar had authority under section 195, sub-section 1, clause (*a*), to grant a sanction for the prosecution of an offence under section 182, Indian Penal Code, as the public servant concerned. It was also equally competent to the Chief Judge, to whom the Registrar is by law subordinate, acting as a public servant, to revoke the sanction.

The difficulty in the case has arisen from the confusion which apparently existed in the mind of the Chief Judge as to the capacity in which he was by law empowered to act, and he was in error in treating the matter as one for decision of the Small Cause Court, as he appears throughout to have done, both in the proceedings, in his letter (No. 72 of 9th September, 1902) to the Registrar of the Court, and his subsequent statement of the case dated 19th September, 1902. We notice that in the final paragraph of that statement he observes: " The Registrar has never, during the twenty years since his office was created, granted a sanction to prosecute, and I have now issued an order to him that he should not do so again." It would be as well if the legality of such an order were reconsidered.

We are of opinion that the Small Cause Court had no power to revoke sanction, and that the Full Court had no jurisdiction to do so, but that such power is vested in the Chief Judge to whom as a public servant the Registrar is subordinate. We therefore set aside the order, and return the case to the Chief Judge for passing such order as may seem to him proper in the circumstances of the case.

Order reversed.

Digitized by Google

1902 *November* 27. I. L. R. 27 Bom. 135.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

EMPEROR *v.* SHERUFALLI ALLIBHOY.*

Criminal Procedure Code (Act V of 1898), sections 234 and 235—Number of charges—Same transaction.

The fact that offences are committed at different times does not necessarily show that they may not be so connected as to fall within section 235 of the Criminal Procedure Code (Act V of 1898). The occasions may be different, but there may be a continuity and a community of purpose. The real and substantial test by which to determine whether several offences are so connected as to form the same transaction depends on whether they are so related to one another in point of purpose, or as causes and effect, or as principal and subsidiary acts, as to constitute one continuous action.

The accused was tried at one trial for three offences : (1) for having in his possession on the 9th October, 1902, certain stencil plates for the purpose of counterfeiting Hubbock and Company's trade-mark on two kegs of paint (section 485 of the Indian Penal Code), (2) for having, on or about the 7th October, 1902, sold 12 kegs of paint to which a counterfeit trade-mark was affixed (under section 486 of the Indian Penal Code), and (3) for having in his possession for sale on or about the 9th October, 1902, certain kegs of paint purporting to be Hubbock's paint having a counterfeit trade-mark (under section 486). He appeals, contending that the trial was illegal, inasmuch as he had been charged at one trial with offences which were not connected together so as to form the same transaction, under section 235 (1) of the Criminal Procedure Code (Act V of 1898.)

Held, dismissing the appeal, that the trial was not illegal. There was a community and also a continuity of purpose in the possession and the sale—the possession of the instruments was the cause, the possession of the kegs and their sale the effect, and both the possession and the sale had one intention and aimed at one result, namely, that of deceiving buyers into purchasing what was not the genuine article of Hubbock and Company.

APPEAL from a conviction and sentence recorded by J. Sanders Slater, Chief Presidency Magistrate of Bombay.

The accused was charged at one trial with the three following offences, viz. :

(1) having in his possession on the 9th October, 1902, certain stencil plates for the purpose of counterfeiting Messrs Hubbock & Co.'s trade-mark on kegs of paint (section 485 of the Indian Penal Code) ;

(2) with selling on the 7th October, 1902, 12 kegs of paint bearing a counterfeit trade-mark (section 486 of the Indian Penal Code) ; and.

(3) with having in his possession for sale on 9th October, 1902, a certain number of kegs of paint bearing a counterfeit trade mark (section 486 of the Code).

The Magistrate convicted the accused on each charge, and sentenced him on the first to eighteen months' rigorous imprisonment, and on each of the others to one year's rigorous imprisonment. The sentences were ordered to run concurrently.

The accused appealed, contending, *inter alia*, that he had been illegally tried at one trial for three separate offences, those charged in the first two charges being punishable under different sections of the Indian Penal Code and having (as alleged) taken place at different dates, and that the acts which were alleged to constitute the two offences did not form part of the same transaction.

Strangman (with Messrs. *Payne, Gilbert, Sayani and Moos*) for the accused.

Scott (Advocate General) and *Lowndes* (with Messrs. *Crawford, Brown & Co.*) for the complainant.

* Criminal Appeal No. 393 of 1902.

Digitized by Google

CHANDAVARKAR, J. :—The petitioner, Sherufalli Allibhoy, was tried before the Chief Presidency Magistrate Bombay, on three charges: firstly, under section 485 of the Indian Penal Code, having in his possession on the 9th October, 1902, certain stencil plates for the purpose of counterfeiting Messrs. Hubbock & Co. Limited's trade-mark on two kegs of paint; secondly, under section 486 of the Indian Penal Code, having on or about the 7th October, 1902 at Bombay, sold two kegs to which a counterfeit trade-mark was affixed without taking reasonable precautions, &c.; thirdly, under section 486 of the Indian Penal Code, having in his possession for sale on or about the 9th October, 1902, certain kegs of paint purporting to be Hubbock's paint, having a counterfeit trade-mark. The Magistrate convicted the petitioner on each of the charges and sentenced him to eighteen months' rigorous imprisonment on the first and to one year's rigorous imprisonment on each of the other two charges. He also directed the sentence to run concurrently. The petitioner now appeals against the convictions and sentences.

The first point raised before us in support of the appeal is that the trial was illegal and must be quashed, because the Magistrate charged the petitioner at one trial with offences which were neither of the same kind, under section 234, nor connected together so as to form the same transaction, under sub-section 1, section 235 of the Code of Criminal Procedure. Mr. Strangman, who has appeared for the petitioner and argued the appeal, conceded that if the offences of which his client has been convicted could be regarded as arising out of the same transaction, the point raised by him should fail. His argument is that they do not arise out of the same transaction, because the first charge related to having had possession on the 9th of October, 1902, of instruments for counterfeiting, whereas the second charge relates to a sale on the 7th October, 1902, of certain counterfeit articles—that in other words, as the two offences related to two different occasions, they could not be regarded as "one series of acts so connected together as to form the same transaction." Briefly put, the argument makes time the test, and the sole test, for determining whether two or more offences arise out of one and the same transaction. But, in my opinion, there is no principle on which we can hold that, merely because an offence is committed at one time and another offence is committed at another, they should be regarded as not falling within the category of offences contemplated by sub-section 1 of section 235 of the Code of Criminal Procedure, whatever in other respects be their interrelation or interdependence. Some of the illustrations to the sub-section in question serve to throw light on its real meaning. Illustration (*c*) says:

A entices *B*, the wife of *C*, away from *C*, with intent to commit adultery with *B*, and then commits adultery with her. *A* may be separately charged with and convicted of offences under sections 498 and 497--of the Indian Penal Code.

Here the enticing away and the adultery take place on different occasions but the two acts are connected together, because there is not only continuity of time but also continuity of purpose in them, and, therefore, they are connected together so as to form the same transaction. Illustration (*f*) says:

A, with intent to cause injury to *B*, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial *A* gives false evidence against *B*, intending thereby to cause *B* to be convicted of a capital offence. *A* may be separately charged with and convicted of offences under sections 211 and 194 of the Indian Penal Code.

Here, again, the occasions when the two offences were committed were different; but there was a continuity and community of purpose. The real and substantial test, then, for determining whether several offences are connected together so as to form the same transaction depends upon whether they

Digitized by Google

are so related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action. A mere interval of time between the commission of one offence and another does not by itself necessarily import want of continuity, though the length of the interval may be an important element in determining the question of connection between the two. For instance, in *Queen-Empress* v. *Vajiram*(1) proximity of time, combined with the case as to intention and similarity of action and result, was held to bring several offences as to several fraudulent transfers of property within the meaning of the words "same transaction" in section 235 of the Code of Criminal Procedure.

Judged by these considerations, the present case must be held to fall distinctly within the scope of sub-section 1 of that section. The petitioner sold a number of kegs having a counterfeit trade-mark of Hubbock's on the 7th of October, 1902; on the 9th October he was found in possession of more kegs of the same description and of instruments for counterfeiting them. There was a community and also continuity of purpose in the possession and the sale—the possession of the instruments was the cause, the possession of the kegs and their sale the effect; and both the possession and the sale had one intention and aimed at one result, of deceiving buyers into purchasing what was not the genuine article of Hubbock. There was, therefore, no illegality in the trial.

Passing on to the merits, the main facts of the case relied upon by the prosecution and found proved by the Chief Presidency Magistrate on the evidence have not been challenged before us by Mr. Strangman in arguing the appeal; but the plea advanced in support of the petitioner's innocence is that he had taken charge of the shop where the counterfeit articles were found only six months before the finding. But no evidence was adduced before the Magistrate to prove that plea and to prove that the instruments for counterfeiting had been kept in the shop without his knowledge by his deceased partner and uncle. In the absence of such evidence the Magistrate was right in giving effect to the evidence of the prosecution and attaching no weight to the unsubstantiated statement of the petitioner. As to the sentence which is complained of as excessive and severe, we do not think that it errs at all on the side of severity, considering the nature of the offence and the necessity, in public interests, of protecting commerce from fraudulent dealings. We dismiss the appeal.

ASTON, J.:—I concur in the view that the possession up to 9th October 1902, of stencil plates for the purpose of counterfeiting Messrs. Hubbock & Co's trade-mark, the possession for sale up to 9th October, 1902, of goods marked with the counterfeit trade-mark, together with the sale on or about the 7th October of certain kegs marked with the counterfeit trade-mark, were parts of "one series of acts so connected together as to form the same transaction," and the offences charged in respect of each of these acts could, therefore, under section 235 of the Criminal Procedure Code, be tried at the same trial. On the merits the guilt of the appellant is, I think, established by clear evidence, and there is no ground for reducing the sentences.

Appeal dismissed.

(1) (1892) 16 Bom. 414.

Digitized by Google

1903. *June* 16. I. L. R. 27 Bom. 551.

Before the Honourable Mr. E. T. Candy, Acting Chief Justice, and Mr. Justice Chandavarkar.

EMPEROR *v.* JAMSETJI CAWASJI CAMA. *

Abkari Act (Bombay Act V of 1878), sections 3 (9), 62—Medicated article—Intoxicating drug—Cocaine.

The term "medicated article" as used in section 62 of the Bombay Abkari Act (Bombay Act V of 1878), applies to something which is manufactured and by that manufacture is imbued with certain medicinal properties. It does not therefore include cocaine, which is a medicine *per se*.

The word "intoxicating" as used in section 3, clause 9 of the Bombay Abkari Act (Bombay Act V of 1878), cannot be confined to its derivative meaning, namely, poisonous: the word must be taken to be used in its popular sense, which would include the effects produced by cocaine.

APPEAL under section 417 of the Criminal Procedure Code (Act V of 1898), made by the Government of Bombay, from an order of acquittal recorded by J. Sanders Slater, Chief Presidency Magistrate of Bombay.

The accused, a chemist, was charged with having sold on or about the 27th January, 1903, ½ a dram of cocaine without a license from the Collector of Abkari, in contravention of the provisions of the Abkari Act (Bombay Act V of 1878), an offence punishable under section 43, clause (*g*) of the Act.

On the 6th February, 1903, the accused was acquitted under section 245 of the Code of Criminal Procedure (V of 1898). The Magistrate in the course of his judgment said :—

From the evidence before the Court it appears that cocaine—as it is commonly called—is a drug of an extremely deleterious character when placed in the hands of inexperienced persons, and one the sale of which with public advantage be placed under stringent restrictive rules. Its effects, when administered in other than medical doses, are highly obnoxious to human life, and when administered in medical doses for a more or less prolonged period create a craving for the drug in increasing doses. The immediate effect of the drug is to stimulate the spinal cerebral nerve centres—the stimulation being followed by corresponding depression and ultimately, in the event of continued administration of the drug in increasing doses, by paralysis of these centres and death. There can be no doubt upon the evidence that cocaine is a poison, though not, so virulent a poison as aconite, degitalis, belladonna, and other vegetable poisons. It is used medicinally, chiefly by subcutaneous injection for producing local anasthesia, in solution, and occasionally by external application, though its effect on unbroken skin is perfectly nil. But in Bombay it appears to be swallowed wrapped up in a *pan* leaf, and that without medical advice, or for any other purpose than that of enjoying the exhilarating effect which it temporarily produces. It is to check the consumption of the drug in this manner, and not with the object of interfering with its administration by medical men, that this prosecution has been instituted. If cocaine is an intoxicating drug within the meaning of the Abkari Act, vendors of the drug must be held to be amenable to the provisions of that Act, and therefore the main question which I have to decide is whether cocaine falls within the definition of "intoxicating drug" as laid down in section 3 (9) of the Act, which runs as follows :—

"Intoxicating drug" includes ganja, bhang, charas and every preparation and admixture of the same and every intoxicating drink or substance prepared from hemp, grain or other materials not included in the term "liquor" but does not include opium or anything included within the meaning of that word, as defined in the Indian Opium Act, 1878. It will be noticed that this definition is not an exhaustive one, but includes intoxicating drinks or substance prepared from hemp, grain or other material. In interpreting this enactment, which is a highly penal one, a strict construction must be placed upon, the words used, and in case the meaning of any word in this definition is doubtful it must be construed in the manner most favourable to the liberties of the subject. This is a well-known maxim of the law, but I may cite as an authority for its application in Bombay *Reg* v. *Bhista bin Madana* [I. L. R. 1 Bom. 308]. What then is the meaning to be attached to the word "intoxicating"? The first meaning of the word "intoxicate," as given in the Century Dictionary, is "to poison"; the second meaning is "to make drunk as with spirituous liquor; inebriate,", and a third meaning—a figurative one—is "to excite to a very high pitch of feeling." Which of these meanings is to be attributed to the word as used in the Abkari Act? I think I am bound to look to the words of the definition to

* Criminal Appeal No. 112 of 1903.

Digitized by Google

ascertain whether they give any clue to to the answer to this question, and on looking to those words I find a distinct clue—the intoxication must be intoxication such as causes by ganja, bhang, charas and other preparations of hemp—that is to say, that "any other material" must in my opinion, be material "*ejusdem generis*" as hemp or must produce similar effects. Major Collis-Barry in his evidence states that cocaine is in no way prepared from hemp or grain, and that it does not in any way resemble ganja or bhang. He says it is not *ejusdem generis* with them. Many references were made to treatises on the subject, *inter alia*, of cocaine, but in none of them does it appear, so far as they have been brought to the notice of the Court, that the properties or effects of cocaine resemble the properties or effects of ganja, bhang or any other preparations of hemp. The Public Prosecutor argued that opium does not resemble hemp or grain, and that therefore the mention of opium in the section indicated that the material referred to need not be material *ejusdem generis* as those mentioned. This however is entirely of a negative character, as the definition entirely excludes opium and its preparations. It is quite possible, though on that point there is no evidence before the Court, that the intoxication produced by the use of opium may resemble that produced by ganja, etc. Stated shortly, the theory of the prosecution is that "intoxicating" is synonymous with "poisonous" and that therefore cocaine is an intoxicating drug. I cannot however place that technical interpretation upon that word as used here and I hold that the word "intoxicating" must be construed to mean making drunk as with ganja or bhang. The prosecution having failed to show that cocaine is a drug which has such an effect as an ordinary consequence of its consumption, the case fails.

The Government of Bombay appealed to the High Court.

The Advocate General, with the *Public Prosecutor*, for the appellant.

S. B. Spencer for the accused.

CANDY, ACTING C. J.—It is necessary to put forth the facts which have led to the present prosecution. The case is admittedly a test one and the main question for our consideration is whether the cocaine which is the subject matter of the present case comes within the definition of "intoxicating drug" as set forth in section 3, clause (9) of Bombay Act V of 1878.

There were two lines of defence. One is under section 62 which provides:—"Nothing in the foregoing provisions of this Act applies to the manufacture, sale or supply of any *bona fide* medicated article for medicinal purposes by medical practitioners, chemists, druggists, apothecaries or keepers of dispensaries; but it shall be lawful for Government at any time, by notification in the *Bombay Government Gazette*, to prohibit the sale of any such article within any defined local area or place except under a license from the Collector, which shall be granted on payment of such fees and subject to such conditions as Government may deem fit to prescribe." We are clearly of opinion that the bottle of cocaine which was the subject of this prosecution is not a medicated article within the terms of that section. It appears to us that it is a medicine *per se* and that the term medicated article must apply to something which is manufactured and by that manufacture is imbued with certain medicinal properties. This appears to us to be a salt of the base cocaine.

Now we turn to the second line of defence, *i. e.*, the ground upon which the learned Chief Presidency Magistrate considered that the accused had not committed the offence within the terms of the Act.

Clause (9) of section 3 runs:—"Intoxicating drug includes ganja, bhang, charas and every preparation and an admixture of the same and every intoxicating drink or substance prepared from hemp, grain, or other materials not included in the term liquor but does not include opium."

The learned Chief Presidency Magistrate was of opinion that cocaine did not come within these terms, because he held that the intoxication which must be caused by any intoxicating drug falling within the terms of the section must be such an intoxication as is caused by ganja, bhang, etc., and also that the other material referred to in this section must be *ejusdem generis* with hemp, etc.

Digitized by Google

We are unable to concur with that opinion. The learned Chief Presidency Magistrate quoted a case in which it was held in accordance with well-known rulings that in construing a penal clause the Court must be very strict. The clause which we are considering is not a penal clause; it is an interpretation clause, and what we have to look at is whether the inclusion of cocaine within the term "intoxicating drug" is within the mischief contemplated by the Act and within the four corners of the definition.

A perusal of the previous legislation on this subject in the Bombay Presidency would seem to show that the mischief aimed at was the vicious use of intoxicating drugs of any description. A reference to the preamble to Regulation XXI of 1827 and to section 10 of Act III of 1852 will show that there was apparently no intention in the mind of the Legislature to limit the provisions of the law to any particular kind of intoxicating drugs. With reference to the inclusion of charas made by Bombay Act V of 1891, it is evident from the perusal of that Act that the object of that legislation was not simply to include charas as an intoxicating drug, but to make the most stringent provisions with regard to both the manufacture and the sale of charas as suggested by the Hemp Drugs Commission. The inclusion, therefore, of charas within the interpretation clause by recent legislation does not assist us.

Coming now to the words of the clause we find that there is some difficulty in ascertaining whether the words "not included in the term liquor" apply to the words "drink or substance" or to the words "other material." If it is permissible for us to refer to the words of the corresponding Act in the Madras Presidency in which the word "and" is found before the words "not included in the term liquor," the presumption would be that those words were intended to apply to "drink or substance." In whichever way we regard the clause, we think it is clear that the Legislature did not intend the definition to apply solely to hemp, grain, or other material of the same kind as hemp. It is noticeable that liquor as defined in clause (7) of the same section and opium as defined in the Opium Act are both purposely excluded from the definition of "intoxicating drug." This exclusion would hardly have been necessary had the meaning of the Legislature been that the term in question should apply only to hemp or materials of that nature. In connection with this point it may be well to refer to the judgment of Mr. Justice Quain in the *Queen* v. *Midland Railway Co.*,(1) where he says:—"I start with this proposition that it is a mistake to apply the rule of *ejusdem generis* at all to the construction of the statute. If the words had been "houses, buildings and property," and had stopped there, I agree that the rule would be applicable; but the words are "houses, buildings and property other than land."

In the same way here, had the words stopped at "hemp, grain or other material" it is possible that the argument used for the defence would have some force.

In our opinion the word "intoxicating" used in the interpretation clause cannot be confined to its derivative meaning, namely, 'poisonous.' We think that the word must be taken in its popular sense. That cocaine can have "intoxicating" effects has been amply proved in this case. It is unnecessary to refer to the evidence at any length. It will suffice to mention the paper by a well-known acknowledged authority, Dr. Bose, in which he describes all those intoxicating effects at great length.

(1) (1875) L. R. 10 Q. B. 369 at p. 398.

Digitized by Google

For these reasons we think that the cocaine, the subject of this prosecution, is an "intoxicating drug" within the meaning of the Act. We reverse the acquittal recorded by the Magistrate; and we record a conviction under section 43, clause (g) of the Abkari Act V of 1878; and as this is a test case we impose merely a nominal fine of Rupee one (1).

1903. *July* 20. I. L. R. 27 Bom. 626.

Before Mr. Justice Chandavarkar and Mr. Justice Jacob.

EMPEROR *v.* WAMAN SHIVRAM DAMLE.*

Charge to jury—Sessions Judge—Misdirection—Inadmissible evidence—Criminal Procedure Code [Act V of 1898], sections 418, 423 [2].

Where a charge to the jury by the Sessions Judge is, upon the whole, favourable to the accused, and most of the points of importance in favour of accused are more or less dealt with in the charge, the mere fact that some of the points are not so amplified as they might have been does not amount to a misdirection.

Before the High Court can interfere with the verdict of a jury on the ground that the evidence of accused's confession was wrongly admitted, it must be satisfied, *firstly*, that the verdict is erroneous; *secondly*, that the erroneousness was caused either by the Judge's misdirection to the jury as to that evidence or by a misunderstanding on their part of the law as to it as laid down by the Judge.

Where material evidence which ought not to be admitted is admitted and the jury are placed in possession of it, there is an error in law in the trial under section 418 of the Criminal Procedure Code [Act V of 1898], and there is a misdirection of law when the Judge tells the jury that it is evidence which they can consider and on which they can, if they think proper, convict the accused. The fact that after putting the jury in possession of the inadmissible evidence the Judge in his charge goes also to point out circumstances which would justify the jury in disbelieving the wrongly admitted evidence does not make the misdirection less a misdirection.

Where evidence which the law says shall not be admitted is let in with other evidence legally admissible, and where the former is of a material character, it would be mere speculative refinement to hold that the jury must have, in convicting the accused, relied upon the latter and rejected the former.

APPEAL from convictions and sentences passed by L. G. Crump, Sessions Judge of Belgaum.

The accused, twelve in number, were convicted of the offence of forgery of the will of one Lakshman Keshav Damle under section 467 of the Indian Penal Code (Act XLV of 1860), and sentenced each to undergo rigorous imprisonment for five years, and accused No. 1 was sentenced to an additional term of two years' rigorous imprisonment on the charge of using the forged will as genuine under section 471 of the Code.

Lakshman Keshav Damle was a wealthy money-lender of Khanapur. He had one son Ganpatrao who died in 1900, leaving behind him a widow named Jankibai and a minor son Bandhu. Besides these persons, Lakshman's wife Chimabai was alive and living with him and also his natural brother Waman Shivram (accused 1).

Waman Shivram was by birth Lakshman's brother, but had been some years before adopted by Lakshmibai, the widow of one Shivram Damle, a near relative of Lakshman's father. At the date of Lakshman's death, Jankibai was living at Miraj with her parents and her son Bandhu was with her.

In 1901 there was an epidemic of plague in Khanapur. On the 10th January, 1901, Lakshman fell ill. The following day unmistakeable symptoms of

* Criminal Appeal No. 159 of 1903.

Digitized by Google

plague appeared and on the night of the 18th January, 1901, he died. Shortly after Lakshman's death, Jankibai and her relatives from Miraj appeared on the scene. Chimabai at that time was seriously ill with plague. Some disputes seemed to have arisen, and on the 15th January, 1901, a number of persons, including the majority of the accused, collected at Lakshman's house, and there was a panch held with the object of arriving at some settlement. After this incident of the panch, Chimabai, Jankibai, Datto Gopal (Jankibai's uncle), and Waman (accused 1) continued to live in Lakshman's house until Chimabai's death on the 19th January, 1901.

On the 28th January, 1901, Datto Gopal applied to the Mamlatdar who appeared on the scene. It was asserted before the Mamlatdar that the will was a forgery. The Mamlatdar made a kind of summary enquiry, recorded certain statements, and made a report in favour of the genuineness of the will put forward by Waman, as Lakshman's last will. This will, it was contended by the defence, was written on the day it bore date (10th January, 1901). It was contended by the prosecution that the will was a forgery, having been prepared on the 26th January, 1901, several days after Lakshman's death.

Datto Gopal next applied to the District Court of Belgaum, on behalf of Jankibai, for a temporary appointment of guardian to the estate of the minor; and pending a regular decision, the District Judge, on the 31st January, 1901, passed a temporary order appointing Mr. Varadaraj, the then Nazir of the Court, temporary guardian. A notice was issued to accused 1 who, on the 5th February, 1901, put in an application asking that the temporary order of attachment should be set aside. This application was rejected. The date fixed for hearing the regular application was 15th March, 1901. Accused 1 obtained a postponement to the 14th June, 1901. Before this date there had been negotiations between the parties, and the hearing was postponed with a view to an amicable settlement.

On the 19th June, 1901, the parties appointed four arbitrators. The award was made but was not signed; and the matter came again before the District Court.

On the 19th July, 1901, the District Judge proceeded to hear Jankibai's application. Waman opposed it on the ground that there was a will made by Lakshman which appointed him guardian. The result of the enquiry was that on the 20th July, 1901, the District Judge appointed the Nazir guardian of the property and Jankibai guardian of the person.

On the 8th November, 1901, the Nazir, Mr. Varadaraj, moved the District Court to sanction the prosecution of the persons making or attesting the will. Mr. Varadaraj died on the 18th December, 1901. The application for sanction was renewed on the 24th June, 1902, and the District Judge granted the sanction on the 26th July, 1902.

In August, 1902, the present proceedings commenced.

The following are the extracts from the heads of charge by the Sessions Judge to the jury :—

" Statement said to have been made by accused 1 to the Nazir inadmissible against the other accused as being a confession of an offence for which they are not being tried. At most a confession *not of forgery* but of *using as genuine a forged document*. The other accused are not being tried for the latter offence. Also self-exculpatory and therefore inadmissible against them. Does not implicate himself to the same degree as them. Do you believe that as a matter of fact that statement was made? Persons do not confess without some reason. What reason was there? The case was fixed for hearing on the 19th July, 1901. And to all appearances Waman was prepared to go on with it. If, as he suggested, he wished to compromise the matter, it was wholly unnecess-

Digitized by Google

sary for him to implicate himself in this way. He could merely have agreed not to press his claim under the will. Mr. Manerikar's evidence important in this connection. Does not this suggest that the Nazir suggested that Waman should confess and compromise the matter, and that the Nazir then assumed that his own suggestion represented Waman's statement? If this confession was made, why did Mr. Varadaraj wait for four months before taking any steps to obtain sanction to prosecute? It is true that Waman denied ever having been to the Nazir at all, but is it not reasonably possible that he was taken by surprise at this unexpected statement, and foolishly denied that any interview took place? The whole matter rests on the uncorroborated testimony of a dead man, and without having him before the Court some caution is necessary in accepting his statement.

* * * * * *

(5) The conduct of accused No. 1 with reference to certain property.

Prosecution perfectly entitled to prove conduct of accused No. 1 if such conduct is inconsistent with the existence of a will.

The accused appealed to the High Court.

Branson and *Robertson*, with *Nilkantha Atmaram*, for the accused.

The *Advocate-General*, with the *Government Pleader*, for the Crown.

CHANDAVARKAR, J. :—The unanimous verdict of the jury, finding the accused guilty in this case, has been accepted by the Judge, and, in accordance with it, he has sentenced accused Nos. 1 to 12 to five years' rigorous imprisonment on the charge of forgery of a will under section 467, Indian Penal Code, and accused No. 1 to an additional term of two years' rigorous imprisonment on the charge of using as genuine a forged document under section 471, Indian Penal Code. In this appeal against the convictions and sentences, the learned counsel for the appellants, relying on *Emperor* v. *Malgowda Basgowda*,(1) has contended that there was misdirection in the learned Judge's charge to the jury, because, it is urged he omitted to call the attention of the jury to several matters of prime importance which favoured the accused. It is conceded that the Judge's charge was, upon the whole, favourable to the accused, and we think that he summed up the case most carefully and fairly. Most of the arguments urged in support of the appeal before us amount practically to this, that the learned Sessions Judge did not put the points referred to in the heads of charge in greater detail. Most of the points of importance urged by the learned counsel for the appellants have been more or less dealt with in the charge, and the mere fact that some of the points were not amplified as they might have been does not, in our opinion, amount to a misdirection.

There are three objections, however, urged in support of this appeal, which stand upon a different footing. They may be formulated as follows :—

(1) Exhibit 58, the deposition of the deceased Nazir recorded in a civil proceeding, was wrongly admitted in evidence under section 33 of the Evidence Act as containing accused No. 1's confession.

(2) The Judge put before the jury the evidence of accused No. 1's conduct as if the jury could, if they chose, draw an inference from it against all the accused.

(3) The Judge omitted to place before the jury the evidence as to the alleged signature of Lakshman on the will, Exhibit 8, which told in favour of its genuineness and which stood uncontradicted.

As to the first of these objections, the learned Advocate-General, who has appeared for the Crown to support the convictions, has not contended that Exhibit 58 was admissible in evidence either under section 33 or any other provision of the Evidence Act. Exhibit 58 is a statement made by the deceased Nazir of the District Court of Belgaum in Miscellaneous Application No. 8 of

(1) (1902) 4 Bom. L. R. 663; Post p. 644.

Digitized by Google

1901 and was tendered by the prosecution for the purpose of proving an admission or confession alleged to have been made by accused No. 1 to the Nazir. Its admissibility was objected to by the defence in the Sessions Court, but the Judge overruled the objection, holding that "the statement may be proved under section 33 of the Evidence Act, and is admissible as an extrajudicial confession against accused No. 1." But the Sessions Judge omitted to notice the important proviso to section 33, according to which evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding only if the parties to both the proceedings are the same. Neither the Crown nor the Nazir now prosecuting the accused were parties to the Miscellaneous Application in which the deceased Nazir made the statement. The argument of the learned Advocate-General is that, though the statement was wrongly admitted, that is not a valid ground for setting aside the verdict of the jury, if as a matter of fact it could not have influenced the jury, and that it did not influence the jury is apparent from the fact that the Judge in his charge was emphatic in telling them that they ought not to believe the statement of the deceased Nazir. It is indeed the case that the Judge in his summing up told the jury *firstly*, that the alleged confession said to have been made by accused No. 1 to the Nazir was not admissible as against the other accused, because it was "at most a confession *not of forgery* but *of using as genuine a forged document*," for which latter offence those other accused were not being tried, and also because it was "*self-exculpatory*," inasmuch as it did not implicate himself to the same extent as it did the other accused; and *secondly*, that it was highly improbable that accused No. 1 made the alleged admission or confession to the Nazir and the whole matter rested "on the uncorroborated testimony of a dead man, and without having him before the Court some caution is necessary in accepting his statement." So far the summing up was favourable to the accused; but the fact stands that the statement was allowed to go in as part of the evidence which the jury could consider, and it is contended by the appellants counsel that when evidence which ought not to be placed before the jury is placed before them, and they are left to believe it or not, and the evidence so let in is material in the sense that, if believed, it must tell against the accused, it is difficult so say that they have not been influenced by it when, in spite of Judge's charge that the evidence in question was not entitled to belief, they have brought in a verdict of guilty against the accused. The law on this point was carefully considered by Melvill, J., in *Reg.* v. *Ramswami Mudliar*.(1) After observing that it is not the admission of every inadmissible evidence which vitiates a trial by jury, that learned Judge went on to say. . . . "The duty of the Appellate Court is, in my opinion, first to consider whether the evidence improperly admitted is material, and such as is likely to have exercised a prejudicial influence on the minds of the jury. If it be so, then, as it is impossible to know the exact amount of weight which the jury attached to the particular evidence in question, their verdict is so far invalidated that the Appellate Court cannot any longer accept it as a conclusive decision on the facts. . . . If the Appellate Court think that the verdict of the jury is founded, in part, upon evidence which should not have been admitted, or that the appellant has been prejudiced by some misdirection or omission of proper direction on the part of the Judge, the Appellate Court is at liberty to treat the case as if it had been tried by the Judge with the aid of assessors." This was under the Code of Criminal Procedure in force in 1869. The question is whether it is the law also under the

(1) (1869) 6 Bom. H. C. Cr. 47.

Digitized by Google

Code of Criminal Procedure now in force. According to section 418 of the present Criminal Procedure Code, where the trial was by jury, an appeal shall lie on a matter of law only; and according to clause (2) of section 423, the Appellate Court cannot alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him. Reading these two sections together, it is clear that before we can interfere with the verdict in this case on the ground that the evidence of accused 1's confession was wrongly admitted, we must be satisfied, firstly, that the verdict is *erroneous;* secondly, that the erroneousness was caused either by the Judge's misdirection to the jury as to that evidence or by a misunderstanding on their part of the law as to it as laid down by the Judge. Where material evidence which ought not to be admitted is admitted and the jury are placed in possession of it, there is an error in law in the trial under section 418 and there is a misdirection of law when the Judge tells the jury that it is evidence which they can consider and on which they can, if they think proper, convict the accused. The fact that after putting the jury in possession of the inadmissible evidence the Judge in his charge goes on also to point out circumstances which would justify the jury in disbelieving the wrongly admitted evidence does not make the misdirection less a misdirection, since the presumption is that the jury are well aware that it is for them to appreciate the evidence and that they are at liberty to take or not the Judge's view of it. And in this case that presumption is supported by the view the jury have taken of the case notwithstanding the tenor of the Judge's charge. It is no answer to that to say that this particular evidence which was wrongly admitted could not have influenced the jury. Where evidence which the law says shall not be admitted is let in with other evidence legally admissible, and where the former is of a material character, it would be mere speculative refinement to hold that the jury must have, in convicting the accused, relied upon the latter and rejected the former: see on this point *Queen* v. *Chunder Koomar Mozoomdar.*(1) In the present case almost every item of evidence relied upon by the prosecution was dealt with by the learned Judge in his charge in favour of the accused. Under these circumstances, we cannot say that the evidence of accused 1's confession which ought not to have been placed before the jury could not have influenced them in returning a verdict of guilty. We must take it, then, that there was a misdirection on a material point of law; but since the Judge directed the jury that the evidence of accused 1's confession was admissible as against him only and not against the other accused, the misdirection does not apply to their case. It is true that in directing the jury not to consider the evidence in question against accused Nos. 2 to 8, the learned Judge assigned three reasons for his view, and that one of those reasons was that the confession of accused No. 1 was self-exculpatory, inasmuch as it did not implicate himself to the same extent as them. As a matter of fact, the confession said to have been made to the Nazir does not implicate any one but accused No. 8. The words of the confession as given by the Nazir in his deposition, Exhibit 58, are :—" Hosmane Balappa," (that is accused No. 8), " has made this will. I tell the truth before you. Hosmane Balappa has done all this." It is possible that the Judge's statement to the jury may have conveyed to them the impression that all the accused were in fact implicated by the confession; but, having regard to the emphatic manner in which the Judge told the jury that the confession was inadmissible as against accused Nos. 2 to 8, we must hold that so far as those accused persons are concerned there was no misdirection.

(1) (1875) 24 W. R. 77.

Digitized by Google

But as to them, the question is whether there has been misdirection in that the Judge put before the jury the evidence of accused 1's conduct relied upon by the prosecution as if it was evidence also against the other accused.

That brings us to the second objection urged in support of this appeal. In his charge the Judge divided the evidence for the prosecution into six different heads, and one of them was, as he put it, the evidence of accused is conduct removing certain property. In dealing with this latter evidence he pointed out that the prosecution was "perfectly entitled to prove the conduct of accused I if such conduct is inconsistent with the existence of a will," and then he went on to comment upon the circumstances relied upon by the prosecution and elicited in the evidence of the witnesses for the Crown. The summing up was, on the whole, in favour of accused No. 1 on this head also, and the learned Judge concluded this part of the charge by warning the jury against the danger of reasoning from conduct, as men often acted unreasonably. So far the charge was unexceptionable from the point of view of the accused; but, seeing that it was open to the jury to give effect or not to the warning and that after all it was they who had to consider the evidence in question and their decision on facts was final, it was, we think, a serious omission on the part of the Judge not to have expressly warned the jury that the evidence of accused No. 1's conduct was inadmissible as against the other accused. It is true that almost at the conclusion of his charge he dealt with the question of the conduct of accused Nos. 2 to 8 and that there, too, he summed up the case in their favour by pointing out "the extreme improbability of conduct imputed to the accused persons." But that part of the summing up stands apart from the portion where the evidence of accused 1's conduct was dealt with and treated as if it was evidence which could be considered as gaainst all the accused persons and not merely accused No. 1; and nothing was said in that part by way of warning to the jury that, in considering the evidence of the accused's conduct, they should not consider it as against the rest.

We now come to the third and last objection. The accused were charged with the offence of forging a will of Lakshman Keshav Damle, and in all cases of forgery the question whether the signature said to be forged is genuine or not is more or less material. In the present case the theory of the prosecution as to the signature on the will, Exhibit 8, purporting to be that of Lakshman Keshav Damle does not appear very clearly upon the evidence recorded, and Mr. Branson who, we are informed, appeared in the Sessions Court to defend accused Nos. 4 and 8, and who has also appeared before us in support of this appeal on behalf of those accused, has urged that in his address the Public Prosecutor in the Sessions Court was not able to advance any particular theory with reference to the question of the genuineness or otherwise of the signature. The only oral evidence on the point adduced for the prosecution is that of the pardoned approver Mangesh. His evidence is to the effect that accused No. 8 produced before him a draft and gave him "a paper signed by Lakshman Keshav Damle. It appeared to be his signature." Then he goes on to state:—"I told Mr. Gloster that the signature was genuine and I recognized it as such. Even now I say that to me it appears a genuine signature." The prosecution have put in a number of documents (Exhibits 20 to 23 and Exhibits 26 to 29) containing what are admitted for the Crown and the defence to be the genuine signatures of Lakshman Keshav Damle. It must no doubt be taken as a matter of course that the jury looked at the signature on Exhibit 8 and compared it with the signatures on the other documents; but that does not cure the defect in the summing up. It was a matter of prime importance that the prosecution was not able to adduce

Digitized by Google

any evidence beyond that of the approver and he could not deny nay, he admitted that it was a genuine signature of Lakshman. The learned Judge ought to have specifically dealt with this question and drawn the attention of the jury to the approver's evidence on the point and the absence of any evidence to the contrary. The omission, we think, falls within the principle of the ruling of the learned Chief Justice in *Emperor* v. *Malgowda*(1) that a non-direction amounts to a misdirection if the point is one of prime importance, especially telling in favour of the accused.

We, therefore, hold that there have been misdirections in the case and the question is, whether the verdict can be pronounced to be erroneous owing to those misdirections? Counsel for the appellants pointed out circumstances in the case and called our attention to certain portions of the evidence to show that the verdict of the jury was, as he put it, "astounding" and "manifestly erroneous." The learned Advocate General, on the other hand, did not argue the case before us on the merits so as to show that the verdict was in accordance with the weight of the evidence and probabilities and such as reasonable minds could arrive at. He confined himself to the question whether there were misdirections, and if there were, whether the verdict was erroneous owing to them. For the reasons to be presently given, we have come to the conclusion that the verdict is erroneous, and we think that we must also hold that the verdict is vitiated by the misdirections with which we have dealt. We think that the reception of accused 1's confession and the treatment of the evidence of accused 1's conduct as if it was evidence against all the accused, and the omission to deal with the question of the genuineness of the signature, must have seriously affected the merits of the case and influenced materially the verdict of the jury. In the language of Melvill, J., in the case above cited, "as it is impossible to know the exact amount of weight which the jury attached to the particular evidence in question," so far as that evidence was wrongly admitted and treated in the Judge's charge, the verdict of the jury "is so far invalidated that the Appellate Court cannot any longer accept it as a conclusive decision on the facts." It is competent to us, under these circumstances, to consider whether, after excluding the evidence wrongly admitted, the rest of the evidence is sufficient to sustain the verdict and to determine the appeal: see *Queen-Empress* v. *Ramchandra*, Criminal Ruling No. 11 of 1895.

We are spared the necessity of dealing with the evidence in detail, as it has been clearly set forth in the Judge's charge and its infirmities have been lucidly pointed out there. The case, moreover, for the prosecution is simple, though the evidence adduced is voluminous. The question is, whether the will, Exhibit 8, is a forgery? We have at the outset the unchallenged fact, sworn to by the approver, Mangesh, that the signature on Exhibit 8 is genuine and "appears to be a genuine signature." A comparison of that signature with the signatures on Exhibits 20 to 23 and 26 to 29, which are admittedly genuine, has satisfied us that it resembles the latter and that there is no marked difference between them to excite suspicion. The Nazir, who is administrator of the property of the minor grandson of Lakshman, states in his deposition, Exhibit 4, that when he was first instructed that the will was not genuine, he was told that it was not genuine because Lakshman had not been in a position to make a will and that the ink of the signature was different from the body of the writing. But, so far as we can see, no difference of ink is perceptible.

We start, then, with this circumstance in favour of the will that the signature is genuine. The case for the prosecution, however, is that a week

(1) (1902) 4 Bom. L. R. 683.

Digitized by Google

after Lakshman's death, the pardoned approver, Mangesh, was called to the house of accused No. 8, who there produced to him a draft and asked him to copy it on some pieces of blank paper, one of which contained Lakshman's signature. This story stands on the evidence of the approver alone: and it is so full of improbabilities that it is difficult to believe it. Here is a man who, when examined by the Mamlatdar and the Sub-Registrar, swore to the genuineness of the will, but who afterwards stated before Mr Gloster, the District Judge of Belgaum, that it was a forgery, under the impression, as he stated then, that a pardon had been given to him. His story is that when accused No. 8 asked him to copy the will he refused, but that accused No. 8 having threatened him, he wrote it in the presence of several persons. The suggestion of the defence is that the statement made by the approver before Mr. Gloster was made because he had been won over by Jankibai's side; that just then he was hard up for money which he had to pay for *tagai* and that just about that period he was able to pay the amount. This suggestion finds some support from the approver's answers in cross-examination. There is, moreover, evidence to contradict this witness so far as it could be contradicted. Mangesh says that when he copied the will at accused No. 8's instance in the house of the latter, his (Mangesh's) brother Dattc was present. Dattc has been called for the defence and denies that he was present at any such meeting. Five witnesses examined for the defence swear that the will was written in Lakshman's house and presence by Mangesh, that it was signed by Lakshman in their presence, and attested by accused Nos. 2 to 8. Their evidence shows nothing which would justify us in disbelieving them and believing the approver. In his charge to the jury the Judge rightly brushed aside the evidence of the approver as unreliable. We have, in addition, the fact that accused Nos. 2 to 8 swore before the Sub Registrar that Lakshman had signed the will in their presence and that they had attested it at his instance. The evidence for the prosecution shows that these eight persons were Lakshman's friends and that they are persons who are invited along with others on important occasions such as adoptions or executing deeds (*vide* Exhibits 9 and 11). This is the positive evidence to prove the genuineness of the will and the probabilities so far support it. When we are dealing with the question of probabilities and testing the oral evidence by means of them, the theory of improbability must be such, as observed by the Privy Council in *Choley Narain Singh* v. *Ratan Koer*,(1) that "in order to prevail against such evidence as has been adduced" in support of the will, it must be "clear and cogent. It must approach very nearly to, if it does not altogether constitute, an impossibility." On what does the theory of improbability advanced in this case by the prosecution rest? First, it is said Lakshman "was not in a position to make a will" on the day and at the time the will is said to have been made, and when we come to examine what that means it comes to this, not that Lakshman was unconscious or so enfeebled by his disease (plague) that he was physically incapable of making the will, but rather that to almost every one who saw him he spoke as if he did not think he was going to die. The inference suggested is that as he did not take a serious view of his illness he did not feel the necessity of making a will and therefore could not have made one. A man may not think he is going to die and yet there is nothing improbable in his making a will. Here it is common ground that on Friday (the date of the alleged will) he had a bubo and that his case was discovered to be one of plague. It may be that to those who came to inquire after his health he spoke as if he did not take a

(1) (1894) 22 Cal. 519 at p. 531.

Digitized by Google

erious view of his illness; but that does not militate against the theory that seeing he had plague he thought it proper that he should make a will and not let his affairs lie uncertain in the event of his death. Some witnesses for the prosecution state that when they called on him on Friday he did not say anything about a will to them. That part of the evidence is purely negative and it is best answered in the language of the Privy Council in the case already cited that we cannot assume that a person who has made a will must necessarily have introduced the subject of it into his conversation with every friend or acquaintance whom he happened to meet. Three of Tatya's servants have been examined and they say there was no will; but, as the Judge put it in his summing up, this is not a reliable class of witnesses. Parshya (Exhibit 32) says that he was in Lakshman's house on Friday, that Lakshman was in the *Majghar* and that he saw no paper written But he admits that on Friday he looked after the bullocks and that at intervals sat at the house; that he saw many persons come to see Lakshman and that out of the accused, accused No. 2 and some others may have come. He does not know what they did with Tatya. Gangappa (Exhibit 33), who says he attended on Lakshman on Friday, can tell that Rambhat, Krishnabhat and Vishnu, two of whom are witnesses for the prosecution, came to see Lakshman on Friday, but he cannot remember who else came. The third servant Abdul's story is discrepant and the Sessions Judge has commented on his demeanour as suspicious. There can be no doubt on the evidence for the prosecution that Lakshman was physically capable of making a will on Friday. The learned Sessions Judge charged the jury to that effect. The evidence is that he was conscious, though he had high fever and bubo, and that he *was* able to converse with all who came to see him. The bubo was under his right arm, but that could not have prevented him from putting his signature because witness No. 3, Krishnaji (Exhibit 9), who saw him at 9 P. M. on Friday, stated that Lakshman told him that the bubo did not give him much pain.

We come next to the nature of the provisions of the will, which, according to the *dictum* of their Lordships of the Privy Council in *Bamasundari Debi* v. *Tara Sundari Debi* (1) "is always a material element in such questions, from its bearing on the probabilities of the case." The will, Exhibit 8, gives half the property to accused No. 1 and the other half to Lakshman's grandson Keshav *alias* Bindoo; it provides for the maintenance of Lakshman's wife and daughter-in-law; it directs that accused 1 should manage the minor's share during the latter's minority. These are the main provisions of the will and the case for the prosecution is that as accused No. 1 had been given away in adoption and had become separate it is highly improbable that Lakshman would have given half of his property to him to the detriment of his own grandson. Here it becomes necessary to consider the state of Lakshman's family for some time before and at the date of his death. The undisputed facts of the case are that accused No. 1 was Lakshman's brother, given in adoption to their uncle. Accused No. 1 lived separate from Lakshman with his adoptive mother and managed the estate he had inherited from his adoptive father. This went on for some years, when accused No. 1's wife having died, he came and lived with Lakshman. All the witnesses for the prosecution examined on the point state that accused No. 1 lived and messed with Lakshman and managed Lakshman's shop and trade. Lakshman had a son called Ganpati who led a loose life and died. At the date of the alleged will, then, Lakshman's family consisted of himself, his wife, his daughter-in law Jankibai, and a minor grandson, and

(1) (1891) 19 Cal. 65 at p. 74.

Digitized by Google

accused No. 1 had been living with him and managing his shop for five or six years. When Lakshman fell ill Jankibai and the minor were not in Khanapur where Lakshman lived, but were living in her parent's house at Miraj. So far the facts are undisputed, but the case for the prosecution is that, though accused No. 1 lived with Lakshman and managed his shop and had done so for some years, his dealings and estate were kept and treated as separate and that his estate was considerably less than Lakshman's. Some witnesses have given evidence in support of this case, but it is evidence of the vaguest description and their denial of the defence that when accused No. 1 came and lived with Lakshman his estate was mixed up with the latter's is refuted by the statement which Lakshman's daughter-in-law, the mother of the minor, made before the arbitrators to whom the dispute which has led to this prosecution was referred after Lakshman's death. In that statement, which is recorded as Exhibit 54 in the case, Jankibai said :—"From that time the plaintiff," that is accused No. 1, "began staying with my father-in-law and began staying with us, having brought with him his whole property and business. It is therefore a very large portion of his property must have got mixed up with our property." Having regard to the fact, apparent from the evidence of witnesses for the Crown, that Lakshman not only allowed accused 1 to come and live with him but left the management of his shop to him, Jankibai's statement appears very probable. It appears that there were separate *khatas* of Lakshman and accused 1 in the accounts; but it is notorious that among trading families it is usual to have separate *khatas* in the names of their different members. The question, however, is not whether Lakshman and accused 1 were joint or separate in estate. That is a question which does not arise in the present case. Assuming that, legally speaking, they were separate in estate, the question is whether their mutual relations were such as to make it improbable that Lakshman should have made a will giving one half of property to accused No 1. Lakshman was a wealthy sowkar and had only a minor grandson as his heir. He was attacked with plague and there is nothing unnatural or improbable in that he should have thought of providing for contingencies in the event of his death by giving a half-share in the estate, including his trade, to his natural brother, who had been managing it so that he (accused 1) being the only adult male relation whom he could trust, the trade could go on and everything managed properly in the minor's interests on Lakshman's death. The provisions of the will under these undisputed facts seem both natural and reasonable and tell in favour of its genuineness.

The events which happened on Lakshman's death must now be considered. The theory of the prosecution is that accused No. 1 and accused 8 made certain admissions shortly after the day of Lakshman's death, showing that there was no will. Some witnesses depose to that effect Some of them say that accused No. 1 had deposited Rs. 1,800 with Lakshman and that on Lakshman's death he said माझा घात झाला "I am ruined;" and that he asked Chimabai, the widow of Lakshman, for repayment. Chimabai was at the time herself lying ill, being attacked with plague, and it does not appear probable that accused 1 Waman would have raised the question of repayment to her when she was fresh in the pangs of widowhood and herself lying ill. But there is the evidence of the Mamlatdar Rajacharya that the will was mentioned to him the very next day after Lakshman's death. It appears from the record that the Mamlatdar's evidence was sought to be impugned in the Sessions Court by the allegation that he had been siding with the accused, that he was a Brahmin and that he was indebted to one of the accused. The Mamlatdar has on his oath denied the indebtedness; and there is no foundation, so far as we can judge upon the evidence

Digitized by Google

for the insinuation against him. It is a noticeable feature of this case that the Mamlatdar, the Chief Constable, and the Aval Karkun have supported the case for the defence. The story of the prosecution is that Lakshman having died on Saturday, a relation of Jankibai, accompained by a friend, came from Miraj to Khanapur and put labels on the property of Lakshman. The friend and witness Dhondbhat who have been examined say that they went to the Chief Constable and asked his help in putting seals on the property and that accused No. 8 who was then present said that Lakshman had made no will. The Chief Constable denies that these people ever came to him. They also say that they went to the Mamlatdar and that the latter complied with their request and set a Kulkarni to put seals on the property. The Mamlatdar denied all this on oath. The Aval Karkun says that when he was called as a Panch on Tuesday (Lakshman having died on Saturday) to settle the dispute about the seals put on the property, Lakshman's will was mentioned. If the case for the prosecution is true, we have here huge conspiracy to which eight respectable men, some of them of different castes from that of accused 1, and the Chief Constable, the Mamlatdar, and the Aval Karkun, were parties. But the moment we come to examine the grounds on which this conspiracy is alleged to rest, we find that it stands on very slender basis. The fact that seals and labels were put on by Jankibai's relations is not denied for the defence; it is also common ground that a dispute arose after they had been put on and that a Panch was called. The case for the prosecution is that during all this time no will was mentioned and that accused 1 had allowed the seals to be put on, but that the dispute arose in consequence of Chimabai's protest. But if accused 1 was so trustful and ready to give way to the people who came from Miraj, if he had no dispute to raise, where was the urgent necessity of putting seals on at all? According to the evidence for the prosecution he set up no claim, he put forward no will. The fact that seals were put on shows that a dispute arose as soon as the people from Miraj came, and if there was a dispute the legitimate inference is that it could only have been on account of the will. This inference is supported by the fact that a Panch was called to settle the dispute which had arisen on account of the seals put upon the property. One of the witnesses for the prosecution (Vishnubhat, Exhibit 10), says :—" The quarrel between accused 1 and the Phadakes arose out of the question of putting on those labels. Chimabai objected to this on Sunday night. Nevertheless the Phadakes put them on that night and when she found it out in the morning she was displeased. Accused No. 1 also objected strongly on Monday. It was over this dispute that the Panch was called." When the Panch were called it is said, it was agreed that an inventory of the property should be made, but no inventory was made and the reason given is that accused 1 put off the making of an inventory. Evidence bearing on this part of the case is of so unsatisfactory a character that we cannot rest the convictions of the accused on it, and further it is opposed to the undisputed facts of the case. When the will was presented for registration, the Sub-Registrar called upon Jankibai to produce her evidence to show that the will was not genuine, and though she had then the assistance of her relations who were pressing her claim forward, she did not appear before the Sub-Registrar and adduce any evidence. The evidence that accused 1 removed ornaments and misappropriated property is, again, of a weak character, and even if it is believed it cannot affect materially the question whether the will is forged. As remarked by the Judge in his charge, it is not necessarily inconsistent with the *factum* of the will; the same remark applies to the evidence that he had concealed certain bonds, which evidence again is not free from suspicion. The only remaining point is that accused 1 agreed to a reference

Digitized by Google

of the dispute to arbitration, but that again is no evidence that the will is not genuine. As pointed out by the Judge in his charge, accused 1 agreed to the reference on certain terms, one of which was that he should get Rs. 10,000 from the property. Such a conditional consent can by no means be construed into an admission that the will was forged. Besides, there was the chance of the will being attacked on the ground of its invalidity. Many motives lead parties to agree to the compromise of a dispute privately, and the chief among them is the buying of peace and the avoidance of litigation: and when they do so agree the natural presumption is not that each necessarily admits his claim to be false, but rather that each gives up and waives his extreme contention and consents to an amicable settlement by third parties as arbitrators.

The conclusion we have come to is that the prosecution has failed to prove the case against the accused, that the verdict is manifestly wrong; and indeed for the Crown no attempt was made to support the convictions on the evidence legally admitted. We must, therefore, set aside the verdict of the jury and acquit all the appellants and direct that they be discharged.

1902. *September* 4. I. L. R. 27 Bom. 644.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Batty.

EMPEROR *v.* MALGOWDA BASGOWDA.*

Sessions Judge—Jury—Summing up—Defective direction—Contentions placed before the Jury—Judge should not omit pointedly to call attention of the Jury to matters of prime importance especially if they favour the accused.

A Sessions Judge in summing up is entitled to have regard to the elaboration and skill with which the rival contentions have been placed before the jury by the advocates on both sides, but he should not in doing so omit pointedly to call the attention of the jury to matters of prime importance especially if they favour the accused, merely because they have been discussed by the advocate.

(Note—This case is Fol. 27 Bom. 626.)

APPEAL from the conviction and sentence recorded by J. C. Gloster, Sessions Judge of Belgaum, in a sessions trial under sections 467 and 471 of the Indian Penal Code.

One Tukaram bin Ravji claiming to hold a certain land as the tenant of one Godu Naikin brought a possessory suit in the Court of the Mamlatdar of Chikodi complaining that an obstruction was caused to his possession by the accused Malgowda bin Basgowda, who in support of his contention that he was the owner of the land, produced a sale-deed, dated the 22nd July, 1877, executed in his favour by one Parappa bin Chanappa. The Mamlatdar found the sale-deed to be a forgery and gave sanction for the prosecution of the accused. He was, thereupon, tried in the Sessions Court at Belgaum on two charges, namely: (1) that he forged or used as genuine knowing to be forged a sale-deed in the Court of the Mamlatdar of Chikodi in July, 1901, and thereby committed an offence punishable under sections 467, 471 of the Indian Penal Code, and (2) that at the time and place aforesaid he corruptly used as true the aforesaid sale-deed knowing such evidence to be false or fabricated and thereby committed an offence punishable under sections 193, 196 of the Indian Penal Code.

The Judge in his charge to the jury made the following observations:—

§ § § § § § §

* Criminal Appeal No. 261 of 1902.

Digitized by Google

The first and the main question to which you must direct your attention is whether it is established beyond reasonable doubt that the document in question (Exhibit A) is "false document" (section 464, Indian Penal Code). The prosecution alleges that it is a "false document" either.

(*a*) as not having been in fact executed by Parappa by whom it purports to have been executed,

or

(*b*) as having been written not in 1877, as it purports to have been, but at a later date,

or

it may be a false document in both these. ways There must also be a dishonest or fraudulent intention in order to bring it within the definition in section 464, Indian Penal Code.

As you have observed a large mass of evidence deals with questions which may be described as of a "civil" character, you must be careful to assign to this portion of the evidence its proper position and not lose sight of the main question stated above whether in the first instance it is proved to your satisfaction and beyond reasonable doubt that Exhibit A is a "false document."

You will remember too that if there is a reasonable doubt accused must get the benefit of it: and you will remember that the burden of proof is on the prosecution: you are not directly concerned with the question who is entitled to possession of the land or who has been paying its assessment—these are only subsidiary questions—, nor have you to decide whether the accused has proved that the document is genuine. It is for the prosecution to prove to your satisfaction that it is *not* genuine.

The evidence regarding the litigation of 1869, regarding the alleged sale by Ningappa to Godu, and the latter's lease to Tukaram and regarding the latter's possession of the land is only of incidental value, as showing a motive for the alleged forgery, or the existence of circumstances which render probable the prosecution story regarding the forgery. I do not say you should ignore this evidence, but you must be very careful to assign to it its proper place. And you will observe that it would be quite possible to accept as wholly true the prosecution theory regarding the litigation of 1869 and its results, the purchase by Ningappa at a Court-sale, Ningappa's sale to Godu and all these other incidental matters, and yet it would by no means necessarily follow that the document in question was a forgery. I ask your special attention to this last remark.

The evidence on both sides has been carefully summarized by pleaders on both sides and I will not go through it in detail but will endeavour to indicate generally the points to which your attention should be specially directed.

Keeping in view the above remarks turn to the evidence of the first witnesses. It is for you to decide whether you accept Godu's story regarding her purchase and subsequent lease to Tukaram. Discrepancies in their story have been pointed out and you must decide whether these discrepancies are vital. As opposed to their evidence, the defence call several witnesses who testify to the possession of accused and Parappa. Many of these witnesses merely state generally that accused, or Parappa, was "in possession." As the Public Prosecutor points out, there is not much scope for cross-examination on evidence of this character; you will look at the evidence on both sides and decide whether you consider it established that Tukaram has been in possession of the land as alleged by the prosecution: still remembering that this is only one of the subsidiary questions.

Then there is the evidence regarding the litigation of 1869. The Public Prosecutor has carefully and I think fairly, reviewed the documents on which he relies, and looking to that evidence as a whole, it does in my opinion go to support his contention that in that litigation Chanappa, the father of Parappa, the alleged executant of Exhibit A, was worsted, at all events for the time.

But on the other hand those papers also go to show that he was prosecuting a claim *bona fide*: for instance the document, Exhibit 15, goes to show that Chanappa claimed to hold the land as tenant of Morbhat, one of the parties to the litigation, and it would not be impossible to suppose that notwithstanding Chanappa's failure to establish his position in 1869, accused might still—eight years later (in 1877)—have purchased Chanappa's interest for what it was worth, taking the risk of litigation.

Then the Public Prosecutor had laid stress on the fact that the accused as officiating Patel signed certain summonses, prohibitory orders, &c., in those proceedings which must have shown him that Chanappa's claim was disallowed. The argument being that with this knowledge he would not have been so foolish as to purchase the land from Chanappa's son in 1877. It is for you to decide how far this argument is entitled to weight. I would merely point that in those proceedings accused was merely acting in his official capacity as a village officer and you are hardly entitled to judge his conduct in the same way, as if he had been a party interested in those proceedings. Further, the alleged sale took place eight or nine years later in the course of which period circumstances may have altered.

Leaving these incidental questions which, as already explained, bear only indirectly on the question before you, turn to the more direct evidence. The document, Exhibit A, purports to

Digitized by Google

have been written by Shamrav Govind, and that is the allegation of the defence. This witness (No. 7 for prosecution) denies having written it. If you accept his evidence it goes far to support the prosecution theory that the document is a forgery, for if it is a genuine document why should the parties allege that it was written by a person by whom it was not written. But before accepting his story you should consider his evidence very carefully. You have also seen the specimen of his handwriting (Exhibit 33) made in Court in your presence, and you have had an opportunity of comparing it with Exhibit A. He pronounces against the document because (he says) his handwriting in 1877 would not have been so similar to his present handwriting. Do you consider this convincing? Then remember his story as to accused approaching him before the proceedings in the Magistrate's Court. He says that accused gave him no hint of any foul play, yet without seeing the document he, the witness (Shamrav), at once stated that he had not written it. Is there not some reason to suppose that he is keeping something back?

The Public Prosecutor has told you that in his opinion Shamrav may not improbably have written the document. That view suggested itself to me also. But it is a question of fact of which you are the judges. If you think that view is correct you have then this position to face. Either he wrote the document—at all events so far as the date is concerned—or else he wrote it on some other occasion, and if so can you doubt that he knew of and was party to the false entry of the date? In this latter case he would be in the position of an accomplice and his evidence would have to be received with the greatest caution.

You have to consider the evidence of Satyappa (witness No. 3 for defence) who states that he attested the sale-deed. He testifies to its genuineness He too has given a specimen of his signature (Exhibit 96) and you have compared it with Exhibit A.

Then there is the evidence of Parappa, the alleged executant. He now says that he did execute it, and he therefore gives no assistance to the prosecution. But his previous evidence before the Mamlatdar (Exhibit 37) was to contrary effect. This same Survey No. 95 was then in question (1901) and he denied having sold it to accused, who was a co-defendant in those proceedings. You have heard his attempted explanation—that he thought another field was in question. But the plaint (Exhibit 41) shows that the case was confined to this survey number only. Do you think it probable that Parappa can really have been unaware of what the dispute was about? Then you have heard him deny *seriatim* the statements which he is said to have made before the Mamlatdar in his deposition (Exhibit 37). Do you attach more weigh to that record duly taken or to the witness's memory? The prosecution say that his previous evidence was true and his present story false. It is for you to decide if this is so.

But even if you accept this view you are not entitled to ignore his present testimony and treat his previous statement as evidence against accused. What you have to decide this case on is the evidence adduced here *before you*, and the utmost use the prosecution can make of the previous statement is to say to you "The witness now admits execution of the sale-deed, but we show you his diametrically opposite statement of last year. So you must attach no weight to his present testimony."

The above remarks cover the greater portion of the evidence and I do not think it necessary to go in detail through all the documents, which have been carefully put before you by pleaders on both sides. Do not lose sight of the fact that it is *for the prosecution to establish* that the document, Exhibit A, is a "false document."

If you hold this not established then the charge under sections 467, 471 falls to the ground. If you consider it is proved that Exhibit A *is* "false document" then see whether the evidence establishes that accused dishonestly or fraudulently made it for one or other of the purposes mentioned in section 463, the words "to support any claim or title" or those on which the prosecution relies in this case.

There is no direct evidence of his making the document, but if it is proved that he dishonestly or fraudulently used it as genuine knowing it to be forged, then section 471 makes him liable as though he had actually forged it. If you hold it proved to be forged, then it being admitted that he used it, can you doubt that he did so fraudulently and knowingly.

Remember that in case of a reasonable doubt accused must get the benefit.

Turning to the second charge under sections 193 and 196, Indian Penal Code, in respect of which you will give me your opinion as assessors, I read to you section 192, Indian Penal Code. The prosecution contends that even if though forgery be not proved still the document contained a false statement as to Parappa handing over possession of the land, &c.

It is for the prosecution to establish the ingredients of the offence. I need hardly point out to you that in many documents, mortgage-deeds and others, loose statements as to one party being in possession are sometimes made, but though they be incorrect or untrue it does not follow that the offence of fabricating false evidence has been committed. You must be satisfied that the statement is wilfully false and made with the intention specified in section 192 to which I again direct your attention. Are you satisfied of this in the present case? If so you will ask yourselves the further question whether it is proved that accused used this "fabricated" evidence as genuine, with corrupt motive and knowing it to be false.

Digitized by Google

You observe that there is a difference between a false statement in a document and a "false document" (as defined in section 464); hence the two charges.

Give the whole case your careful consideration.

The jury unanimously found the accused guilty of the offence charged under sections 467, 471, Indian Penal Code, and as assessors they were of opinion that he was not guilty under sections 193, 194, Indian Penal Code. The Judge thereupon put the following question to the jury.

Q.—I may take it then that your verdict of guilty under sections 467, 471, is based on the finding either that the document was not executed by Parappa or that it was not executed in 1877 on the date on which it purports to have been executed or that both these conditions were fulfilled?

A. (of Foreman).—Yes.

The Judge accepted the unanimous verdict of the jury and convicted the accused of forgery of a valuable security under sections 467 and 471, Indian Penal Code, and sentenced him to undergo rigorous imprisonment for two years. Under section 240 of the Criminal Procedure Code further inquiry into the charge under sections 193, 194 was stayed.

The accused appealed urging that—

The verdict of the jury was perverse and erroneous on the face of it.

The jury having found that there was no evidence that the accused knew that Exhibit A was false, the Judge ought to have himself applied the law and acqitted the accused instead of asking the jury any further question.

The Judge having asked the jury on what finding their verdict was based, ought to have ascertained from the jury the specific finding that they had arrived at and ought not to have accepted the simple answer "yes" to his question to the jury.

In the absence of any evidence that the document was not executed on the date on which it purports to have been executed, or that the document was executed on any particular date, and having regard to the fact that the prosecution admitted that the document was probably written by the person by whom it purports to have been written, there was no evidence before the jury of the document being a false document.

The Judge was in error in not summing up to the jury the evidence on both sides.

The Judge was in error in not admitting in evidence certain documents produced by a witness for the prosecution though some of them were certified copies of Government records and some were more than thirty years old, and in not giving proper facilities to the accused to prove certain other documents produced by the same witness.

The Judge was in error in allowing prosecution to adduce evidence which was not adduced before the Committing Magistrate and at the same time not giving the accused any adjournment in order to be ready to meet such fresh evidence.

Branson (with *V. V. Ranade* for *H. S. Dikshit*), for the appellant (accused).

Rao Bahadur *V. J. Kirtikar* (Government Pleader), for the Crown.

PER CURIAM :—The accused in this case has been found guilty of having forged a valuable security and of using the same as genuine, knowing or having reason to believe that it was forged. There were other charges preferred against the accused on which the jurors sitting as assessors expressed an opinion favourable to the accused. But we are now concerned only with the

Digitized by Google

charges under sections 467 and 471, Indian Penal Code. Mr. Branson has pointed out that there was inconsistency between the verdict of the jury as such and the opinion expressed by the same individuals as assessors. If we were to limit ourselves to an examination of the words used, and to read them in their strictest sense, there would be great force in Mr. Branson's argument. We think the explanation of this apparent inconsistency is to be found in the meaning which the assessors must have attributed to the question proposed to them in the light of the Sessions Judge's direction to them on the second charge. But it is unnecessary to elaborate on this point, because there are other and more substantial grounds on which we cannot allow the present verdict to stand.

Mr. Branson has said, and we agree with him, that the charge of the Judge in many respects leaves nothing to be desired. On most points the charge is admirable, but at the same time there are one or two vital points on which the Judge did not appreciate the real importance of certain portions of the evidence so that his direction in regard to them has been defective. We accept the view that a Judge in summing up is entitled to have regard to the elaboration and skill with which the rival contentions have been placed before the jury by the advocates on both sides, but he should not in doing so omit pointedly to call the attention of the jury to matters of prime importance, especially if they favour the accused, merely because they have been discussed by the advocate. For instance, the evidence of Ningappa, who practically gives the lie direct to the tale set up by the complainant, deserved especial comment, for it was a matter on which he must have been competent to speak; there could have been no mistake on his part, and he must therefore have intentionally spoken either falsely or truly. The Judge ought therefore to have expressly contrasted the evidence of Ningappa on the one side, the evidence of the prosecution on the other. Another matter which demanded special comment was document A: the date of that stamp paper, the endorsement of the stamp vendor, the signature of the attesting witness who is dead, all ought to have been specially commented on. We are quite conscious that even if it were made clear that the stamp was of the year it purports to be, that would not necessarily show that the document was not subsequently fabricated, still the matter should have been brought to the notice of the jury. More important is the fact that the prosecution has failed (for what reasons we confess we cannot understand) to lead any evidence to show whether the stamp vendor whose name appears under the endorsement of that document carried on that business in 1877 or not, for that was relevant to the question of the genuineness of the document. Then again it is nowhere suggested in the evidence that the signature of the attesting witness Parappa (who is said to have been dead several years, not less than 10 years), was a fabrication. This we think to be a matter of great importance, because manifestly if that was a genuine signature, the document could not have been of recent fabrication The attention of the jury should have been specially invited to a consideration of this matter. Then there is a point in which, we think, the jury may have failed to understand the value attributable to the proceeding in which the Sessions Judge described Chanappa as having been *worsted*, because all that his *worsting* consisted of was that the application to have the attachment removed failed on the ground that it was not properly stamped We do not think that can be said to be a *worsting* which ought to have a material bearing on the question whether a few years after, with knowledge of the fact, a man would be likely to purchase the property from the person so worsted. The last point, but in a sense the most important, is that we think the learned

Digitized by Google

Judge's charge must have induced the jury to attribute to the question of possession and title a subsidiary importance. Now it is curious commentary on this that when we asked the learned Government Pleader (than whom no one is more competent to deal with cases of this kind), what really was the direct evidence on which he would suggest that the forgery was made out, he answered that he relied on the evidence which proved that Godu's title had been made out. This appears to us to have been an answer he could not have failed to give, but manifestly if that be so, the title and the possession accompanying it were not of subsidiary but of prime importance. These grounds, therefore, without discussing the others urged before us, justify us in saying that this case, with all its doubts, has not been satisfactorily dealt with. Mr. Branson has further pointed out that certain evidence was improperly excluded. We should have been glad if we were in a position to deal with this point. But we do not know with precision what the excluded documents were and what they contained. All we know is that it is alleged that these documents contained valuable materials for the purpose of determining with whom title and possession to the property in question was in 1877 and prior to that date. If that be so, these documents did deserve a place in the records of this trial; and when the case comes for rehearing we have no doubt the learned Judge will consider how far the documents are of the description attributed to them before us. We refrain from expressing any opinion about them.

With these remarks we set aside the verdict and sentence and send back the case for a fresh trial.

VOLUME XXVIII.

1903. *August,* 25. **I. L. R. 28 Bom. 129.**

Before Mr. Justice Chandavarkar and Mr. Justice Jacob; on reference, before Mr. Justice Aston.

EMPEROR *v.* ALLOOMIYA HUSAN.*

Gambling—Bombay Prevention of Gambling Act (Bombay Act IV of 1887), sections 4, 5, 6, 7—Keeping a common gaming house—Applicability of presumption under section 7 to cases under section 4—Warrant under section 6—Delay in executing the warrant—Previous conviction—Criminal Procedure Code (Act V of 1898), section 342—Evidence Act (Act I of 1872), sections 11, 54.

On the 19th May, 1903, a warrant was issued by the Commissioner of Police at Bombay, under section 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) for the arrest of accused 1. In execution of this warrant, when, on the 7th June, 1903, the police entered the room of accused 1, no actual play was seen by the raiding party, but there were found playing cards on the ground, and ten persons, including accused 1, were found sitting in a circle. Upon these facts the Magistrate convicted the accused of keeping a common gaming house, an offence under section 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), by applying to him the presumption created by section 7 of the Act; and taking into consideration the previous convictions of the accused under the Act, he sentenced him to pay a fine of Rs. 500 the maximum amount of fine allowed by the section. On appeal to the High Court.

Held, by Chandavarkar and Aston, JJ. (Jacob, J., dissenting), affirming the conviction, (1) that the presumption created by section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) could be applied to cases falling under section 5 as well as to those falling within the purview of section 4 of the Act.

---

* Criminal Appeal No. 259 of 1903.

Digitized by Google

(2) That the applicability of section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) was affected by the fact that a considerable interval had elapsed between the issue of a warrant under section 6 of the Act and the execution thereof.

(3) That the evidence that the accused had been previously convicted of the same offence was admissible to show guilty knowledge or intention.

Held, by Jacob, J., dissenting, (1) that the presumption created by section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) is sufficient for the purposes of section 5 of the Act. It is also sufficient for the purposes of section 4 (*a*) so far as regards the fact that the house, &c., is so used, but it is not alone sufficient for the purpose of showing that the house was so kept or used by any specified person.

(2) That in a trial for an offence under section 4 (*a*) of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), the evidence that the accused was previously convicted of a similar offence cannot be admitted either under sections 14, 15 or 54 of the Evidence Act (I of 1872).

(3) That the question whether the delay, between the issue of a warrant under section 6 of the Act and its execution, has been reasonable or otherwise is one which must be decided with reference to the circumstances of each case.

APPEAL from the conviction and sentence recorded by Karsandas Chhabildas, Third Presidency Magistrate of Bombay.

On the 19th May, 1903, the Commissioner of Police at Bombay issued, under section 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), a warrant for the arrest of Alloomiya Husan, accused 1.

In execution of this warrant, the police entered the room of accused 1 on the 7th June, 1903, where a pack of cards was found and ten persons, including accused 1, were found seated in a circle.

The accused 1 was thereupon charged under section 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) with keeping a common gaming house, and accused 2—10 under section 5 of the Act with being found gaming therein with cards and money.

The Magistrate convicted them and sentenced them to pay fines varying in amount. The following is a material portion of his judgment.

Three witnesses have been examined by prosecution, *viz.*, Inspector Peter Sullivan, Sub-Inspector Roberts and Sub-Inspector Finch. After going through their evidence I am fully convinced that the statements of all the accused except No. 9 are unworthy of any belief whatever and that all the accused, except No. 9, were actually gaming with cards and money when they entered No. 1's room armed with a warrant from the Commissioner of Police on the 7th instant at 3 P. M. It is proved to my satisfaction that when they entered the room, all the accused except No. 9 were actully playing with cards and money as they were seated in a circle; that on seeing Inspector Sullivan entering there was a general confusion and rush for windows and doors; that accused No. 10 threw out of the window a cap which was lying on the ground; that No. 8 jumped on a chair and began to read the Kuran, while No. 7 quietly sat near him and that No. 9 began to work in a bath room. The evidence of Inspector Sullivan is fully borne out by the evidence of Sub-Inspectors Roberts and Finch, from whose evidence it is also proved that the packs of cards, Exhibits B and C, were found in No. 1's room—Exhibit B on the floor scatterd about and Exhibit C underneath a mat—and that Rs 1-3-0 were found lying on the ground. It is also proved that Sub-Inspectors Finch and Roberts had to go to the door on the other side in order to prevent the accused escaping. One witness has been examined on behalf of the accused by name Abbdul Rehman Abbdul Rasool, a relation of accused No. 1. He was not present at the time accused were arrested, but he tries to support the statements of accused Nos. 1--4 and 5 and 8 showing that No. 8 is a preacher of Kuran, that No. 1 was never seen gambling, and that some money was due to Nos. 4 and 5. In view of the evidence

Digitized by Google

for the prosecution which is quite clear and trustworthy, and which I do not see any reason to disbelieve, I am not prepared to hold on the evidence of this witness alone, who is related to No. 1 closely, that Nos. 4 and 5 and 8 were in No. 1's room for the innocent purposes they suggest and that the three witnesses for the prosecution have perjured themselves. I do not believe his evidence at all and on the evidence for the prosecution find that accused No. 1, being the occupier of the room, used it for the purpose of a common gaming house, and that Nos. 2, 3, 4, 5, 6, 7, 8, and 10 were found gaming with cards and money in that room. I accordingly convict accused No. 1 under section 4 of Act IV of 1887 and accused Nos. 2, 3, 4, 5, 6, 7. 8 and 10 under section 5 of the said Act. With regard to accused No. 9, I am inclined to believe that he was a mere looker on temporarily. For the evidence shows that his tools were with him and that he began to work after the Police came. It is doubtful whether he was in No. 1's room purely for the purpose of gaming. I therefore give him the benefit of the doubt and order him to be acquitted. Now with regard to the suggestion made by Mr. Kazi Kabirudin that the warrant issued by the Commissioner of Police is bad, I must hold that the warrant is perfectly legal. It has been executed by an officer to whom it was addressed and has been issued by the Commissioner of Police who is authorized, under section 6 of the Gambling Act, to issue it. I fail to see any illegality in it. With regard to the point that there is no evidence to show that accused No. I used this room as a common gaming house, as there is nothing to show that the room was used for the profit of the person occupying or using such room, I think section 7 of the Gaming Act is quite clear. Section 7 says when cards, dice, counters or other instruments of gaming used in playing any game, &c., are found in a house or room entered under warrant issued under section 6, it shall be evidence, until the contrary is shown, that such house or room is used as a common gaming house and that the persons found therein were present for the purpose of gaming, although no play was seen by the Police officer. In this case it is proved that a legal warrant was issued under section 6 by the Commissioner of Police. It is also proved that cards and money were found in a room which is proved to be in No 1's occupation and which was entered under the authority of that warrant. These two circumstances are, in my opinion, evidence under section 7 of that room being used as a common gaming house and that the persons present therein were there for the purpose of gaming until the contrary is made to appear. As it has not been made to appear to my satisfaction that the accused were in that room for the innocent purposes mentioned by them and as cards and money were found in that room, I must convict accused No. 1 under section 4 and accused Nos. 2, 3, 4, 5, 6, 7, 8, and 10 under section 5 of the Gaming Act. With regard to the punishment to be inflicted on the accused, I think No. 1 deserves to be dealt with severely as he is admittedly a confirmed gambler. He has been convicted twice under section 4 on a charge of keeping a common gaming house and thrice under section 5 on a charge of gaming. In his case a deterrent sentence is necessary. I sentence accused No. 1 to pay a fine of rupees five hundred, in default three weeks' rigorous imprisonment. With regard to accused Nos. 2, 3, 4, 5, 6, 7, 8 and 10, I sentence each of them to pay a fine of rupees seventy-five each, in default one week's rigorous imprisonment.

The accused 1 appealed to the High Court.

The following are the sections of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), referred to in the case:—

Digitized by Google

4. Whoever:

Keeping common gaming house.

(a) being the owner or occupier or having the use of any house, room, or place, opens, keeps or uses the same for the purpose of a common gaming house;

(b) being the owner or occupier of any such house, room or place, knowingly or wilfully permits the same to be opened, occupied, kept or used by any other person for the purpose aforesaid.

(c) has the care or management of, or in any manner assists in conducting the business of any such house, room or place opened, occupied, kept or used for the purpose aforesaid.

(d) advances or furnishes money for the purpose of gaming with persons frequenting any such house, room, or place, shall be punished with fine which may extend to five hundred rupees, or with imprisonment which may extend to three months.

Gaming in common gaming house.

5 Whoever is found in any common gaming house, playing or gaming with cards, dice, counters or other instruments of gaming, or is found there present for the purpose of gaming, whether by playing for any money, wages, stake or otherwise shall be punished with fine which may extend to two hundred rupees, or with imprisonment which may extend to one month.

Any person found in any common gaming house during any gaming or playing therein, shall be presumed, until the contrary be made to appear, to have been there for the purpose of gaming.

Power to authorize entry of gaming house by Police officers and seizure of gaming instruments.

6. It shall be lawful for the Commissioner of Police in the City of Bombay, and elsewhere for any Magistrate of the First Class or any District Superintendent of Police or for any Assistant Superintendent empowered by Government in this behalf, upon any complaint made before him on oath that there is reason to suspect any house, room, or place to be used as a common gaming house, and upon satisfying himself after such enquiry as he may think necessary that there are good grounds for such suspicion to give authority, by special warrant under his hand, when in his discretion he shall think fit, to any Inspector, or other superior officer of Police of not less rank than a Chief Constable—

(a) to enter, with the assistance of such persons as may be found necessary, by night or by day, and by force, if necessary, any such house, room, or place; and

(b) to take into custody and bring before a Magistrate all persons whom he finds therein, whether they are then actually gaming or not; and

(c) to seize all instruments of gaming, and all moneys and securities for money, and articles of value reasonably suspected to have been used or intended to be used for the purpose of gaming, which are found therein; and

(d) to search all parts of the house, room or place, which he shall have so entered, when he shall have reason to believe, that any instruments of gaming are concealed therein, and also the persons of those whom he shall so find therein or take into custody, and to seize and take possession of all instruments of gaming found upon such search.

Proof of keeping, or of gaming, in common gaming-house.

7. When any cards, dice, gaming table, counters, cloth board or other instruments of gaming used in playing any game, not being a game of mere skill, are found in any house, room, or place entered under warrant issued under the provisions of the last preceding section or about the person of any of those who are found therein, it shall be evidence, until the contrary is made to appear, that such house, room, or place is used as a common gaming house, and that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the Magistrate or Police officer, or by any person acting under the authority of either of them.

S. B. Dady Burjor for the accused 1.

Scott (Advocate General), with the Public Prosecutor, for the Crown.

CHANDAVARKAR, J:—The appellant, Alloomiya Husan, has been convicted by the Third Presidency Magistrate, Bombay, of the offence of keeping a common gaming house under section 4 of Bombay Act IV of 1887. Three grounds have been urged before us in support of this appeal against the conviction. The first is that presumption of guilt created by section 7 of the Act has been wrongly applied to the offence of keeping a common gaming house under section 4. It is contended that that presumption applies and was intended by the Legislature to apply only in the case of the offence of gaming in a common gaming house, which is dealt with in section 5 of the Act. There is nothing in the language of section 7 which lends support to the

Digitized by Google

narrow construction which we are asked to put upon it. On the other hand, the language is wide enough to cover the case of an offence of keeping or using a common gaming house.

The second ground of appeal urged before us is the learned Presidency Magistrate admitted the evidence of certain previous convictions against the appellant in proof of the offence of which he has been convicted. That evidence is to the effect that the appellant was previously convicted twice under section 4 of Bombay Act IV of 1887 and thrice under section 5 of the Act. The learned Magistrate has drawn from this evidence the inference that the appellant is a "confirmed gambler" and that he, therefore, "deserves to be dealt with severely." If the object of proving the previous convictions was merely for the purposes of the punishment to be awarded after conviction, the Magistrate ought not to have allowed that evidence to go in before convicting the appellant; but even in that case there is no law which provides that proof of previous convictions can be given to justify enhanced punishment under Bombay Act IV of 1887. Section 75 of the Indian Penal Code, which deals with the punishment of persons convicted after a previous conviction, is confined to offences punishable under Chapter XII or XVII of that Code. Nor could the proof of previous convictons be given against the appellant to show that he bore a bad character. Section 54 of the Evidence Act prohibits the admission of such evidence unless evidence has been given that the accused person has a good character, and the only exception allowed to that is where the bad character of the person is itself a fact in issue or relevant. The learned Advocate General has sought to bring the admission of the evidence in question within that exception by contending that, as the question at issue in this case was whether the appellant kept a common gaming house, the evidence was admissible under either section 14 or 15 of the Evidence Act. Now, however the law stood before the amendment of the Evidence Act in 1891, such evidence is made clearly admissible by the amendment of the Act. See Explanation 2 to section 14 of the Evidence Act. According to it, previous convictions become relevant within the meaning of that section when the existence of any state of mind, or body or bodily feeling, is in issue or relevant For instance, where a person was charged with the offence of belonging to a gang of persons associated for the purpose of *habitually* committing dacoity, it was held by the Calcutta High Court that proof of previous conviction was admissible under section 14 of the Evidence Act, having regard to the character of the offence attributed to the accused: *Empress* v. *Naba Kumar Patnaik* (1). In the present case, the offence charged against the appellant was one of keeping a common gaming house. Both in the charge-sheet and in the Magistrate's judgment it is stated generally that he was accused of the offence of keeping a common gaming house under section 4 of the Act. That section divides the offence into four classes, and all are described in the marginal note as "keeping a common gaming house." The first class has reference to the owner or occupier of a house, room, or place, who uses or keeps it as a common gaming house. Now, the user of a place or the keeping of it for a particular purpose necessarily connotes the existence of a state of mind. They imply a purpose showing intention and knowledge, intention to use the place for that purpose and knowledge that it is so used. To keep a common gaming house is to hold the house and manage it with the intention of using it as such *habitually*. In the words of Lord Hobhouse in *Powell* v. *Kempton Park Race-course Company*,(2) "the phrase *use for a purpose* necessarily implies a deliberate use, a designed choice of the thing used for the purpose in hand." "Kept" and "used," he says, are expres-

(1) (1897) 1 C. W. N. 146.

(2) (1899) A. C. 143 at p. 172.

Digitized by Google

sions necessarily or very strongly importing an habitual or repeated use of the thing for the purpose. So also in the second class of the offence. According to it, a person commits the offence of keeping a common gaming house, if, being the owner or occupier of it, he *knowingly* or *wilfully* permits the same to be opened, occupied, kept, or used by any other person as aforesaid; or, in the third class, if he advances or furnishes money *for the purpose* of gaming with persons frequenting any such house. These are ingredients of the offence which render it necessary to give proof of his *knowledge* or intention and habitual course of dealing with the house, room, or place so far as they are relevant to the proof of the offence. I think, therefore, that, having regard to the character the evidence charged against the appellant *in respect to this particular room*, of the offence was rightly admitted under section 14 of the Evidence Act.

The appellant was convicted by the Magistrate generally under section 4, and the evidence in the case shows that there was gambling going on when the Police entered, and the appellant who was the occupier of the room was one of the gamblers. This evidence, with the evidence of previous convictions, consisting in his own admissions, shows that he used and kept it as a common gaming house both under the first and the second class of the offences in section 4, *i. e.* (*a*) and (*b*).

The third and last ground of appeal is that the execution of the warrant which was issued by the Commissioner of Police under section 6 of Bombay Act IV of 1887, and under which the Police entered the appellant's house and conducted a search, was illegal, because, it is contended, the warrant was executed not immediately after it had been issued, but several days after. The date of the warrant is 19th May, 1903, and it was executed on the 7th June, 1903. Section 6 of the Act does not say that the warrant should be executed immediately after its issue, nor does it prescribe any period during which it must be taken to be in force. But the argument advanced by the appellant's pleader is that it could not have been the intention of the Legislature to keep a warrant of this kind in force for an indefinite period and authorise those to whom it is issued to let it lie in their pockets as long as they like and execute it after the lapse of considerable time. But when the Lagislature has not prescribed any period limiting the time during which it is to be in force, the presumption is that it retains its validity until it is executed. In *Dickenson* v. *Brown and others*(1) Lord Kenyon said that the warrant of a Magistrate was not returnable at any particular time, but continued in force until it was fully executed and obeyed, though it were seven years. In *Mayhew* v. *Parker*(2) the same learned Judge held that a warrant to arrest a person that he might be bound to appear at the next Session of *Oyer and Terminer* might be executed at any time. Some discretion must be given to the officer executing a warrant, and whether that discretion is exercised properly and within a reasonable time or not is a question which must depend on the circumstances of each case. But the warrant itself does not become illegal merely because it is executed not immediately after its issue but some days after that. There may be, under certain circumstances, illegality attending the execution of the warrant and rendering the officer executing it liable on account of such illegal execution; and yet the warrant itself may be in force, no period of time being expressly prescribed for its execution. It was said that the language of section 6 of the Act showed that the warrant must be executed immediately after its issue, and the case was put before us in this way in support of that. The persons who occupied the place when the

(1) (1794) 1 Peak. N. P. 307. (2) (1799) 8 T. R. 110.

Digitized by Google

warrant was issued might leave and others might come and live there, and it cannot have been the intention of the Legislature that the warrant should be executed when there has been a change of that kind. But it appears to me that the language of section 6 supports the view that the Legislature did not intend to restrict the authority executing the warrant to any limit of time. The warrant has to be issued when a complaint is made on oath that there is reason to suspect that "any house, room or place" is used as a common gaming house. The attack aimed at primarily is against a *particular locality* as distinguished from the persons who live in or frequent it. It is because a house, room, or place is suspected to be a rendezvous of gamblers that the Lagislature has authorized the issue of a warrant, the object being to prevent any house becoming the resort of gamblers. The gamblers are reached through the house, room, or place, and it is the house, room, or place which is to be entered and searched. The complaint in fact on the basis of which the warrant goes is against the house, room, or place, and its inmates and its contents come in as parts of it. That being the the nature of the complaint and the house, room, or place standing where it did, it may be the Legislature has not prescribed any limit of time for the execution of the warrant, but let it to the discretion of the officer issuing it. Persons who live in such a place may change from day to day or from hour to hour, as those who gamble there may change. But the house, room, or place being in itself *prima facie* proved to the satisfaction of the authority issuing the warrant under section 6 of the Act to be *a common gaming house*, it continues to be so for the purposes of the Act and may be searched within a reasonable period so long as the warrant, not being executed, is in force. Again, the object being to apprehend the gamblers and seize the gaming instruments, it may be necessary sometimes that the executing officer should bide his time to make the search. Having regard to all these circumstances I think that the Legislature has deliberately omitted to provide for any period of time for the execution of the warrant.

The only flaw in the warrant urged before us was that because the search under it was made some days after its issue, we must decline to draw under section 7 the presumption against the appellant that the place was used as a common gaming house. For the reasons I have given neither the warrant nor the search under it is vitiated by the fact that the search was made several days after it had issued. But assuming that the flaw pointed out is of such a character as to vitiate the search and make the presumption created by section 7 inapplicable to the case, what follows? This only that the prosecution must prove that the place searched by the Police was used as a common gaming house. It only makes a difference as to on whom the *onus* of proof in the first instance lies. Here the evidence of witnesses for the prosecution proves that gambling was going on when the Police entered and that packs of card and money were found in the room. The appellant and the other persons who were accused with him were caught almost red-handed. That evidence with the evidence of previous convictions against the appellant is sufficient, in my opinion, as it was sufficient in the opinion of the Magistrate who saw and heard the witnesses and examined the accused, to prove that the appellant's course of dealing with the room in which he has lived for the last 18 or 19 years has been to treat it as a house kept for gaming. The discrepancies pointed out in the evidence by the appellant's pleader are too trivial to affect the weight of it. I would, therefore, confirm the conviction and sentence under section 4 and reject this appeal.

JACOB, J.—I have had the advantage of perusing my learned colleague's judgment in this appeal, and it is with much regret that I feel myself unable to concur in some of the conclusions at which he has arrived, materially affecting the decision of the case.

Digitized by Google

The first objection taken for the appellant was that the *presumption* (I use this word for want of a better concise term, in accordance with common practice, though I am doubtful whether the term accurately connotes the conclusions of the section) created by section 7 of Bombay Act IV of 1887 was applicable only in connection with an offence alleged to fall under section 5, and not in connection with one under section 4 of the Act. It is, I think obvious that broadly stated as this contention was, it is untenable. I am not sure, however, that the learned pleader, who appeared for the appellant, was quite successful in explaining clearly the point of his objection.

Now it is clear that section 7 does provide for a " presumption " under certain circumstances that the house, room or place in question is used as a common gaming house. That is sufficient for the purposes of section 5. It is also sufficient for the purposes of section 4 (*a*) so far as regards the fact that the house, &c., is so used, but it is not alone sufficient for the purpose of showing that the house was so kept or used by any specified person, and in certain cases this would be certainly an important distinction in favour of a person charged with an offence under section 4 (*a*).

It is necessary in order to comply with the provisions of section 6 of the Act that the authority issuing the warrant should be satisfied that there are good grounds for suspecting the house, &c., to be used as a common gaming house, that is (under section 3), that it is kept or used for the profit or gain of the owner or occupant, &c., and before he can be so satisfied, it would seem to be necessary *ex hypothesi* that he should have what he deems to be reliable information as to the enjoyment, or at least as to matters involving reason to suspect the enjoyment, of such profit or gain by some specified individual as such owner or occupant. In the present case the warrant which is on the record indicates that the house was kept by the appellant. I am of opinion that this circumstance alone would not have justified any presumption against the accused if he had disputed the fact that he was the owner or occupant of the house. The burden of proving this fact, which it is necessary to prove for a conviction under section 4 of the Act, is not removed from the prosecution by the provisions of section 7 and the entry of his name in the warrant would so far be no evidence of this fact against the accused.

In the present case, however, this objection of fact was not taken before the Magistrate. As the record before us stands it is undisputed that the appellant was the occupant of the house, and to him, as such, the " presumption " that the house was used as a common gaming house attaches. I concur therefore in holding that on the facts of this case the first objection is untenable.

The second objection has reference to the admission, not indeed of evidence but of statements elicited from the appellant as to previous convictions for offences under the same Act. I concur in the opinion (see *Yasin* v. *King Emperor* (1)) that the examination of an accused person in respect of such previous convictions which it may be necessary or permissible for the prosecution to prove is without legal warrant or justification, having regard to the provisions of section 342 of the Criminal Procedure Code. For the purposes of the present argument, however, these statements must be regarded as evidence, and the question which arises is whether evidence of such previous convictions was relevant in the present case.

It is not necessary I think to consider in this case whether such evidence

(1) (1901) 28 Cal, 689.

Digitized by Google

would have been admissible after conviction for the purpose of affecting the sentence to be passed. It seems probable on the construction of section 54 of the Evidence Act, especially in view of the circumstance that in the matter of civil suits a somewhat analogous condition of affairs is dealt with in section 55, that such evidence tendered even for such a limited purpose must be excluded. The question however is not free from doubt (see *Queen* v. *Shiboo Mundle*(1) and *Roshun Doosadh* v. *Empress*, (2)) and whether this is likely to have been the real intention of the Legislature in view of the deliberate adoption of the principle expressed in section 54 of the Evidence Act prior to its amendment by Act III of 1891, and the considerations which brought about that amendment (see *Queen-Empress* v. *Kartick Chunder Das*(3)) may well be questioned.

The provisions of section 221 of the Criminal Procedure Code have reference, it may be noted, to the competence not to the discretion of the Court in awarding punishment. However in this case a decision on this point is not at present called for as the learned Advocate General very readily admitted before us that the previous convictions must have weighed with the Magistrate in determining the question of the accused's guilt. Now as regards the admissibility of the evidence in this connection my learned colleague has applied section 14 of the Evidence Act. He regards for this purpose the case as falling possibly within the purview of section 4, clause (*b*) or clause (*d*), of the Act.

This in my opinion is going entirely beyond the record. It is true that so far as any law is quoted, the Magistrate only refers generally to section 4, which of course might include or denote clause (*b*) or clause (*d*) as well as clause (*a*), but the offence is clearly stated to have been that of "keeping a common gaming house," and this no less clearly falls under clause (*a*) and not under clause (*b*), much less under clause (*d*).

I can find nothing in the record and certainly nothing was said at the hearing before us to indicate that the offence was ever regarded as falling under clause (*b*) or clause (*d*).

It is indeed true that the general expression "keeping a common gaming house" is attached in the margin to the whole of section 4 of the Act. This seems to me however beside the present question, apart from the fact that marginal notes from no part of the legislative enactment: *Dukhi Mullah* v. *Halway* (4), *Punardeo Narain Singh* v. *Ram Sarup Roy*(5) Section 242 of the Criminal Procedure Code requires that the particulars of the offence of which a person is accused shall be stated to him, and it is to my mind clear that a general reference to the inclusive terms of a marginal note appended to a section which deals with several offences made up of distinct facts, does not amount to a compliance with this requirement. The expression "keeping a common gaming house" applies in strict parlance only to the terms of clause (*a*), and looking to the record and to the case as presented to us, it seems to me impossible to conceive that any other offence than one falling under clause (*a*) was contemplated by the prosecution, or by the Magistrate, or by the accused.

In my opinion there can be no doubt that the two clauses (*a*) and (*b*) provide for perfectly distinct offences. The ingredient of the house being kept or used for profit or gain is common indeed to both, but in the case of clause (*a*) the direct recipient of the gain or profit is the owner or occupant himself,

(1) (1865) 3 W. R. Cr. 38. (2) (1880) 5 Cal. 768. (3) (1887) 14 Cal. 721.
(4) (1895) 23 Cal. 55. (5) (1898) 25 Cal. 853.

Digitized by Google

while under clause (*b*) it is some other person whom the owner or occupant has knowingly or wilfully permitted to use the house for such a purpose.

Clause (*d*) on the other hand deals with an entirely different state of facts. The advance of money by the appellant for such a purpose has never been alleged. Now even assuming that clause (*b*) could under any circumstances be applied by us in this appeal, there is no evidence or allegation that any such permission as is stipulated in this clause had been given by the appellant to any other person, or that any other person had used or kept the house for his profit or gain. The necessary ingredient of fact, therefore, is wanting, and no question of knowledge of wilfulness, or indeed of any other state of mind, can, therefore, arise in connection therewith as affecting the appellant.

As stated above, however, I am clearly convinced that clause (*b*) is not applicable, and clause (*a*) read with the definition in section 3, which states the ingredients of the offence, is concerned solely with matter of fact, and not with any such states or conditions as are specified in section 14 of the Evidence Act.

Further, it seems clear that the relevance of such previous convictions would be excluded by the terms of explanation (1) of section 14 of the Evidence Act, read for instance with illustration (*p*) appended to the section.

Equally I am of opinion that section 15 of the Evidence Act is inapplicable. In connection with an offence under section 4 (*a*) there is no question, at any rate in the present case, of accident, or knowledge or intention. The words "*for the purpose of* a common gaming house" in this clause do not in my opinion involve any notion of intention, as distinguished from accident, but are used as introductory of the definition in section 3. The *facts* set out in that definition are what must be proved to establish the purpose

The words of Lord Hobhouse quoted by my learned colleague from the case of *Powell* v. *Kempton Park Race-course Company*(1) do not appear to me to be in point. The expression was used in the course of a discussion bearing on the question how far the phrase "use for a purpose" is to be limited to the more proximate or direct object of the use. A presumption of deliberate choice or intention attaches more or less to nearly all criminal acts, but it would not therefore be held that intention is a necessary ingredient of such offences. It is also to be borne in mind that section 15 of the Evidence Act invites consideration of the question of intention, only as opposed to accident, and in connection with an offence under section 4 of Bombay Act IV of 1887 it appears to me that no question of accident can arise.

It is clear that the evidence cannot be let in under section 54, or under section 11 of the Evidence Act. I have not thought it necessary to refer to sections 310, 511, &c., of the Criminal Procedure Code. The provisions of these sections are directed to matter of procedure, on the assumption that the evidence is admissible.

I am of opinion, therefore, that the conviction, admittedly based in material part on the fact that the accused had been previously convicted, should be set aside, and that the accused should be re tried. The previous convictions under section 5 would not in any view of the law be admissible. With regard to the discrepancies as to the discovery of the second pack of cards, though standing alone they might not be worthy of serious consideration, the fact that only one pack was endorsed on the warrant and sent up with the charge sheet is significant, and appears to require further explanation. On the the third point, *viz*,

(1) (1899) A. C. 143 at p. 172.

Digitized by Google

delay in execution of the warrant, I am unable to concur entirely in the opinion expressed by Mr. Justice Chandavarkar, but my difference of opinion will not affect the decision of this case.

Section 6 of Bombay Act IV of 1887 empowers any one of certain officials, on the event of certain conditions being fulfilled, to "give authority by special warrant under his hand when in his discretion he shall think fit" to a Police Officer of not less rank than an Inspector to enter, &c. This section read with section 7 imports a departure from the principle ordinarily enforced in criminal proceedings as to the incidence of the burden of proof, and it has been frequently held that the provisions of these sections must in consequence be strictly construed. It appears to me that the justifying reason for the new departure adopted in section 7 is to be found in the fact that the proceedings contemplated by section 6 involve the exercise by an experienced official of a carefully restricted class of a discretion, which, though applied to *ex parte* and it may be interested information, is essentially judicial. Now the *giving of the authority* by the *special* warrant —(the use of such guarded terms cannot be inteded to have no significance, compare section 96 of the Criminal Procedure Code)—is in the exercise of that judicial discretion applied to facts as they have been brought to the knowledge of the authorising official. In the course of time it may be shorter or longer, according to circumstances, a change in those facts may be brought about; the house or place may be transferred to another occupant, or the same occupant may change his habits, or may cease to take profit or gain, and the result of delay in executing the warrant may thus result in virtual delegation of the carefully guarded discretion from the issuing to the executing official, which cannot have been the intention of the Legislature.

The provisions of section 75 (2) of the Criminal Procedure Code, which embody the principle affirmed in the English cases cited by my learned colleague, are indeed by section 101 of that Code made applicable to search warrants issued under that Code, but they are not in my opinion applicable to a special warrant issued under section 6 of the Bombay Gambling Act. To hold that they are applicable would also involve the application of the provisions of section 104, Criminal Procedure Code, to such special warrants, which would probably tend to defeat their object.

On the other hand, however, it would be absurd to hold that the warrant issued under section 6 of the Gambling Act must be forthwith executed. It appears to me that the question whethere the delay has been reasonable or otherwise is one which must be decided with reference to the circumstances of the case. In the present case I am not disposed to hold that the delay of 19 days was unreasonable.

Owing to the above difference of opinion the case was, under section 429 of the Criminal Procedure Code (Act V of 1898), referred to Mr. Justice Aston.

S. B. Dady Burjor for the appellant (accused 1):—We contend that the Magistrate was not right in raising a presumption of guilt on the strength of section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887). The Act must be construed strictly: *Queen-Empress* v. *Narottamdas Motiram*(1) *Queen-Empress* v. *Govind*(2); *Queen-Empress* v. *Kanji Bhimji*(3); and, hence, section 7 must be held to apply to a conviction under section 5 only, and not under section 4 of the Act.

Moreover, the admission of irrelevant evidence as regards previous convic-

(1) (1889) 13 Bom. 681. (2) (1891) 16 Bom. 283. (3) (1892) 17 Bom. 184.

Digitized by Google

tions had weighed with the Magistrate in coming to a conviction. These previous convictions are not admissible under any provision of law, either under the Criminal Procedure Code (Act V of 1898) or the Evidence Act (I of 1872). Sections 220, 321, 310, 348 and 511 of the Criminal Procedure Code (Act V of 1898) deal with the procedure regarding such evidence and not with its admissibility or otherwise. Such evidence was formerly admissible under section 54, Evidence Act, I of 1872 (*Queen-Empress* v. *Kartick Chunder Das*(1)); but since its amendment by Act III of 1891, it is inadmissible. It is also inadmissible under section 14 or section 15 of the Evidence Act (I of 1872); for in an offence under section 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), *viz.*, of keeping a common gaming house, there is no question of intention or guilty knowledge. No state of mind is relevant in this case: *Empress* v. *M. J. Vyamoory Moodeliar*(2); *Hollingham* v. *Heath*(3). As regards the dictum of Lord Hobhouse in *Powell* v. *Kempton Park Race-course Company*(4), on the phrase "use for the purpose," we rely on the opposite view taken by the Earl of Halsbury, L. C., in the same case at page 162.

We further contend that the warrant being a special warrant, must be executed forthwith, and not having been so executed, it must be taken to have spent itself, or in any event the presumption under section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) ought not to be raised against us. The general rules regarding ordinary warrants under the Criminal Procedure Code (Act V of 1898) do not apply to this special warrant. The delay in execution of the warrant in the present case is far from reasonable and has not been accounted for.

Scott (Advocate General), with the Public Prosecutor, for the Crown:—The presumption under section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) applies equally to sections 4 and 5 of the Act. There is nothing in the Act to limit or restrict its operation.

The evidence of previous convictions was rightly admitted either under section 14 or section 14 or section 15 of the Evidence Act (I of 1872). It is necessary to prove the intention of the accused and guilty knowledge is an ingredient of the offence. The prosecution had to prove that the present act of the accused formed one of a series of similar acts on his part.

As regards the legality of the warrant, the Court must so construe section 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) as to give some meaning to its provisions. To hold that the warrant should be executed forthwith is to make the section nugatory. Section 75 (2) of the Criminal Procedure Code (Act V of 1898) shows that a warrant shall remain in force until it is cancelled or executed. In any event, the delay in executing the warrant is not shown to be unreasonable.

ASTON, J.—It is, I consider, clearly proved by the evidence in this case that a room, of which the appellant is the occupier, was entered by certain Police officers on the 7th June last under a warrant legally issued in accordance with the provisions of section 6 of the Gambling Act (Bombay Act IV of 1887) nineteen days previously, and that in the room thus entered under the warrant so issued, there were found playing-cards, and ten persons including the appellant.

The finding of cards under these circumstances constitutes legal evidence, until the contrary is made to appear, that this room is used as a common

(1) (1887) 14 Cal. 721. (2) (1881) 6 Cal. 655. (3) (1858) 27 L. J. C. P. 241. (4) (1899) A. C. 143.

Digitized by Google

gaming house and that the persons found therein were present for the purpose of gaming even if no play was actually seen by the raiding party (see section 7 of the Act.)

It has been contended by Mr. Dady Burjor who appeared for the appellant that section 7 of the Act has no application when there has been an interval of many days as in this case between the issue of the warrant and its execution. This argument is, I think, unsound, for no foundation for it can be discovered in any express words or necessary implication in the Act. It is, however, open to the appellant to ask the Court to treat what the Legislature declares in section 7 to be incriminating " evidence, " as reduced in weight by any unreasonable delay which may take place between the issue of a warrant under section 6 and its execution. In the present case the delay is not shown to have been unreasonable.

There is further evidence on the record which I think the Presidency Magistrate has rightly believed to be true. This evidence establishes the following additional facts. The ten men in the room when surprised were seated on the floor in a circle. Some of the cards were scattered about and some under a mat after the raiding party entered, but most of the persons in the room had cards in their hands when first seen. Money was found on the floor. When surprised there was at first general confusion and effort to escape and then a pretence of listening to the reading of one of the ten persons.

The offence of " keeping a common gaming house " of which appellant stands convicted under section 4 of the Gambling Act (Bombay Act IV of 1887) may be committed in any of the various ways set out in clauses (*a*), (*b*), (*c*), (*d*) of that section. It is sufficient at present to confine attention to clause (*a*)— " being the owner or occupier or having the use of any such house, room or place, opens, keeps, or uses the same for the purpose of a common gaming house" —though it may be observed that under clause (*c*) it would be useless for the appellant to plead that he was not the owner or occupier if he had " the care or management of, or in any manner assisted in conducting the business of any such house, room or place opened, occupied, kept or used for the purpose aforesaid."

The incriminating evidence on the record may be summarised as follows:-

(1) The appellant is the occupier of the room in question.

(2) When the room was entered under a warrant issued under the provisions of section 6 of the Act cards were found in the room. This has been declared by the Legislature (section 7) to be evidence until the contrary is made to appear that such room is used as a common gaming house, and that the persons found therein were there present for the purpose of gaming.

(3) There were in fact nine persons besides the appellant, some of whom were playing cards in the presence of the appellant, and evidently playing for money.

To rebut the complete case made out by this evidence that this room was opened, kept or used by the appellant as a common gaming house, there is merely the bare assertion of the accused that the persons present had met fortuitously each for a different purpose wholly unconnected with card-playing and that there was no card-playing at all—an assertion which the Magistrate, for, I think, good reasons, did not believe.

But it is contended for the appellant the conviction is vitiated because the Magistrate elicited from the appellant before he was convicted that he had

Digitized by Google

been previously convicted of keeping a common gaming house and Mr. Dady Burjor argued first that the Magistrate treated this admission as part of the evidence on which he based the conviction appealed against: secondly, that this fact of a previous conviction was not legally admissible evidence to prove the offence of keeping a common gaming house for which the appellant was being tried.

The case was tried not by a jury but by a Magistrate who was judge of the law and the facts. He was presumably aware already from the papers before him that previous convictions were alleged against the appellant and he knew that a previous conviction if proved would afford legal ground for awarding more severe punishment in the event of the appellant being convicted by him. The Magistrate in setting out the evidence upon which he has held the charge against appellant proved has not included the admission of a previous conviction and the record does not afford indication that he took this admission into consideration except for the purpose of assessing punishment. If it is to be assumed (which I think unnecessary) that the admission of a previous conviction was treated by the Magistrate as part of the evidence upon which he based the conviction, the question arises was it admissible evidence under the provisions of the Evidence Act (I of 1872).

Section 54 of the Evidence Act (I of 1872) is as follows :—

" In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

" *Explanation* 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

" *Explanation* 2.—A previous conviction is relevant as evidence of bad character."

It is sufficiently clear from this section that in criminal proceedings the fact that the accused person has a bad character is not relevant for the purpose of raising a general inference *from such bad character* that the accused person is likely to have committed the crime charged.

The second explanation says " a previous conviction is relevant as evidence of bad character." It does not say that a previous conviction is never relevant unless evidence of bad character is relevant or is itself a fact in issue, and even if it did go so far as to say this, it has to be remembered that the Evidence Act nowhere says that evidence may be given *only* of relevant facts.

Under section 5 " evidence " may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others. The illustration (*a*) to that section is as follows :—

" A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue :—

A's beating B with club ;

A's causing B's death by such beating ;

A's intetion to cause B's death."

The words " *for the purpose* of a common gaming house " occur in each clause of section 4 of the Gambling Act (Bombay Act IV of 1887) and guilty

Digitized by Google

knowledge or intention becomes thus an essential ingredient of the offence defined in that section so that guilty knowledge or intention becomes a fact in issue when a person is tried for the offence of keeping a common gaming house.

Again section 14 of the Evidence Act enacts that facts showing the existence of any state of mind, such as intention, knowledge ..... are relevant when the existence of any such state of mind is in issue or relevant, ...and (explanation 2) "where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact."

Under section 11 of the same Act, facts not otherwise relevant are relevant ..... if by themselves or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

If the prosecution had been in a position to prove that the appellant had habitually on many occasions used this very room or another room in his occupation as a common gaming house by the direct evidence of persons who had gambled there, such a fact would make the existence of the guilty intention or knowledge imputed in the present charge highly probable, and under the sections 5, 11 and 14 quoted from the Evidence Act (with which section 54 must be read) such fact would be admissible in evidence. Previous conviction might be a mode of proving such a use on some of the previous occasions, but it can hardly be contended that such previous convictions are inadmissible if the use for such criminal purpose could be allowed to be proved by other evidence.

I therefore concur in the opinion of Mr. Justice Chandavarkar that in a trial for an offence of keeping a common gaming house under section 4 of the Gambling Act (Bombay Act IV of 1887) evidence that the accused had been previously convicted of the same offence is admissible to show guilty knowledge or intention.

I have assumed in dealing with this part of the argument for the appellant, that the Presidency Magistrate did take into consideration for the purposes of conviction, the previous conviction admitted by the appellant, but I have said that in my opinion it is not necessary to make this assumption. It is, I think, under the circumstances already set out more probable that the Presidency Magistrate's object in putting the question as to previous conviction was to ascertain whether in the event of conviction formal evidence as to alleged previous convictions and as to identity of the accused could be dispensed with.

Section 342 of the Code of Criminal Procedure (Act V of 1898) enacts that "for the purpose of enabling the accused to explain any circumstances appearing in evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

It is under this section that the appellant appears to have been examined by the Magistrate.

If the question was put by the Magistrate under the belief that a previous conviction of appellant under section 4 of the Gambling Act (Bombay Act IV of 1887) could be taken into consideration for the purpose of conviction, then the question was not authorised by section 342 of the Criminal Procedure Code, its object not being to enable the accused to explain any circumstances appearing in the evidence against him.

Digitized by Google

If, on the other hand, the object of the question was to ascertain whether, in the event of conviction, formal evidence as to alleged previous convictions and as to identity of the accused could be dispensed with, the question was equally unauthorised at that stage by the provisions of section 342, Criminal Procedure Code, so that it may well be contended that inquiry of any sort into the fact of previous convictions for the latter object should have been postponed until after actual conviction of the appellant in this case.

On the view which I take of the evidence, independent of the appellant's admission of previous conviction, it is unnecessary to pursue this matter, as on that view it becomes equally immaterial in the present appeal whether the Presidency Magistrate in fact treated that admission as part of the evidence establishing the offence charged, or whether it was improper so to treat it.

Independently of the evidence objected to there was, as already shewn above, sufficient evidence to justify the conviction.

Section 167 of the Evidence Act (I of 1872) enacts that "the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independetly of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision." The conviction appealed against is therefore confirmed.

The case does not appear to be one in which, even taking into consideration previous convictions, the maximum fine allowed for the offence is required. Having had the advantage of consulting Mr. Justice Chandavarkar and Mr. Justice Jacob before whom this appeal has been also argued, I reduce the fine to Rs. 250 or in default three weeks' imprisonment. The balance of fine, if paid, to be restored.

Conviction confirmed. Sentence reduced.

1904, *January* 28. **I. L. R. 28 Bom. 346.**

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

EMPEROR *v.* MAGANLAL DULABHAI.*

Bombay Salt Act (Bombay Act II of 1890), section 47 §—Salt—Removal of Salt—Intention—Knowledge—Ingredients of the offence.

To support a conviction under section 47 (*a*) of the Bombay Salt Act (Bombay Act II of 1890) it is not necessary to prove dishonest intention on the part of the accused; since the wording of the clause does not in express terms or by necessary implication make intention or knowedge an essential ingredient of the offence. What is prohibited by the Act is the removal of salt in contravention of any license or permit and that shows that such removal is prohibited in itself.

APPEAL by the Government of Bombay under section 417 of the Code of Criminal Procedure (Act V of 1898), from an order of acquittal passed by J. Sladen, District Magistrate of Surat.

The accused, a boy, obtained in the usual way on his application a permit for one maund of salt in each of the two bags brought by him. He presented the permit, but his bags were filled with two maunds each. The permit, which

---

* Criminal Appeal No. 464 of 1903.

§ Section 47 of the Bombay Salt Act (Bombay Act II of 1890) runs as follows :—

Digitized by Google

is usually signed after the weight and the bags are verified, was signed by both the weighing clerk and the writing clerk at the scales. The accused then removed the bags containing salt, and it was discovered at the Preventive Naka to be in excess of the permit.

On these facts, the accused was charged with an offence punishable under section 47 (a) of the Bombay Salt Act (Bombay Salt Act II of 1890). The Second Class Magistrate of Bulsar convicted the accused of the offence and sentenced him to pay a fine Rs. 25.

The accused appealed to the District Magistrate of Surat, who reversed the conviction and sentence and acquitted the accused. The following were his grounds:—

"The Lower Court has convicted on the assumption that so large an excess could not be removed without the appellant's knowledge that he was taking more than the permit allowed. In the face of the evidence this assumption cannot be admitted. There is not a syllable which imputes any guilty knowledge on the part of the appellant. Nor is it safe to assume that every one can tell the difference between one maund and two maunds. There is not in my opinion any ground for assuming that the appellant either obtained double the quantity entered on his permit by collusion with the karkuns, or having obtained it by their carelessness was aware of the fact and tried to remove it.

The Government Prosecutor referred particularly to sections 32 and 35 of the Salt Act. The former requires the subordinate Salt officer 'to endorse upon the order a certificate signed by himself and by the person who removes the salt, as to the correctness of the weighment' and the latter makes it 'incumbent on every person who has obtained a permit for removal of salt; (b) to prevent the removal of salt in excess of the quantity mentioned in the permit.' But I cannot hold that he becomes criminally liable if no dishonest intention can be proved."

The Government of Bombay appealed to the High Court.

The Government Pleader for the Crown.—Under section 47 (a) of the Bombay Salt Act (II of 1890), knowledge is not an essential ingredient of the offence. This becomes apparent when clause (a) is contrasted with clause (c), of the section. Further section 35 of the Act shows that knowledge is not an essential ingredient in the offence under section 45 (a), since the former section imposes upon the permit-holders the duty of testing the scales and weights. The true test is to look at the object of the Act to see how far knowledge is made the essence of the offence, and in this connection three rules of construction must be considered. They are (1) whether the object of the Act will be frustrated, if proof of such knowledge is rendered necessary, (2) whether there is anything in the wording of the section which implies knowledge, and (3) whether this is made clear by comparison of the section with the other cognate sections of the Act. Judged by all these tests, knowledge does not appear to be a necessary element of the offence.

N. K. Desai for the accused.—The accused is not liable for he cannot be said to have removed salt in contravention of his permit, and if knowledge is not considered an essential in the offence of section 47 (a) of the Bombay Salt Act (Bombay Act II of 1890), it would go very hard with innocent and un-

47. Whoever in contravention of this Act, or of any rule or order made under this Act, or of any license or permit obtained under this Act—

(a) manufactures, removes or transports, salt ; or

(b) excavates, collects or removes natural salt, or salt-earth ;

and whoever

(c) except in the exercise of some power or the discharge of some duty conferred or imposed upon him under this Act or any other enactment at the time in force receives or is in possession of, or, without lawful excuse, retains contraband salt knowing or having reason to believe the same to be contraband salt ;

shall, for every such offence, be punished with fine which may extend to five hundred rupees, or with imprisonment for a term which may extend to six months, or with both.

Digitized by Google

cultured purchasers, who would be held criminally liable for the honest mistakes, if any, of the clerks of the Salt Department.

PER CURIAM.—The District Magistrate reversed the conviction under section 47, clause (*a*), of the Bombay Salt Act on the ground that no dishonest intention on the part of the accused was proved. But the provisions of the section do not in express terms or by necessary implication make intention or knowledge an essential ingredient of the offence. Where the Legislature intended intention or knowledge to be the gist of any offence under the Act it has used apt language to convey its meaning. See clause (*b*) of section 47 whereby the retention of contraband salt by any person "knowing or having reason to believe the same to be contraband salt" is made an offence under the Act. But it was urged before us by the accused's pleader that the Legislature omitted to use the words "knowingly or intentionally" in clause (*a*) of section 47 because it was said the mere act of removal by a person in contravention of his license or permit is sufficient to imply that the removal should be deliberate. We do not think so. In the words of Lord Alverstone, C J, in *Emary* v. *Nolloth* (1) "if the offence is prohibited in itself, knowledge on the part of the licensee is immaterial; this principle was acted upon quite recently in *Brooks* v *Mason* (2) where intoxicating liquor had been sold in a bottle not in fact sufficiently corked but believed to be so, and knowledge was held to be immaterial. Similarly, where there is an absolute prohibition against selling, it is unnecessary to prove knowledge." What is prohibited by the Salt Act is the removal of salt in contravention of any license or permit and that shows that such removal is prohibited in itself We must, therefore, set aside the order of acquittal and restore the order of conviction and sentence passed by the Second Class Magistrate against the accused under section 47 (*a*) of the Bombay Salt Act.

1904, *March* 15. I L R. 28 Bom. 412.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

EMPEROR *v.* KONDIBA DHONDIBA POWAR AND OTHERS.*

Criminal Procedure Code (Act V of 1898), sections 303, 304—Judge—Jury—Misunderstanding the law—Verdict mistaken or ambiguous—Powers of the Judge to question the jury.

Section 304 of the Criminal Procedure Code (Act V of 1898) obviously contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury. It has application where there is no accident or mistake in the delivery of the verdict; and the mistake lies in the misunderstanding of the law by the jury. If such a mistake results in an erroneous verdict, it can be corrected only by the Judge disagreeing with the jury and referring the case under section 307 of the High Court.

PER CURIAM:—"There is no provision in the Code of Criminal Procedure (Act V of 1863) which empowers the Judge to question the jury as to their reasons for a unanimous verdict when there is nothing ambiguous in the verdict itself, and no lurking uncertainty in the minds of the jury themselves regarding it. Section 303 of the Code limits the power of the Judge to question to cases in which it is necessary to ascertain what the verdict of the jury is—that is, where the verdict being delivered in ambiguous terms or with uncertain sound their meaning is not clear."

APPEALS from convictions and sentences passed by A. Lucas, Sessions Judge of Poona.

The accused were charged with counterfeiting Queen's Coin, and having in their possession implements and materials for the purpose of counterfeiting

(1) (1903) 2 K. B. 264 at p. 268. (2) (1902) 2 K. B. 743.

* Criminal Appeals Nos. 29, 30 and 77 of 1904.

Digitized by Google

Queen's Coin, offences punishable under section 232 and 235 of the Indian Penal Code (Act XLV of 1860). They were tried by the Sessions Judge with a jury. After the case was summed up by the Judge to the jury, the latter returned a unanimous verdict of guilty under section 235, part 2, of the Indian Penal Code (Act XLV of 1860) and a unanimous verdict of not guilty under section 232 in respect of all the accused. With the latter part of the verdict the Judge did not agree; and he therefore put the following question to the jury.

Question.—May I ask your reasons for holding that the accused are not guilty under section 232?

Answer.—The accused were not actually caught in the act of coining.

What followed then was thus recorded by the Sessions Judge. "The commentary of section 232 (which had already been read to the jury by the Public Prosecutor when summing up the case) is again read to the jury, as it appears to me probable that their verdict of 'not guilty' under section 232 is the result of a mistake, and the jury are asked to retire and reconsider their verdict in the light of the commentary on section 232. In my heads of charge I told the jury that if they believed the evidence for the prosecution they should find the accused guilty of both offences. I did not again read out the commentary on section 232, because the Public Prosecutor had read it but a very short time before. After retiring for some time the foreman states that the jury were under a mistake and that they had not properly understood the commentary on section 232 he states that the verdict of the jury now is that all of the accused are also guilty of an offence under section 232 of the Indian Penal Code."

The Sessions Judge then agreed with the verdict and sentenced each of the accused to undergo rigorous imprisonment for five years.

The accused appealed to the High Court.

The *Government Pleader* for the Crown.

No one appeared on behalf of the accused.

PER CURIAM:—In this case the accused were tried before the Sessions Judge of Poona and a jury on charges under sections 232 and 235 of the Indian Penal Code. The jury returned a unanimous verdict of guilty under section 235, and a unanimous verdict of not guilty under section 232 in respect of all the accused. The learned Judge thereupon questioned the jury as to their reasons for holding that the accused were not guilty under section 232. The jury answered that the accused had not been actually caught in the act of coining. The learned Judge then explained to them the law under section 232 and asked them to reconsider their verdict. Upon this the jury returned a unanimous verdict of guilty under section 232.

The ground upon which the Judge asked the jury to reconsider the verdict was, as explained in the record of the case, that it appeared to him that the first verdict of "not guilty" was the result of mistake. No doubt section 304, Criminal Procedure Code, provides that "when by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict." But that section obviously contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury. Here there was no accident or mistake in the delivery of the verdict, for the jury having arrived at the conclusion that the accused were not guilty gave the verdict in accordance with it. The mistake was in their misunerstanding the law under section 232. If such mistake has resulted in an erroneous verdict, it can be corrected only by the Judge disa-

Digitized by Google

greeing with the jury and referring the case under section 307 of the Criminal Proceedure Code to the High Court. There is no provision in the Code which empowers the Judge to question the jury as to their reasons for a unanimous verdict when there is nothing ambiguous in the verdict itself and no lurking uncertainty in the minds of the jury themselves regarding it. Section 303 limits the power of the Judge to question to cases in which it is necessary to ascertain what the verdict of the jury is—that is, where the verdict being delivered in ambiguous terms or with uncertain sound their meaning is no clear. In the present case there was no ambiguity in the unanimous verdict of "not guilty" and the only course left for the Judge, if he disagreed with it, was to record it and act under section 307 of the Criminal Procedure Code. This view is in accordance with the decisions of this Court in *Empress* v. *Bharmia*,(1) and *Queen-Empress* v. *Madhavrao*(2). In the former it was held that "the questions actually put to the jury demanding their reasons for acquitting of the charge of murder, on which charge the jury had delivered an unanimous verdict without any uncertain sound, exceeded the limits of questioning which the law contemplates": see also the remarks of Phear, J., in *Queen* v. *Sustiram Mandal*.(3)

Though for these reasons we think the procedure of the Judge was irregular, we are of opinion that it has not led to a miscarriage of justice and we do not see any reason to interfere with the sentence of 5 years' rigorous imprisonment passed on the accused, as it could have been passed under the Indian Penal Code. for the conviction under section 235 of the Indian Penal Code. We confirm the convictions and sentences and dismiss the appeals.

1904, *March* 3. **I. L. R. 28 Bom. 479.**

Before Sir L H. Jenkins, K.C.I.E., Chief Justice, and Mr, Justice Batty.

EMPEROR *v.* BAL GANGADHAR TILAK. §

Indian Penal Code (Act XLV of 1860), section 193—Criminal Procedure Code (Act V of 1898), sections 435, 439—Indian Evidence Act (I of 1872)—Intentionally giving false evidene in a judicial proceeding—Absence of discussion of evidence for the defence—Explaining away the statement of the accused to his prejudice—Assignment of perjury—Proof—Miareading of documentary evidence—Fundamental errors in principle—Revisional jurisdiction.

According to the Criminal Law in England from which the Indian system is largely drawn, the assignment of perjury must be proved by two witnesses, or by one witness and the proof of other material and relevant facts confirming his testimony. This "is not a mere technical rule but a rule founded on substantial justice." The Indian Evidence Act (1 of 1872) does not provide that there must be corroboration to support a conviction, but in ordinary cases and where the provisions peculiar to Indian Law do not apply, a rule which is founded on substantial justice may well serve as a safe guide to those who have to administer the criminal law in India.

Where with reference to an adoption the accused made a statement and where no other expression would with equal propriety have been used to express the corporeal act (of giving and taking in adoption), it is antagonistic to the first principles of criminal jurisdiction to explain away to the prejudice of the accused that statement which in its legitimate sense indicated a corporeal giving and taking.

Per Jenkins, C. J.:—A conviction for perjury cannot stand where the onus has been wrongly placed : explanations have been demanded from the accused when no occasion for them existed ; and the rule that there must be something in the case to make the oath of the prosecution witness preferable to the oath of the accused has not been satisfied.

For silence to carry incriminating force in a case like the present there must have been circumstances which not only afforded the accused an opportunity to speak, but naturally and properly called for the declaration which is said to be absent.

---

(1) (1895) 6 Bom. L. R. 258 at p. 261. (2) (1894) 19 Bom. 735. (3) (1873) 21 W. R. I. (Cri. Bul.).

§ Criminal application for revision No. 1 of 1904.

Digitized by Google

APPLICATION for criminal revision against the order of A. Lucas, Sessions Judge of Poona, confirming the conviction of the accused on one of two counts under which he was convicted and sentenced by E. Clements, First Class Magistrate of Poona.

The facts were as under ;—

Shri Vasudeo Harihar Pandit *alias* Shri Baba Maharaj, a First Class Sarder of the Dakkhan, residing at Poona, died leaving a will dated the 7th August, 1897. Under the will the testator appointed five trustees or *panchas*, namely, (1) Bal Gangadhar Tilak (accused), (2) Rao Saheb Kirtikar, Huzur Chitins, *nisbat* Karvir (Kolhapur) Sarkar, (3) Ganesh Shrikrishna, Khaparde, Vakil, Amraoti, (4) Shripad Sakharam Kumbhojkar and (5) Balvant Martand Nagpurkar. The will provided as follows:—

My wife Shri Sakvar (Shri Tai Maharaj) is at present pregnant. If no son is born to her, or if one is born and dies prematurely, a son should be given in adoption with the advice of the above-named gentlemen, in the lap of my wife in accordance with the *shastras*, as many times as it may be found necessary, in order to continue the name of my family ; and the above-named *panchas* should manage the moveable and immoveable estate on behalf of that son until he attains majority.

Out of the above-named five persons Rao Saheb Kirtikar declined to act as trustee and probate of the will was granted to the remaining four persons by the District Court at Poona on the 16th February, 1898.

Shri Sakvarbai *alias* Shri Tai Maharaj gave birth to a posthumous son who died an infant aged about four months. Owing to the death of the posthumous son there arose the necessity of selecting a boy for adoption as provided for in the will of Shri Baba Maharaj. Sometime passed in finding out a suitable boy for adoption and on the 18th June, 1901, a meeting of the four trustees was held in Shri Baba Maharaj's wada at Poona and it was then resolved that the several boys of Shri Maharaj family at Kolhapur were not fit for adoption and that a boy out of the descendants of the brother of Sidheswar Maharaj at Babre near Aurangabad should be selected for adoption and that no other boy from other families should be adopted. Accordingly Shri Tai Maharaj, Tilak and Khaparde went to Aurangabad on the 20th June, 1901, and on the next day, Tilak and Khaparde accompanied by some other men went to a place called Nidhone near Babre where the descendants of the brother of Sidhesvar Maharaj lived. From Nidhone they took some boys to Aurangabad for the selection of Shri Tai Maharaj. Out of the said boys, a boy named Jagannath a son of Malhar Manohar Dev, was approved by Shri Tai Maharaj, Tilak, Khaparde and other persons. On the 27th June, 1901, a meeting of respectable and learned persons was called at Aurangabad and in their presence a verbal gift and acceptance of the boy to be adopted was made and on the same day a *dattakpatra* (deed of adoption) was also written bearing the signatures of Malhar Manohar Dev and Tai Maharaj, and attestations of witnesses. After these and other minor proceedings were finished, Shri Tai Maharaj, Tilak and other persons returned to Poona on the 28th June, 1901, Khaparde in the meanwhile having gone to Amraoti. After per return to Poona, Shri Tai Maharaj changed her mind and began to show clear indications that she wanted to adopt Bala Maharaj of Kolhapur and that the adoption would come off on the 13th or 16th July next. This circumstance led to a disagreement between Tilak, Khaparde and Kumbhojkar on one hand and Shri Tai Maharaj on the other, Nagpurkar who was the *karbhari* (manager) of Shri Tai Maharaj siding with her. There were various proceedings between the parties and among them there was an application, No. 112, dated the 29th July, 1901, made by Shri Tai Maharaj to the District Judge of Poona (Mr. Aston) who

Digitized by Google

was also the Agent of Sardars in the Dekkhan, against the trustees for the revocation of the probate of Shri Baba Maharaj's will, on the ground that the will was invalid and that she succedeed to the estate as the heir of her deceased posthumous son. In the said application Shri Tai Maharaj alleged that:—

Opponents 1 and 2 (Tilak and Khaparde) taking advantage of petitioner's weakness as a woman, induced her to go to Aurangabad and forced her to sign some documents relating to adoption. After her return to Poona she took legal advice and was about to take steps to protect her rights when the accused (opponents ?) by unlawful acts prevented her and ultimately by keeping her in confinement for six days attempted to coerce her into consenting to certain matters. Fortunately an event occurred which put an end to her confinement.

During the progress of the inquiry under the said application, Tilak was examined as a witness for the applicant Shri Tai Maharaj and his examination lasted from the 16th November, 1902, to the 3rd April, 1903, sometimes from day to day. After the examination was closed, the District Judge gave sanction for the prosecution of Tilak, *inter alia*, under section 193 of the Indian Penal Code for giving false evidence in a judicial proceeding, as follows :—

In that he made the following statements under examination as a witness during the hearing of the Miscellaneous Application, No. 112 of 1901, in the District Court at Poona.

(1) The boy was formally placed by his father on the lap of Tai Maharaj and Tai Maharaj gave him sweetmeats and then the father said to Tai Maharaj, "Now you should protect the boy —the boy has now become your son : whether fool or wise, he is yours."

(2) We never kept her (Tai Maharaj) under restraint nor intended to do so.

The case was tried by E. Clements, First Class Magistrate of Poona, who after rejecting certain applications of the accused for the examination of witnesses whose evidence was considered to be material by the defence, found the accused guilty on both the counts of the charge and sentenced him to rigorous imprisonment for eighteen months and a fine of one thousand rupees ; in default, further rigorous imprisonment for two months.

On appeal by the accused the Sessions Judge acquitted him on the second count of the charge, but confirmed the conviction on the first count and reduced the sentence to six months rigorous imprisonment and a fine of rupees one thousand or in default further rigorous imprisonment for two months.

The accused having preferred an application for revision,

Branson (with D. A. *Khare*) appeared for the accused :—

Our first grievance is that the Magistrate should have examined certain witnesses whose evidence even the Sessions Judge considered was essential. We applied for a commission to examine them, but the Magistrate without giving any reasons cancelled the commission he had already granted. Most of the witnesses were so intimately connected with the facts of the case that our case has been prejudiced by their evidence not being on the record.

Secondly, we submit that the Judge should not have brushed aside the whole of the Aurangabad evidence. That evidence was also intimately connected with the principal allegations as to what took place at Aurangabad.

Thirdly, the Judge bases the conviction of the accused not on any positive evidence but rather upon what he considered to be the omission in certain of the letters addressed by the accused of the full description of what took place at Aurangabad. We contend that there is in fact no omission as in the earliest of such letters the fact of the adoption is mentioned. It is not at all necessary to give a complete description of all the ceremonies that take place at an adoption. The word adoption would connote that all the necessary ceremonies have been performed. There was no occasion to give a detailed description as the fact

Digitized by Google

of the physical giving and taking of the boy was not challenged by any body. (At this stage several Exhibits were gone through and consistency therein was pointed out).

Scott (Advocate General) with *Rao Bahadur V. J. Kirtikar*, Government Pleader, appeared for the Crown :—We submit that the High Court has no power to consider evidence in matters coming before it in revision.

As to the omission to call certain winesses, the Magistrate has given reasons why he did not call them. The matter being within the discretion of the Magistrate, this Court has only to see whether he has exercised that discretion improperly and whether he had any data before him in the light of which he could exercise it. The Magistrate has referred to such data and has given his reasons. The Aurangabad evidence has been disbelieved by the Magistrate and the Judge also has disbelieved it by implication. The Magistrate and the Judge have very carefully sifted the several statements made by the accused in writing and we submit that the conclusion to which they have arrived with respect to the guilt of the accused is inevitable. In the letters the accused described the other ceremonies and expressly omitted to state any thing about the physical giving and taking of the boy. The subsequent conduct of the accused is a piece of evidence which the Judge was competent to take into consideration. (Here several Exhibits were gone through to show that the physical giving and taking did not take place).

Branson(in reply) :—The High Court has power to interfere in revision. Section 435 of the Criminal Procedure Code expressly authorizes the High Court to see whether the order of the Subordinate Court is proper.

JENKINS, C. J. :—The charge on which the accused has been tried is under section 193 of the Indian Penal Code with intentionally giving false evidence in a judicial proceeding in that he made the following statements while under examination as a witness during the hearing of Miscellaneous Application No. 112 of 1901 in the District Court of Poona .—

" (1) The boy was formally placed by his father on the lap of Tai Maharaj and Tai Maharaj gave him sweetmeats and then the father said to Tai Maharaj, ' now you should protect the boy, the boy has now become your son : whether fool or wise he is yours.'

" (2) We never kept her under restraint nor intended to do so. "

Mr. Clements, the Magistrate appointed to hear the case, found the accused guilty in respect of both statements, and, convicting him of the offence, passed on him a sentence of eighteen months rigorous imprisonment, and a fine of Rs. 1,000, with two months further rigorous imprisonment in default.

On appeal, Mr. Lucas, the Sessions Judge of Poona, has found the accused guily in respect of the first statement alone, and reduced the sentnce of eighteen months to six months rigorous imprisonment.

The accused has now applied to us in revision, basing his application principally on the grounds, first that the Magistrate and the Sessions Judge have failed to call evidence necessary for the proper determination of the case, and secondly, that the reasons of the Sessions Judge are insufficient to support the conviction. To understand the case a brief outline of the admitted facts is desirable.

On the 7h August, 1897, Shrimant Shri Vasudev Harihar Pandit *alias* Baba Maharaj, a Sirdar of considerable position in the Deccan, died leaving a will, whereby he appointed as his representatives, the accused, Rao Saheb

Digitized by Google

Kirtikar of Kolhapur, Mr. Khaparde, Mr. Kumbhojkar and Mr. Nagpurkar, and to them he committed wide powers of management over his property. Rao Saheb Kirtikar declined to act, and probate was granted to the rest. The testator was survived by his widow Tai Maharaj, who was pregnant at the time, and by his will he directed in the events there indicated that she should adopt a son with the advice of the trustees.

A posthumous son was born, but he died, and then the necessity arose of making an adoption. After some dicussion in which the trustees and Tai Maharaj took part, it was determined that a visit should be paid to Aurangabad in connection with the adoption of a son, and accordingly on the 19th of June, 1901, Tai Maharaj and Messrs. Tilak and Khaparde with a number of attendants left Poona for Aurangabad. Several boys were seen, and ultimately the choice fell on Jagannath, the son of Bhaushaheb Dev, as the most suitable of those who had been inspected. Documents were executed in relation to the adoption, and on the 28th of June the party started for Poona.

The first of the two statements charged as false evidence in this case relates to what is alleged to have occurred at Aurangabad on the morning of the 28th. Soon after the return of the party of Poona, Tai Maharaj expressed her intention to adopt a young man from Kolhapur named Bala Maharaj, and ultimately purported to carry her intention into effect.

This brings us to the judicial proceeding in which the false evidence is stated to have been given. It commenced with a petition by Tai Maharaj to which the executors were parties as opponents, asking that the probate granted to them might be cancelled.

Such an application could only be made under section 50 of the Probate and Administration Act of 1881, and the only grounds stated in that section as a just cause of the cancellation which could have had any application were the 4th and 5th, with neither of which had the alleged adoption at Aurangabad anything whatever to do. Yet the accused, though cited by the petitioner as her witness, was kept in the witness-box, we are told, for no less than 17 days, during the greater part of which he was subjected to a most rigorous cross-examination by the person by whom he was called on matters wholly irrelevant to the subject then under investigation.

It was in the course of this examination that the accused made the statements on which the present charge is based.

The law of England requires that a false statement in order to support a charge should be material to the question in dispute, but the Penal Code does not impose that qualification, so that we need not consider the question how far the statement became material through the ruling of the Judge, who permitted it to be put.

We have nothing to do with the second of the two statements, for Mr. Lucas has held the charge in respect of it not proved we are only concerned with the first. The prosecution in respect of these statements originated with a document described as an order, sent by the Court before whom the application for cancellation of probate was made to the City Magistrate of Poona.

The offences ascribed by that document to the accused are many, and include forgery, and the using as genuine a forged document; yet, though the accused demanded that those charges should be proceeded with, this was not done, and the Advocate General has stated in this Court that all charges except that in question now before us have been abandoned.

First we will deal briefly with the objection that the Magistrate and Ses-

Digitized by Google

tions Judge failed to call evidence necessary for the proper determination of the case.

The accused desired that Kumbhojkar should be examined on commission; he lived outside British territory, so his attendance before the Magistrate could not be secured, while it is clear his evidence might have been of considerable value to the accused.

On the 10th of February, 1903, at the accused's instance the Magistrate decided to ask for a commission under section 506 of the Criminal Procedure Code in the case of Kumbhojkar.

On the 26th of February Mr. Strangman, counsel for the prosecution, stated that he had good reasons for believing that Kumbhojkar would appear on the 16th of March if summoned. A summons was therefore issued and further proceedings in the master of Kolhapur Commission were stayed.

On the 13th April (to which date proceedings were adjourned on the 16th March) "Mr. Strangman produces the evidence of two witnesses—1 Nagpurkar, 2 Vishnu Narayan—regarding Kumbhojkar's movements. Yeshwant Ganesh is also examined by the Court.....Mr. Karandikar is informed by the Court that the Court does not now consider that there are any grounds to issue a Commission for Kumbhojkar's evidence."

Now what was the evidence on which this conclusion is founded? Nagpurkar and Vishnu say in effect they were told by Yeshwant that Kumbhojkar was in Poona, so that their evidence was merely hearsay: but that is not all, for Yeshwant when called gave a direct denial to this.

How this evidence was made a ground for the decision we cannot conceive. The Sessions Judge thought "it would have been wiser if Mr. Clements had issued a Commission for the examination of Kumbhojkar at Kolhapur": it certainly would.

But this does not exhaust the accused's complaints, for he desired that Shankar Hari Gurav, Laxman Shivram Mhasvade and Anant Narayan Bele should be called by the Court.

The last of these three was an important witness, for not only did he accompany Tai Maharaj to Aurangabad, but also according to Parvati, one of the witnesses for the prosecution (Exhibit 52) "on *Dwadashi* Antoba Behale distributed sweetmeats as Jagannath had become Tai Maharaj's Yajman *i. e.*, master." Antoba Behale is Anant Bele, we are told, and *dwadashi* is the 28th of June. Anant Bele is also said to have written an Exhibit, which was treated as of considerable importance by the Magistrate, Exhibit 14.

The Sessions Judge has commented on this and expressed the opinion that the prosecution erred in not calling these witnesses. With this we agree.

In explanation of his determaination the Magistrate says "there are facts in this case which strongly support the prosecution in saying that these witnesses would not speak the truth."

On this Mr. Branson has commented that nowhere on the record does it appear that counsel for the prosecution made any such case, and this comment has not been displaced by the prosecution.

The considerations which weighed with the Magistrate were:—(*a*) "the extraordinary popularity and influence of the accused;" (*b*) that there was evidence which suggested the inference that the accused took steps to undermine whatever authority Nagpurkar had over the establishment at the *wada*;

Digitized by Google

(*c*) that there were facts which showed interference on the part of the accused with witnesses and persons, who might have given evidence for the prosecution (*d*) that there was a very instructive example of the accused's methods in the case of Parvati ; and (*e*) that it was in evidence that Shankar left his place in the *wada* while the case was going on and that Anant Bele had deserted Tai Maharaj.

It will be seen that only the fifth of these considerations had any direct application to the particular witnesses ; the other four can only be noticed to be condemned, and we pass them by without more.

The evidence as to Bele's untruthfulness is Nagpurkar's and as to Shanker's is Tai Maharaj's, and we are of opinion that the Magistrate was wrong in concluding on their testimony they would not have spoken the truth.

The Sessions Judge has pertinently remarked that all the Magistrate could assume was that perhaps they would not speak in favour of the prosecution. No reason personal to Laxman was adduced.

We think the objection urged by Mr. Branson to the course adopted by the Magistrate, and not corrected though disapproved by the Sessions Judge, well founded.

This brings us to the gravest aspect of the case, we mean the objection urged and supported most ably by Mr. Branson, that the reasons of the Sessions Judge are insufficient to support the conviction.

Now what is the evidence as to the truth or falsehood of the first statement?

The direct oral evidence consists of the sworn testimony on the one side of Tai Maharaj to its falsehood, and on the other of the several witnesses called for the defence, who deposed to its truth.

The defence witnesses include (1) Krishna Shastri bin Nathu Shastri Durge, Exhibit D 67, whose occupation is described as the "observance of the daily routine of ceremonial worship" and who was the astrologer consulted in connection with the Aurangabad adoption ; (2) Mahadeo Ganesh Bele, Exhibit D 72, a pleader of Aurangabad ; (3) Krishnaji Govind, Exhibit D 73, an acting teacher in a school on a salary of Rs. 75 per month, (4) Laxman Trimbak Parnaik, Exhibit D 74, a pleader in His Highness the Nizam's Courts ; (5) Vinayak Balkrishna Dongade, Exhibit D 77, a school master on Rs 12 a month; (6) Raghunath Divakar, Exhibit D 78, an Educational Inspector's karkun on Rs. 15 per month : (7) Keshav Vithal Bhide, Exhibit D 80, Head clerk, Educational Inspector's Office, on a pay of Rs. 45 per month and with a private income as an Inamdar of about Rs. 500 per annum ; (8) Shankar Falvant Poohle, Exhibit D 81, Assistant Master of the High School, Aurangabad, on a pay of Rs 20 per month and (9) Malhar Bhausaheb Dev, Exhibit D 82, Jagannath's father.

Here then we have in opposition to Tai Maharaj's interested statement, the testimony of several witnesses of apparent respectability, and yet the whole of their evidence is put on one side without a word of comment, beyond a profitless generalization as to the unreliability of native testimony. These witnesses were not examined before the Sessions Judge, or for the matter of that before the Magistrate, so that this wholesale disregard of their testimony cannot even be defended on an appeal to the opportunities of just appreciation commonly ascribed to the officer before whom witnesses are examined.

"We must be careful," it was said in *Madhoo Soodun Sundial* v *Suroop Chuder Sirkar Chowdry*. (1) "not to carry this caution to an extreme length,

(1) [1843] 4 Moo. I. A. 431 at p. 441.

Digitized by Google

nor utterly to discard oral evidence, merely because it is oral, and unless the impeaching and discrediting circumstances are clearly found to exist. It would be very dangerous to exercise the judicial function, as if no credit could necessarily be given to witnesses, deposing *vivâ voce*, how necessary however it may be always to sift such evidence with great minuteness and care." What is here said applies with even greater force where the witnesses thus dealt with are called on behalf of the accused, and where in the result action is taken against him. We can find in the judgment of the Sessions Judge no attempt at sifting this large body of Aurangabad evidence, and had it been necessary, we should have been prepared to hold that the absence of any discussion of this evidence called for the defence constituted such a grave omission, that on that ground alone we would be bound to interfere. But we proceed in preference to discuss the case on the further lines on which it has been argued before us.

At the outset it is desirable to observe the foundation on which the Sessions Judge has built up his conclusions. He says "After a very careful consideration of all the evidence I have reluctantly come to the conclusion that it is quite unsafe to believe any of the oral evidence in the case except in the following cases :—(1) when it is borne out by documentary evidence, (2) when the statements and admissons are against the interest of the side on which the witness is examined, (3) when witnesses on either side agree as to any fact.' We have already pointed out that the only oral evidence directed against the accused is that of Tai Maharaj, and as to her and Nagpurkar, the Sessions Judge himself has said not merely that he was not prepared to act on their evidence, but that he was convinced both of them had given false evidence against the accused before Mr. Clements.

Now it is necessary to see what Tai Maharaj's evidence on the point is : it is quoted in some detail in the Sessions Judge's judgment and we need not now repeat it here : suffice it to say that it agrees in no respect with the version given by the accused and his witnesses ; she even describes such scene as she admits, as having occurred in her bed-room. It remains then to be seen how her version is borne out by the documentary evidence. This part of the case is rested on the documents to which we will now refer.

They group themselves under two main heads, those prior to the visit to Aurangabad, and those that came into existence during or after that visit ; of the first it is said that they do not point to a fixed plan to adopt a boy at Aurangabad, that on the contrary they show Tai Maharaj had by no means abandoned the idea of adopting Bala Maharaj of Kolhapur : of the second group it is said that there is a significant absence from them of reference to a corporeal giving and taking, and that they negative it at any rate by inference.

Now the first group is obviously the less important, and it is doing it no injustice to say that for the purpose in hand it would, standing alone, be of no value : at most it could only give colour of probability.

We therefore pass it by for the present and proceed to a consideration of the second group which falls into two divisions; those documents that came into existence during the visit to Aurangabad and those subsequent to it.

Now the documents in the first of these divisions call for the comment that in the circumstances they could not be, or contain, a narrative of the occurrence to which the accused deposes : they were prior to it, so that all that can be said of them is that they lend a probability to the one version or the other as representing what immediately before the event it was expected would happen.

Digitized by Google

Thus these documents too, it is obvious, are open to the same remark as the first group on which we have already commented.

This brings us to the second division of the second group. As the argument derived from the silence ascribed to the accused has occupied so large a place in the discussion before us, it will be convenient to consider here its value as an incriminating circumstance. It is usual to refer this class of proof to the maxim *quitacet consentiri videtur*, but like most maxims, this must be taken with considerable qualification even in a civil suit, much more when it is used to establish the guilt of an accused. For silence to carry incriminating force in a case like the present there must have been circumstances which not only afforded the accused an opportunity to speak, but naturally and properly called for the declaration which is said to be absent. The first documents that call for notice are Exhibits 68-A and 68-B, both purporting to be sent by Tai Maharaj to Mr. Aston, as Agent for the Sardars in the Dekkhan, the first being written in English by the accused himself, the second in Marathi at his dictation. It is true that in neither of these documents is the corporeal giving and taking mentioned; in Exhibit 68-A it is said that the party went to Aurangabad to see and select a boy eligible for adoption, that Tai Maharaj had selected Jagannath, that preliminary documents had been executed, and that the ceremony of adoption would be shortly celebrated. Exhibit 68-B is substantially to the same effect, but special reliance has been placed on the statement that "The celebration of the adoption ceremonies will take place at Poona hereafter when your Honour will of course be invited to the Durbar according to custom.

First then what is the value of the fact that in these documents the corporeal giving and taking is not mentioned in the light of the principle to which we have referred? In our opinion it has no appreciable force as a piece of self-desserving evidence: the proceedings at Aurangabad were not questioned at that time, much less was there any denial of a corporeal giving and taking, so that there was no occasion for the statement as to a detail of whose absence so much is made.

And we may here appropriately allude to the accused's statement in the miscellaneous proceedings that he had never heard that Tai Maharaj disputed the fact of adoption, and in truth it would seem that until those proceedings the corporeal giving and taking had never been questioned or even mooted.

In Exhibit 68-A it is said "*the ceremony of adoption will shortly be celebrated in Poona when due intimation and invitation will be formally given to your Honour*," and stress has been laid on this by the prosecution as implying that the giving and taking still remained to be performed. But it has not been suggested, that it would be either necessary or usual for the Agent for the Sardars to be invited to witness the giving and taking of a son in adoption Next the expression *the ceremony of adoption will be celebrated* is at least ambiguous; it may as well connote commemoration as performance. And even if the phrase be construed in the sense of a performance with appropriate rites and ceremonies, still on the authorities that would not negative the idea of a prior secular giving and taking.

The accused was not even questioned as to the precise force of this English version.

The passage in Exhibit 68-B, which we have read, at first sight appears to tell against the accused, when regard is had to the Marathi words used. Those words are *Datta Vidhan Samerambh*, which have been rendered "the adoption ceremonies." The argument is that inasmuch as the words *Datta Vidhan*

Digitized by Google

mean the "act of giving" the expression must have meant that there was to be an actual ceremony of giving and taking. But the expression has been clearly explained by the accused in the course of his examination in the miscellaneous proceedings, though the opposing pleader by whom he was examined either could not, or would not, understand the explanation. That explanation is that the words refer to the social functions in connection with the adoption, and if that be so, it does away with the idea of an inconsistency with the statement on which the accused is charged. No evidence has been adduced to show that this explanation is incorrect, and in answer to a question put to him by the Court, the Advocate General on instructions has admitted that if the accused intended to refer to the social ceremonies he names, there was no other expression that he could so appropriately have used. We have parallel expressions in Engish, where we speak of a wedding breakfast or a christening party without in any way suggesting a performance at those social functions of any ceremonial rites.

The next document is Exhibit 19 in appeal, a letter dated the 30th of June, 1901, and written by Nagpurkar under Tai Maharaj's order to Kumbhojkar.

It is said that there is no reference here to giving and taking; but in the first place this letter was not written by the accused; and next it is to be noted that in describing the events at Aurangabad Tai Maharaj says, "Mr. Dadasaheb Khaparde told me to adopt any one of these, especially, if possible, *the very boy who has now been adopted.*" These words clearly indicated a complete adoption and all that is essential to it, including a taking in the lap, with which every Hindu must be familiar as a necessary act to a complete adoption. The is in accord with what is later said in the letter:—"In short there now remains no work connected with adoption The ceremony which has to be performed will be performed soon after selection of an auspicious day."

Exhibit D-63 written on the same date in our opinion suggests no valuable inference either way.

The prosecution then refer to Exhibit 63, suggesting that the heading is not consistent with a corporeal giving and taking, and that the mention of gift and acceptance in the item opposite the sum Rs. 15 13-6 was an interpolation by the accused. The second of these suggestions is absolutely unwarranted, and appears to have been first made on appeal, while the heading was not written by Tilak, and is not unequivocal.

Then on the 5th of July we have a report, Exhibit D 14, by the accused to the trustees of the estate, in which it is distinctly stated that the party returned from Aurangabad "after giving a boy in adoption on the lap of Shri Tai Maharaj", and "after finally disposing of this matter as settled." From Exhibits 23 and 22 it appears that this report came to the knowledge of Nagpurkar and that he recorded his assent.

The importance of this is that Nagpurkar, who after the visit to Aurangabad was working throughout with Tai Maharaj and against the accused, never challenged this distinct statement of corporeal giving and taking until several months later. In the face of this statement we are unable to understand how the Sessions Judge can have thought that the corporeal giving and taking was never asserted by the accused, or how he could have been led to explain away that explicit statement as merely metaphorical. It was admitted before us that no other expression could with equal propriety have been used to express the corporeal act, and it appears to us antagonistic to the first principles of Criminal

Digitized by Google

Jurisprudence thus to explain away to the prejudice of the accused a statement, which in its legitimate sense indicates a corporeal giving and taking. The prosecution have attempted before us to get rid of the effect of this document by impugning it as an antedated fabrication, but nothing has been shown to support this contention, which does not seem to have been made before the Magistrate, was not noticed by the Sessions Judge, and is negatived by Exhibit 23. Finally the all important statement in Exhibit D 14 that the party returned after a boy had been taken on the lap by Shri Tai Maharaj in adoption and after finally disposing of the matter as settled derives complete confirmation from the passage in Nagpurkar's assent in Exhibit 22 wherein he says "I will not help Shri Pandit Maharaj and Shri Tai Maharaj for *setting aside* Aurangabad adoption" On the 6th of July Tai Maharaj went to the Agent of the Sirdars and in Exhibit D 22 we have a complete statement of all she told him. That document was written by her in his presence and it starts with the assertion, "the son made by Tilak is not pleasing to me." This in our opinion is an admission that the adoption had taken place, but for some reason is passed over without comment by the Sessions Judge. The Advocate General seeks to minimize the force of this sentence by contending that it must be read with Exhibit 19 in appeal, and that its true meaning is that the accused acted for her in the transaction. But this does not take away from the finality of the adoption implied, confirmed as it is by the phrase "the very boy who has been adopted," in Exhibit 19 in appeal.

We now come to the telegrams and letter sent by the accused to Kolhapur on the 11th of July after Tai Maharaj had attempted to proceed with the adoption of Bala Maharaj.

The first is Exhibit 10, a telegram from the accused to the Diwan of Kolhapur, in which it is said "giving an acceptance of a son by Tai Maharaj has been completed by registered deed at Aurangabad with trustees' consent." The prosecution lays stress on the reference to the giving and taking by registered deed ignoring the effect of the word *completed* which is certainly susceptible of the meaning that the registered deed was by way of complement to the act of giving and taking, of which it supplies tangible evidence of a character likely to influence the person addressed.

In Exhibit D 41, a telegram from the accused to the Diwan, it is said, "Trustees cannot sanction Bala Maharaj's adoption. Another boy has been already given and taken. Any other adoption would not be *valid* in law" Here the giving and taking is distinctly asserted as a bar to future adoption.

In Exhibit D 42, the accused telegraphs to the Diwan, "Any adoption by Tai Maharaj without trustees' consent is void and illegal according to Baba Maharaj's will and even if sanctioned by the Durbar will be contested." Exhibits D 43 and D 44 to the Sar Nyayadhish and the Chitnis were in the same terms. In these telegrams an additional ground of objection is advanced, but in no way traversing or antagonistic to the others

Exhibit D 45 is a letter written by the accused to the Diwan, in which he states the objections to Tai Maharaj's proposed adoption of Bala Maharaj.

Relying on the decision of the Privy Council, the accused maintains that Tai Maharaj cannot appoint any boy without the consent of the trustees, and he then proceeds to state the circumstances connected with the Aurangabad adoption asserting that Tai Maharaj selected and settled to take in adoption a boy named Jagannath, that a registered deed was passed by the father of the boy to Tai Maharaj giving his son in adoption and that Tai Maharaj accepted the gift by a *shera* on the document: the letter then proceeds "the adoption business is thus practically completed so far as the giving and receiving of a boy is concern-

Digitized by Google

ed, and no other boy can now be adopted according to law. What remains is the ceremony which the trustees have resolved to celebrate soon after His Highness' permission to adopt is obtained in this case.

Later on it is said "when we returned from Aurangabad, it became known both here and at Kolhapur that the trustees were unwilling to adopt a boy above 12 and a boy from the Aurangabad family or branch *has been selected, given and taken for adoption.*"

In our opinion this letter, as will even more clearly appear from the summary of it in Exhibit D 46, a document of the next day's date, was intended to allege that as far as the giving and receiving were concerned, nothing remained to be done. We would here recall the fact that the corporeal giving and taking had been asserted six days before in the report, and it is inconceivable that the accused meant to retire from that position, which had not been challenged.

The next document on which the prosecution relies is, the plaint in the Suit No. 237 of 1901 brought by the accused alone on the 12th of July against Tai Maharaj and others to restrain her from adopting without the consent of the trustees.

We are invited to draw an inference adverse to the accused from the fact that a corporeal giving and taking was not alleged and this omission is regarded as a "very significant fact" by the Sessions Judge.

We cannot understand how such an argument can have been seriously advanced, or for a moment entertained. The suit was brought by the accused alone for an injunction, so that the events at Aurangabad were irrelevant, for even a giving and taking would not have created a right of suit in the plaint. His cause of action was the attempt to adopt without his consent. And yet an inference adverse to the accused has been drawn, because he has refrained from making an allegation that was not relevant.

We cannot for one moment adopt that view.

The Advocate General has suggested that Tilak ought to have joined Jagannath as a party, but the only answer the suggestion calls for is that in fact he did not, but rested his case, as he was entitled to do, on the cause of action appropriate to himself. As a matter of fact the pleader, who is responsible for the plaint, has given an explanation of how it came to be drawn as it was, and we know of no reason why that should not be accepted; but to regard the omission of a statement that there has been a giving and taking as significant is to misappreciate the legal position, and we hold that no inference adverse to the accused can be drawn from the plaint. Moreover Nagpurkar's recorded dissent may well have furnished a reason for avoiding any question as to the Privy Council ruling to which reference was made and on which Nagpurkar was known to rely (see Exl. b . D 14).

On the 13th July the accused wrote Exhibit 74 to the Agent for Sirdars a letter in which he said, "as a matter of fact the giving and receiving in adoption of such a boy has been effected with the full consent of Tai Maharaj at Aurangabad..... the adoption now proposed is virtually a second adoption and therefore void in Law." Much is made of the expression *virtually a second adoption* and evidently it was not without its influence on the Sessions Judge.

Seeing that the accused regarded the sanction of the Kolhapur Durbar as requisite to make the adoption fully operative on the Kolhapur property, it is not surprising that he should have used such phrases as *virtually* and *practically completed* and deference to the Kolhapur Durbar on this account may have

Digitized by Google

influenced his choice of expression in exhibits D 42, D 43 and D 44 to which we have already referred.

The next document is Exhibit 20 which throws no certain light on the case, and as far as we are aware no explanation of this has been sought from the accused nor can any inference unfavourable to him be drawn from it.

The same remark applies to Exhibit D 49, while Exhibit 21 throws no light on this part of the case.

Then we come to Exhibit No. 44, the petition for cancellation of probate, and the only remark for which this decument calls is that in it Tai Maharaj does not deny the *factum* of adoption but merely alleges coercion. We do not however attach importance to this omission.

Exhibit No 11 is a document prepared by the accused and solemnly affirmed by him on the 15th of November, 1901.

The prosecution attach the greatest importance to it as purporting to give in detail all the proceedings connected with the adoption at Aurangabad, and yet as alleging only a gift oral and in writing without specifically alleging the taking in the lap.

But the fallacy lies in estimating what the document ought to have contained in the light of the subsequent dispute: at that date no dispute had been formulated as to corporeal giving and taking, and the point naturally emphasized was the permanent evidence in the documents executed, for it would not have occurred to any one that it was necessary in stating that a boy had been adopted to reiterate the observance of the details necessarily implied.

Having dealt with the evidence on which the prosecution relies it will be instructive now to observe the standard of caution in relation to charges of perjury observed by the highest authorities.

According to the Criminal Law of England, from which our system is so largely drawn, the assignment of perjury must be proved by two witnesses, or by one witness and the proof of other material and relevant facts confirming his testimony. And we have it on high authority that this "is not a mere technical rule but a rule founded on substantial justice." The Indian Evidence Act, it is true, does not provide that there must be corroboration to support a conviction, but in ordinary cases and where the provisions peculiar to Indian Law do not apply, a rule which is founded on substantial justice may well serve as a safe guide to those who have to administer the criminal law in India.

Judged by this standard the conviction clearly cannot stand, but even if it be discarded, it is in our opinion clear on the face of the Sessions Judge's judgment that there is not enough to support the conviction.

To summarize the position it comes to this: according to the Sessions Jndge Tai Maharaj, the only witness for the prosecution on this point, has given false evidence against the accused in this case, and cannot be credited except where her testimony has been borne out in one or other of the three modes named by him: the Advocate General in reply to a question from the Court has been unable to suggest that any but the first of these three modes can apply here: that is that Tai Maharaj's statement is borne out by the documentary evidence: in our opinion the documentary evidence when properly considered absolutely fails to bear out Tai Maharaj's negation.

A practical test of the value of these documents may be furnished by supposing that they constituted the sole evidence in the case, and that the

Digitized by Google

accused was being tried on them before a Judge and a jury: in such circumstances we have not the smallest doubt that it would be an error of law for the Judge to allow the case to go to the jury. And yet we find the Magistrate says that "If it had been found impossible to procure Tai Maharaj's attendance in this Court, the case against the accused on the first and most important part of the charge, at any rate, would have lost none or practically none of its strength."

Our view of these documents is that even on the Sessions Judge's adverse reading of them they could not in reason do more than create suspicion and fall wholly short or legal proof, of even corroboration.

When the judgment is analysed it will be seen that it is really based on the inferences drawn from an assumed silence, but as we have already shown that silence could only be assumed by wresting words from their plain and natural meaning, and even were that not so, the circumstances at no time demanded the deduction on whose absence the conviction is based.

When the accused's statements are given their legitimate effect—we refer in particular to that contained in Exhibit D 14—it will be found that so far from there being a significant silence on his part, there was a distinct assertion by him which was never traversed until the proceedings in which he is supposed to have given false evidence. The onus has been wrongly placed: explanations have been demanded from the accused when no occasion for them existed, and the rule that there must be something in the case to make the oath of the prosecution witness preferable to the oath of the accused has not been satisfied.

We have not discussed individually the introductory documents as it follows from our estimate of the direct evidence in the case that they can carry matters no further, for there is nothing established to which they can give support. This applies even to the minute dated the 18th June of the trustees' resolution, which has been much discussed on both sides and we therefore only propose briefly to notice those whose value, such as it is, is derived from their nearness in time to the occurrence. First there is the deed of adoption and as to this it is said that it contains no words indicating a corporeal gift, and that this becomes the more significant in view of the fact that words descriptive of that act were struck out of the draft On this we would make the comment, that apart from the fact that the documents could not purport to be a narrative of events that had happened, they clearly contemplate that the only thing that would remain to be done would be the ceremonies of *datta homa*, &c. and that all that was essential to make Jankanath the son would be performed at Aurangabad while the ceremonies of *datta homa*, &c., might be performed at any place.

The shastri's certificate invites the same class of comment. Exhibit D 57 must be read as a whole so that though the words "I shall not adopt any boy other than this (your son)" may admit of the view that it was a necessary safeguard, it is impossible to overlook the far more distinct expression "he has the same position as my begotten son would have had, if I had one." In this connection we may refer to the difficulty experienced by the Judge by reason of the accused's assertion that the actual placing on the lap was on the 28th, but only in order to point out that the difficulty solely arises if Tilak's statement is assumed to be false and that is the whole question in dispute. The fallacy into which the learned Judge has fallen is patent.

Digitized by Google

As we are dealing with this case in revision we have accepted the Judge's appreciation of the oral evidence and refrained from discussing the probabilities, but we find it difficult to understand what improbability can attach to the alleged incident of the placing in the lap, if the influence of the accused was sufficient to secure the execution of the adoption deed, and that as Tai Maharaj alleges, against her will and in spite of her protests.

The Advocate General's opening argument before us was based on the fact that the case is before us in revision and not on appeal. But section 435 of the Criminal Procedure Code vests this Court with power to call for the records of inferior Courts for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the irregularity of the proceedings of an inferior Court while section 439 defines our powers of revision.

We have avoided reappreciating the oral evidence: we have accepted the Sessions Judge's estimate of it, though, as we have shown, the accused had reason to complain of the failure to discuss the testimony of the witnesses called by him.

Our ground of interference, it will be apparent, is the misreading of the documentary evidence and the fundamental errors in principle, which vitiate the conduct and disposal of the case.

Accordingly we set aside the conviction and sentence, and order the fine, if paid, to be refunded.

Conviction and sentence set aside

1904. *March*, 23. **I. L. R. 28 Bom. 533.**

Before Sir L. H Jenkins, K. C. I. E., Chief Justice, on difference of opinion between Mr. Justice Chandavarkar and Mr. Justice Aston.

EMPEROR *v.* BANKATRAM LACHIRAM *

Indian Penal Code (Act XLV of 1860), section 193—Criminal Procedure Code (Act V of 1898), sections 435, 439—Perjury—Contradictory statements—Power of the High Court to interfere in revisional jurisdiction.

Where the accused was convicted and sentenced under section 193 of the Indian Penal Code (Act XLV of 1860) of giving false evidence in a judicial proceeding and where the charge was based on the allegation that in two depositions, one given on the 3rd December, 1896, and the other on the 23rd March, 1901, the accused had made two contradictory statements, and the case for the prosecution was that on that ground, though it could not be proved which of the alleged contradictory statements was false, the accused's conviction should be upheld.

Held, (by *Jenkins, C. J.*, reversing the conviction and setting aside the sentence in revisional jurisdiction,) that to convict an accused of giving false evidence, it is necessary to show not only that he has made a statement which is false, but that he also either knew or believed it to be false or did not believe it to be true.

Where it is sought to establish guilt solely on contradictory statements, although the Court "may believe that on the one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong and swear to the reverse without meaning to swear falsely either time."

Where the conviction is based on merely the statements contained in the charge without examining the whole of the depositions, the conviction is an error of law.

Where the conviction of the accused for perjury in such a case was sustained by additional evidence, namely, the statements of the brother of the accused not made on oath at the trial of the case,

---

* Criminal application for revision, No. 332 of 1903.

Digitized by Google

Held that the statements were inadmissible and, if relied on, would vitiate the judgment.

The admission in evidence of a statement made by the accused having no real bearing on the case but showing only at the most that the accused in other matters had been untruthful, would be highly improper.

The controling power of the High Court "is a discretionary power, and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances which vary greatly. This discretion ought not to be crystallized, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the Legislature has committed to them. This discretion, like all other judicial discretions, ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case."

Per Chandavarkar, J.:—In the case of perjury arising out of contradictory statements the Court dealing with them should not convict unless fully satisfied that the statements are from every point of view irreconcilable, and if the contradiction consists in two statements opposed to each other as to matters of inference or opinion on which a man may take one view at one time and a contrary view at another, there, can be no perjury, unless on oath he has stated *facts* on which his first statement was based and then denied those *facts* on oath on a subsequent occasion.

Where the sole and whole question is—are the statements forming the subject of the charge so contrary that one or the other of them must be necessarily false?—the answer to that question depends upon the construction to be put upon the two depositions from which the statements are taken and their construction, as indeed the construction of any document, is a question of law not of fact.

It is not correct to say that the law as laid down in the Criminal Procedure Code (Act V of 1898) gives the High Court no power to go into evidence in revision. The Bombay High Court has, as a matter of practice, held that it will not go into evidence as a rule, but will interfere only under special circumstances, or were there is an error of law.

The accused in a criminal case is merely on the defensive and, unless there is any positive admission of a fact by him, any omission on his part to explain what indeed can be explained without his explanation should not be pressed against him.

Per Aston, J. (contra);—The rule of practice is that the High Court ordinarily refrains from opening questions of fact, when no appeal lies, except on some ground of law and in order to remedy a clear miscarriage of justice.

Where the question before the High Court exercising its powers of revision under section 439 of the Criminal Procedure Code (Act V of 1898) is one of appreciation of evidence, the rule of practice adopted is to refuse to disturb a conviction when there is legal evidence, oral or documentary, to sustain it.

"Under the law of British India, it is not necessary that the charge should allege which of two contradictory statements upon oath is false, but it is sufficient (unless indeed some satisfactory explanation of the contradiction should be established) to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time and directly contradictory statement at another," It is not the duty of the Court of first instance (and far less of a Court of appeal or revision) to supply *ab extra* an explanation which the accused himself has not suggested or an intention or knowledge which the accused has not claimed.

(RININAL application for revision under section 439 of the Criminal Procedure Code (Act V of 1898) of an order passed by A. Lucas, Sessions Judge of Poona, confirming in appeal the conviction and sentence against the applicant (accused) passed by Rao Bahadur V. T. Mirikar, Special Magistrate, First Class, Ahmednagar, for perjury under section 193 of the Indian Penal Code (Act XLV of 1860).

The facts of the case were as under :—

One Ranu valad Nama Pandit was the owner of two fields survey Nos. 19 and 21. He had mortgaged them to two Marwadi brothers, Bankatlal and Ramlal, who assigned their mortgage rights to Ramkisan valad Haribhaga Marwadi. The assignee brought a suit, No. 429 of 1895, in the Court of the Subordinate Judge of Shevgaum against the mortgagor Ranu for the recovery of the mortgage debt by sale of the mortgaged property. The defendant Ranu contended that the mortgaged property was sold at auction for arrears of Government revenue and was purchased by one Lachiram in 1872, therefore the sons of the auction-purchaser, who had since died, should be joined as parties

Digitized by Google

to the suit. On the said contention, Lachiram's sons, namely, Bankatram (accused applicant), Shivnarayan and Dhondiram, were joined as co-defendants. They presented a joint written statement urging that they had become absolute owners of the property by reason of the auction purchase by their father at the revenue sale. The Subordinate Judge disallowed their contention on the ground that they were not entitled to rely on the revenue sale, it being not confirmed by the Collector, and gave a decree for the plaintiff. During the trial of the said suit Bankatram (accused-applicant) was examined as a witness on the 3rd December, 1896, and he deposed as follows :—

EXHIBIT (D).

(Translation.)

I know the parties. Lands in dispute stand in the name of Ranu. He pays assessment thereof and cultivates them. My father had paid assessment before. My father used to say that he paid the assessment. I have never cultivated the lands personally. I have hitherto taken no steps to have the lands transferred to my name. (The lands) have been let out under an oral agreement to the defendant. My father let out the lands to Ranu for cultivation about 20 or 22 years ago. I was not then present. Subsequently I let (them) to Ranu for cultivation. I receive Rs. 10 income per annum. There is no documentary proof of this with me. When Ranu paid the assessment he used to pay Rs. 10. Other people where present. * * I became divided from Dhondiram. There was no document made with respect to partition then. My brother Shivnarayan became divided about 10 years ago. On that occasion also there was no document made with respect to partition. No memos., etc., where made relating to the property. *Dhondiram lives separate from me. I have only given him a cloth-shop. No. divisions (allotments of shares) have been made* * Rama Dhagya is my debtor.

Cross-examination :—*I myself am in possession of all ancestral lands and manage them.*

Subsequently in the year 1900 Dhondiram brought a suit, No. 115 of 1900, in the Court of the Subordinate Judge of Shevgaum against the said Ranu to enforce a mortgage debt by sale of the mortgaged property, namely, survey Nos. 19 and 21. The Subordinate Judge dismissed the suit by upholding the defendants contention that he had satisfied the mortgage debt by paying the *vasul* (income) in full satisfaction of the debt. In this suit also Bankatram (accused-applicant) was examined as a witness on the 23rd March, 1901, and he deposed as follows :—

EXHIBIT (E).

(Translation.)

I am plaintiff's eldest brother. We are divided. It is 13 or 14 years since we separated by affecting partition. Three grrden lands and two debtors, Jahagirdar and Deshpande, are left joint. House, etc., is not joint. *I and Dhondiram became separate in Shake* 1808 *or* 1809, and the third brother, Shivnarayan, had separated in Shake 1807 or 1808. *At that time Dhondiram might have been 12 or* 13 *years old. Since seperation Dhondiram began to manage his estate.* We were united before partition and all dealings were joint, and I used to manage (them). I know that the survey number in suit was mortgaged to the plaintiff when the (mortgage) bond was produced in Court in suit No. 429 of 1895. In that suit I was a defendant. I and my brother have given written statement, Exhibit 2o, in that suit. I did not mention the fact of the mortgage in the written statement in that suit because I was not aware of the fact of the mortgage. The land in suit was purchased by my father at an auction-sale held for default of payment of assessment and the defendant was cultivating the land on payment of rent about 2 or 3 years before we gave the written statement in 1895. *The land had fallen to my share on partition.* The defendant did not give me and Dhondiram wheat, gram, jowari, kardi, kadba and two bullocks by way of vasul in satisfaction of the bond. I was never summoned by the Mamlatdar on the application of the denfendant and I know nothing about the application. I don't remember whether I gave my deposition or not in suit No. 429 of 1895. A copy is read out to me (but) I do not remember whether I gave my deposition or not according to it. *What I have stated above, namely that it is 12 or 13 years since Dhondiram was separated and all was partitioned out to him, is true. Only cloth-shop was given to Dhondiram (on partition). What is written in my deposition in suit* No. 429 *of* 1895, *that no partition took place, that all immoveable estate is in my possession, is not true.*

Ranu valad Nama applied to the Subordinate Judge for sanction to prosecute Bankatram (accused-applicant) and his brother Dhondiram for perjury

* वाटण्या झाल्या नाहींत (Vatanya zalia nahint).

Digitized by Google

and the Subordinate Judge granted the sanction under section 193 of Indian Penal Code. Against the order of the Subordinate Judge Bankatram and Dhondiram applied to the Sessions Judge at Ahmednagar for the revocation of the sanction. The Sessions Judge confirmed the order so far as Bankatram was concerned but amended it with respect to Dhondiram by ordering his prosecution under section 209 of the Indian Penal Code for dishonestly making a false claim in a Court of Justice. Owing to the order of the Sessions Judge two separate trials were held by the First Class Magistrate of Shevgaum who discharged Dhondiram and framed the following charge against Bankatram :—

That you, on or about the 3rd day of December, 1896, at Shevgaum, were examined as a witness in case No. 429 of 1895, before the Subordinate Judge of Shevgaum and being bound by oath to speak the truth intentionally gave false evidence, knowing it to be false, as follows :—

"1. Dhondiram lives separate from me. I have only given him the cloth-shop. *There is no partition.*"

"All the ancestral lands are in my possession and I manage them."

2. Similarly you were examined as a witness before the said Subordinate Judge on 23rd March, 1901, in case No. 115 of 1900, and you have intentionally given false evidence, knowing it to be false, as follows :—

"I am plaintiff's elder brother" (plaintiff is Dhondiram). "We live separate. *It is 13 or 14 years back our partition took place.* Myself and Dhondiram divided in Shake 1808 or 1809; Dhondiram was aged 12 or 13 years. *Dhondiram manages his estate since partition.* It is not true what is stated in my deposition in case No. 429 of 1895, that only cloth-shop was given to Dhondiram, that no share was given to him and that all the immoveable property is in my possession."

"That the land in dispute had come to my share."

"That it is true which I have stated that Dhondiram separated before 12 or 13 years and all division of the property was made."

You have thus deliberately and falsely made two contradictory statements and that either of them is false or one is false.

Soon after the charge was framed the First Class Magistrate of Shevgaum was transferred from that place to Sangamner and the subsequent proceedings were held in the Court of the Special First Class Magistrate of Ahmednagar, who, on the 5th August, 1903, took down Bankatram's statement, which was as follows :—

Q.—Did you give your deposition (Exhibit D) which is now read out to you in the Subordinate Judge's Court?

A.—Yes, I have given that deposition.

Q.—A deposition (Exhibit E) is now read out to you. Did you give it?

A.—According to what I have heard I have given.

Q.—Will you be able to state the reason why there are discrepancies in the above two depositions?

A.—I cannot tell. (My) vakil will tell you on my behalf.

The Special First Class Magistrate of Ahmednagar, on the 31st August, 1903, found the accused Bankatram guilty of the offence charged and sentenced him to suffer rigorous imprisonment for three months and pay a fine of Rs. 300 and in default to suffer further rigorous imprisonment for one month. The Magistrate in his judgment made the following remarks :—

The suit No. 429 was brought by an assignee of a mortgagee wherein the accused, his two brothers Shivnarayan and Dhondiram and also the complainant were defendants (Exhibit O.) From the evidence of the brothers of the accused (Exhibits L and M), his own admission when he was examined as a witness in a criminal case against Dhondiram (Exhibit N), his statement in Civil Suit No 115 of 1900 (Exhibit E), and his statement as an accused before Magistrate, First Class, Mr. Joshi (Exhibit R), there can be no doubt that he deliberately made this false statement to secure his own ends probably with respect to the land in dispute. Herein the attempt seems to have been to set up a plea that there was no partition between him and his brothers and the property was joint. Looking to his statement of 1901 the plea of partition between him and his brothers is apparent and a flat contradiction of his previous statement.

Digitized by Google

While under examination a copy of the statement of 1896 was read to him and he has plainly stated that it was not true.

§ § § § § § §

From the facts and circumstances noted above there can be no doubt of the guilt of the accused. The only possible circumstance in favour of the accused in attenuating his crime is that the statements were made after a lapse of five years. The first in 1896 and the last in 1901. I am constrained to observe that offences of the kind are not uncommon in these parts through the willness of the money-lending class of the Marwadi to whom the accused belongs. Very few come to light unless detected in a Court of Justice or in a particular case for the gratification of a private grudge. Complainant's conduct in the case could not but attract notice. He is an illiterate and ignorant peasant and seems evidently a tool in the hands of designing persons ill-disposed to the accused. The present case seems to be one got up from spite and accused well entrapped unconscious of the dangerous not laid down for him. There is no question of the gravity of his offence. But considering the lapse of time the statements were made and looking into the circumstances of the case on the whole the accused deserves some lenieney in awarding the punishment on him.

On appeal by the accused the Sessions Judge of Ahmednagar having had to deal with the application for the revocation of sanction, moved the High Court to transer the case to some other Court. The case was accordingly transferred to the Court of the Sessions Judge of Poona, who, in confirming the conviction and sentence, observed as follows :—

It now remains for me to consider whether in the present case the two statements are so contradictory as to be irreconcilable, bearing in mind that in such cases every presumption is to be made in favour of their being reconcilable. I have carefully read the two depositions made by the accused in the two Civil suits and it is clear that in the suit of 1895 he intended it to be believed that no partition of property had taken place between himself and Dhondiram. Whereas in his statement in the suit of 1900 he intended it to be believed that a partition of property had taken place between himself and Dhondiram 12 or 13 years previously. The accused himself has not attempted to reconcile them. I therefore consider that one of these statements must be false to the accused's knowledge and that he must have made this false statement intentionally.

Against the order of the Sessions Judge the accused preferred an application for revision under section 439 of the Criminal Procedure Code. The case was heard by a Division Bench composed of Chandavarkar and Aston, JJ., who on the 4th April, 1904, delivered the following judgments :—

CHANDAVARKAR, J. :—The petitioner before us was convicted by the Special Magistrate, First Class, of Ahmednagar, under section 193 of the Indian Penal Code of the offence of intentionally giving false evidence in a judicial proceeding by making two contradictory statements, one of which he knew to be false. The Sessions Judge of Poona, to whom the petitioner's appeal against the conviction was transferred by the orders of this Court, has confirmed the conviction. We are now asked to quash the conviction under our Revisional Jurisdiction and the first ground urged by Mr. Branson in support of the petition is that the two statements, one or the other of which has been held by the Courts below to be false, are not necessarily contradictory. I am of opinion that Mr. Branson's contention must be allowed. The statements were both made by the petitioner with reference to the question whether he was joint with or divided from his younger brother, Dhondiram. The first statement made by the petitioner was in a deposition dated the 3rd December, 1896, in suit No. 429 of 1895 of the Subordinate Judge's Court at Shevgaum and is as follows :—

"Dhondiram lives separate from me. I have only given him the cloth-shop. There is no partition. All the ancestral lands are in my possession and I manage them."

The second statement was made by the petitioner in his deposition dated the 23rd March, 1901, in suit No. 115 of 1900 of the same Court and is as follows :—

Digitized by Google

"I am plaintiff's elder brother" (plaintiff is Dhondiram). "We live separate. It is 13 or 14 years back our partition took place. Myself and Dhondiram divided in Shake 1808 or 1809. Dhondiram was aged 12 or 13. Dhondiram has been managing his estate since partition. It is not true what is stated in my deposition in case No. 429 of 1895 that only the cloth-shop was given to Dhondiram; that no share was given to him and that all the immoveable property is in my possession"; "that the land in dispute has come to my share." "That it is true what I have stated that Dhondiram separated before 12 or 13 years and all division of the property was made."

Now upon the statements contained in the two depositions and made the subject of the alternative charge against the petitioner the learned Sessions Judge, who heard the appeal against the conviction, says :—

"I have carefully read the two depositions made by the accused in the two Civil suits and it is clear that in the suit of 1895 he intended it to be believed that no partition of property had taken place between himself and his brother Dhondiram, whereas in his statement in the suit of 1900 he intended it to be believed that a partition of property had taken place between himself and Dhondiram 12 or 13 years previously. The accused himself has not attempted to reconcile these two statements nor is it, in my opinion, possible to reconcile them."

The contradiction then between the two depositions consists in this—that on the first occasion the petitioner stated in effect that there had been no partition between him and Dhondiram, whereas on the second occasion he stated that there had been one. But unless partition in a Hindu joint family is evidenced by a deed (and in this case the petitioner in his first deposition distinctly stated that there was no deed relating to the separation between him and Dhondiram) it has to be inferred from the acts and mutual dealings of the parties. As observed by Mr. Mayne in his Hindu Law "Numerous circumstances are set out by the Native writers as being more or less conclusive of a partition having taken place, such as separate food dwelling or worship: separate enjoyment of the property; separate income and expenditure; business transactions with each other and the like. But all these circumstances are merely evidence, and not conclusive evidence, of the fact of partition".(1) In such a case a man may well think and say as an inference of law from those acts and circumstances that there is no partition and on a subsequent occasion he may change his view as to the legal consequence of those acts and dealings and draw a contrary inference. Because he took one view of the facts on one occasion and a directly opposite view on a subsequent occasion it does not and cannot, in my opinion, necessarily follow that he has perjured himself by making contradictory statements. The statements are contradictory only so far as the man's conclusion or opinion on the facts goes. But the law does not punish a man as a perjurer because he has changed his opinion. It is often a nice question what is enough in point of law to constitute partition in a Hindu joint family and our Courts afford instances of cases where upon the same facts one Judge has held partition proved and another Judge has held otherwise. When, therefore, a witness deposing on oath states on one occasion that there was no partition and on another states that there was one, he must be presumed to be stating *not a fact* as to which there can possibly be no two views but his own impression of the legal consequences of the relations between the coparceners in a Hindu family.

So far, therefore, as the contradiction attributed by the learned Sessions

(1) Mayne's Hindu Law, p. 651 (6th Edn.).

Digitized by Google

Judge to the two statements of the petitioner consists in the *factum* of partition, the conviction cannot, in my opinion, stand. It is a well known rule of law applied by eminent Judges to cases of perjury arising out of contradictory statements, that the Court dealing with them should not convict unless fully satisfied that the statements are from every point of view irreconcilable, and if the contradiction consists in two statements opposed to each other as to matters of inference or opinion on which a man may take one view at one time and a contrary view at another, there can be no perjury, unless he has on oath stated *facts* on which his first statement was based and then denied those *facts* on oath on a subsequent occasion.

The question, therefor, is whether, apart from the petitioner's contradictory statements as to partition, he has stated any fact in his first deposition which he denied in his second deposition. I, therefore, turn to the statements of fact contained in the first deposition, so far as they were made the subject of the charge. The first statement of fact then is :—" Dhondiram lives separate from me" That statement is not denied but re-affirmed in the second deposition. The next is :—" I have only given him the cloth-shop". That no doubt appears at first as if it were denied in the second deposition, but there again it is not, as the deposition shows, a denial that the cloth-shop had been given to Dhondiram but a denial that no partition had taken place. The statement in the second deposition is :—" It is not true as stated in the deposition in suit No. 429 of 1895 that only the cloth-shop had been given to Dhondiram and that no partition had taken place." The third statement of fact in the first deposition was : —" All the ancestral lands are in my possession and I manage them." The statement in the subsequent deposition was :—"It is not true what I stated in my deposition in case No. 429 of 1895 that.....all the immoveable property is in my possession." I cannot understand how these two statements are necessarily contradictory. In the first deposition the witness spoke of " ancestral lands" only and stated that they were in his possession. In the second deposition, he is asked about " all the immoveable property " —a wider term than mere lands—and he says " it is not true that all the immoveable property is in my possession. " The ancestral lands may be in his possession and yet at the same time he may not be in possession of all the immovable property but only of some, *i.e.*, the lands. It is not found by the Courts below that the immoveable property consisted only of lands. Moreover the second deposition shows that the family had immoveable property besides lands. There the petitioner stated :—" Three fields and two debtors, the Jaghirdar and the Deshpande, are joint. The house, &c., is not joint." He had stated nothing about "the house, &c." in his first deposition.

The last statement which was made the subject of the charge is contained in the second deposition. It is as follows :—'The land in dispute had come to my share."

This is said to be contradicted by the petitioner's previous statement :—"All the ancestral lands are in my possession and I manage them."

But where is the necessary contradiction between the two? In the former he is speaking of the land in dispute having fallen to his share, whereas in the latter he is speaking of that and the other lands being in his possession and management. The two statements relate to two different things—the former statement to his title, *i. e.*, to the land having fallen to his share at the partition ; the latter to his possession, which is distinct from title.

But it was urged before us by the Government Pleader in support of the conviction that the petitioner himself had not attempted to reconcile the two

Digitized by Google

statements as if his failure to reconcile them is fatal to his case. It is the duty of the Court to see whether the statements can be reconciled or not. The accused in a criminal case is merely on the defensive and unless there is any positive admission of a fact by him, any omission on his part to explain what indeed can be explained without his explanation should not be pressed against him. When he states in his second deposition that what he stated in his first was not true, he must be taken to have substantially meant that his denial of the relation of separated coparcenary between him and his brother was not true That, as I have observed already, bears on the question whether they were divided or not in point of law. It is a matter of opinion and as such cannot be made the basis of a conviction for perjury.

Under these circumstances, I think, we are bound to interfere in revision. The accused has been convicted by the lower Courts upon the sole fact that his statements contained in his two depositions are contradictory. As was conceded at the Bar by the learned Government Pleader before us, there is no evidence beyond the statements charged to support the conviction and none has been relied upon by the Courts below. The sole and whole question is—are the statements forming the subject of the charge so contradictory that one or the other of them must be necessarily false? The answer to that question depends upon the construction to be put upon the two depositions from which the statements are taken and their construction, as indeed the construction of any document, is a question of law, not of fact. To say that the two Courts have found upon facts is to lose sight of the common rule of law that where you have to construe a document or documents to infer a fact, the construction is one for the Judge, not for the jury; and in the present case, the evidence of perjury solely resting upon the interpretation of the accused's depositions and a correct interpretation of them showing no necessary contradiction between the two statements charged as contradictory, in my opinion, there is no legal evidence to sustain the conviction. In other words, there is no evidence to go before a jury. My conclusion that the conviction in this case must be set aside by no means involves a departure from the practice of this Court which is as a general rule not to interfere in revision with findings of fact based upon appreciation of evidence by a lower Court. It is not correct to say that the law as laid down in the Criminal Procedure Code gives us no power to go into evidence in revision. We have the power, but this Court has as a matter of practice held that it will not go into evidence as a rule, but will interfere only under special circumstances or where there is an error of law. The analogy drawn from second appeals in civil cases is beside the question when we are dealing with a criminal case in revision. But however that be, I proceed in this case upon the well recognised principle that there is an error of law where a lower Court in convicting an accused person has misread a document or documents.

For these reasons, deeming it unnecessary to consider the other point of law raised by Mr. Branson, I am of opinion that the conviction and sentence must be set aside and the accused acquitted.

ASTON, J.:—I find myself in the unfortunate position of being unable to concur.

We are asked to disturb in revision a finding of fact arrived at by the Magistrate and also by the Sessions Judge. The rule of practice which ordinarily debars us reopening questions of fact, when no appeal lies, except on some ground of law and in order to remedy a clear miscarriage of justice as been often affirmed. See the remarks of Jardine, J., in *Queen-Empress* v. *Chagan* (1).

(1) (1890) 14 Bom. 331 at p. 342.

Digitized by Google

The question whether we are to depart from that rule when no very exceptional grounds exist, and on no fixed principle, seems to me one of importance.

If we suffer exceptions to swallow this rule we shall be granting the second appeal which the Legislature forbids; and we must entertain such "appeals by way of revision" under disadvantages so serious that it may well be doubted whether we are likely to arrive at a nearer approximation to the truth than that arrived at by the Courts below.

There exists an inevitable tendency in such second appeals to eliminate the advantage which the party on the side of truth has and to which that party is justly entitled, from the demeanour of witnesses, from the mode in which any attitude is taken up or changed, and from the local colour and unrecorded *minutiæ* which give a flavour to evidence, a flavour which becomes imperceptible in second appeal. In the endeavours to remedy a particular mischief, a larger evil becomes thus introduced. The further the trial of issues of fact is removed from the real *venue* and the more desperate the situation, the greater the risk of recklessness in the instructions upon which a Court is asked to disbelieve witnesses who may happen to be truthful: and tendency increases to treat the evidence of witnesses who happen to be in fact trustworthy as if they are unworthy of credit unless corroborated to the extent that is looked for in the testimony of criminal accomplices. The apprehension thus engendered and the discouragement caused to (already reluctant) witnesses of facts to give evidence must constitute a serious hindrance to the administration of justice.

A Court of appeal has to contend with such disadvantages, but in a lesser degree, and it does so in pursuance of a duty imposed by the law. A Court of revision which undertakes a fresh adjudication as to the facts when no appeal lies, undertakes a self-imposed task under conditions far less favourable to the elucidation of the truth than those which exist in a local tribunal. Moreover the truth being often known to a much wider circle than the parties and witnesses themselves the effect of a mistake in estimating truth is not confined to the mere miscariage of justice in a particular case. The effect is more farreaching

I will therefore state at greater length than would otherwise have been necessary my reasons for holding that the present case is not one calling for the interference of a Court of revision.

On the 3rd December, 1896, the petitioner Bankatram Lachiram Marwadi as a party witness in suit No. 429 of 1895 in the Court of the Subordinate Judge of Shevgaum said on solemn affirmation:—

"Dhondiram lives separate from me. I have only given him the cloth-shop. There is no partition. All the ancestral lands are in my possession and I manage them."

On the 23rd March, 1901, as a witness in suit No. 115 of 1900 in the same Court he said on solemn affirmation:—

"I am plaintiff Dhondiram's elder brother. We live separate. It is 13 or 14 years back our partition took place. Myself and Dhondiram divided in Shake 1808 or 1809 (A. D. 1886 or 1887). Dhondiram was aged 12 or 13. Dhondiram manages his estate since partition. It is not true what is stated in my deposition in case No. 429 of 1895, that only cloth-shop was given to Dhondiram, that no share was given to him and that all the immoveable property is in my possession. That the land in dispute had come to my share. That it is true which I have stated that Dhondiram separated before 12 or 13 years and all division of the property was made."

Digitized by Google

The First Class Magistrate Mr. Mirikar, who tried the case, convicted the petitioner under an alternative charge, in which the above statements are set out, being convinced, on the evidence adduced, that in one or other of the said two judicial proceedings the petitioner had intentionally given false evidence by making a false statement which he knew to be false.

In coming to that conclusion the Magistrate based his decision upon the evidence summarized in his judgment. It will be observed that this evidence is not confined to any apparent irreconcilability between the evidence given by the petitioner on the two occasions.

The evidence included the further statements of the petitioner himself when full opportunity was afforded to him to reconcile his contradictory depositions. The Magistrate took into consideration the circumstances under which petitioner gave his evidence in each of the two civil suits as the Magistrate was entitled to do, for as remarked in *Edgington* v. *Fitzmaurice*(1) cited quite recently in a decision of this Court, the history of a case is to be looked to in testing the truth or falsity or animus of a statement.

Moreover the petitioner's pleader had at the trial strongly urged that the proviso to section 132 of the Evidence Act (I of 1872) applies to the facts and circumstances of the case, a contention which is wholly irrelevant if the petitioner did not incriminate himself by the answers he gave in his deposition in the latter suit.

The Sessions Judge came to the conclusion that it is clear that by his statements in the earlier suit the petitioner intended it to be believed that no partition of property had taken place between himself and his brother Dhondiram, whereas in his statement in the later suit he intended it to be believed that a partition had taken place 13 or 14 years previously.

So viewing the general purport of the statements of petitioner on the two occasions he points out that the accused has not attempted to reconcile them and considers it is not possible to reconcile them. It may be presumed that the Sessions Judge meant irreconcilable *as they stand*, because it is difficult to conceive how any two contradictory statements can possibly be irreconcilable if the same words used in each are treated as used in a different sense in each statement. The Sessions Judge goes on to say, "I therefore consider that one of these statements must be false to the accused's knowledge *and that he must have made the false statement intentionally.*"

That is clearly a finding of fact. Even if that finding had been based upon the contradiction between the depositions of the accused no question of construction of documents would arise, for the depositions are merely the judicial proof of the oral evidence given by the petitioner in the two judicial proceedings referred to in the charge. But, as already pointed out, that finding of fact that the petitioner in one or other of the said two civil suits intentionally gave false evidence is based not only on the *primâ facie* contradiction in portions of petitioner's depositions set out in the charge, but also upon other evidence recorded. Whether that finding of fact is supported by the evidence is a matter of appreciation of evidence.

"It is only in very exceptional cases that this Court sitting as a Court of Revision deals with questions of evidence, and disturbs or supplements the finding of a lower Court on a question of fact—*Queen-Empress* v. *Shekh Saheb Badrudin* (2). It will do so, in the interests of justice, where the inquiry in

(1) (1885) 29 Ch. D. 459. (2) (1888) 8 Bom. 197. (3) (1884) 10 Cal. 1047.
(4) (1888) 12 Bom. 377 at p. 390.

Digitized by Google

the lower Court has been faulty—*Nobin Krishna* v. *Russick Lall* (3). See *Bhawoo Jivaji* v. *Mulji Dayal* (4).

"Section 439 of the Criminal Procedure Code provides that the High Court in revision may (subject to certain limitations not necessary now to be dwelt upon) in its discretion exercise any of the powers conferred on a Court of appeal. The interference of the High Court in revision is not therefore limited to matters of law, but it is fully competent to this Court to enter into matters of fact if it thinks fit. On the other hand it is not bound to go into evidence if it does not think fit, and the question is where should it exercise this discretionary power and where not. Clearly the mere application of a party to examine the evidence in any case would not be a sufficient ground for doing so. Section 440, which makes it optional with the Court in revision to hear parties or their pleaders, renders this quite clear. Indeed, were it otherwise, there would virtually be a second appeal on facts in every case in which the parties came up to this Court. This we do not think the Legislature could have intended. There must appear upon the face of the judgment or order complained of or of the record some ground (which need not always be a ground of law) to induce this Court to think that the evidence ought to be examined in order to see that there has been no failure of justice. Where there is no such ground, the practice has been to limit the interference in revision to matters of law," *Keshab Chunder Roy* v. *Abhil Metey* (1) where the cases of *Nobin Krishna Mookerjee* v. *Russick Lall Laha* (2); *Reid* v. *Richardson* (3); *Queen-Empress* v. Shekh *Saheb Badrudin* (4), *Bhawoo Jivaji* v. *Mulji Dayal* (5), and *Queen-Empress* v. *Chagan Dayaram* (6) are cited as authorities for the above view of the law and practice.

The actual words used in section 439 of the Criminal Procedure Code (V of 1898) are "the High Court may in its discretion exercise any of the powers conferred on a Court of appeal by sections 195, 423, 426, 427 and 428 or on a Court by section 338." In none of these cited sections is any power conferred to re-open findings of fact, but it may be inferred that the powers actually conferred by these sections are to be exercised in accordance with, and subject to, the other provisions of the Code. It is section 418 which enacts that "An appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only," thus by implication conferring on an Appellate Court a power to re-open findings of fact. One of the questions which arises in construing section 439 of the Code is whether a concurrent finding of fact by two different Courts stands on a lower footing than a finding in a trial by jury and whether the Legislature could have intended that such a concurrent finding, where there is evidence to sustain it, should be disturbed by a Court of revision. For it has always been conceded that the revisional jurisdiction conferred by section 439 of the Code is to be exercised with due regard to the other provisions of the Code which forbid a second appeal.

The limits within which this Court will exercise its discretion as to disturbing a finding of fact on mere appreciation of evidence were long ago pointed out. In *Queen-Empress* v. *Shekh Saheb Badrudin* (7) Kemball, J., remarked in the course of the argument :—"Our rule is that in cases in which there is no appeal we do not weigh the evidence or disturb the Magistrate's finding. If we did so, we should be giving the appeal forbidden by law. Under the old Code we did not deny that we had the power of going into the evidence, but we

(1) (1895) 22 Cal. 998 at p. 1001. (2) (1884) 10 Cal. 1047. (3) (1887) 14 Cal. 861.
(4) (1883) 8 Bom. 197. (5) (1888) 12 Bom. 377. (6) (1890) 14 Bom. 361.
(7) (1883) 8 Bom. 197 at p. 198.

Digitized by Google

invariably refused to exercise it, save upon a question of law, *e. g.*, that there was no evidence whatever to sustain a conviction "; and the judgment in that case says:—" The question with which we are now concerned, is whether the circumstances broght to our notice in the present case are such that we ought in the exercise of our discretion, to reverse the convictions of the two accused on the ground that the evidence does not support them. Hitherto we have refused, and we shall continue to refuse, save on very exceptional grounds, to exercise that discretion.

Where the question before this Court exercising its powers of revision under section 439 of the Criminal Procedure Code is one of appreciation of evidence, the rule of practice adopted, so far as I gather from the decisions and from such experience as I have obtained on this Bench, is to refuse to disturb a conviction when there is legal evidence, oral or documentary, to sustain it: and I understood Mr. Branson's arguments to be directed to show that there was some error in law in the trial and that the conviction was for one reason or another illegal.

It was contended that even though a person may have clearly given false evidence intentionally in one or other of two depositions made by him, he cannot, under the provisions of the Criminal Procedure Code, be successfully prosecuted unless it can be established in the affirmative on which of the two occasions his evidence was false.

The case of *Queen-Empress* v. *Mugapa* (1) decided by a Full Bench (without any argument at the Bar) was cited as authority to show that in such circumstances an alternative charge cannot be framed. This use of the ruling in that case invites two observations. First, it was intended to apply where there is no other evidence but the contradictory statements. Secondly, that decision was passed before the Code was amended by Act V of 1898 and dealt with the contradiction between statements made to a Police officer making an investigation under section 161 and statements made in a Court of justice.

Under the Criminal Procedure Code then in force a witness examined orally by a Police officer was bound to answer *truly* and being thus bound by an express provision of law to state the truth (section 191, Indian Penal Code) prosecutions became common for giving false evidence when a witness contradicted in Court a statement he had made to the Police.

Such prosecutions came deservedly into disrepute because they were calculated to deter persons who had designedly or carelessly made incorrect statements to the Police from speaking the truth in Court. The ruling in *Queen-Empress* v. *Mugapa* (1) dealt with such a prosecution. The law has since been altered, the word " truly " is now omitted in section 161, Criminal Procedure Code, and the following illustration is added to section 236 :—

" (*b*) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false."

Mr. Branson contended that this is an " inapt " illustration and does not alter the effect of the section 236 which, according to his agrument, does not authorise an alternative charge in such a case. But if this is so, the Legislature would presumably have amended section 236 itself instead of merely adding the illustration quoted.

Section 236 is as follwes :—" If a single act or series of acts is of such a

(1) (1898) 18 Bom. 377.

Digitized by Google

nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once ; or he may be charged in the alternative with having committed some one of the said offences."

It was argued that the " series of acts " here contemplated must be a series of connected acts. The section does not say so : and a series of acts may be a series of disconnected acts or series of connected acts. Then it was said that "several offences" means offences not of the same kind.

We are dealing not with section 72 of Indian Penal Code, where the " several offences " to be specified in an alternative judgment may well mean offences not of the same kind, but with the provision of the Caiminal Procedure Code as to joinder of charges.

Even the "*distinct*" offences contemplated in section 233 of the Criminal Procedure Code may be offences of the same kind as may be seen by reference to section 234, for it is only when three distinct offences are of the same kind and committed within the space of twelve months, that they can be charged and tried at the same trial except in the cases covered by sections 235, 236, 239.

A finding that A has committed murder by administering poison to B, or stabbing him, or by drowning him, is not an alternative judgment under section 72 of the Indian Penal Code, but a judgment that A has committed one offence of murder by one or other of the said three different acts.

So a finding that A has committed the offence of intentionally giving false evidence in one or other of two depositions absolutely contradictory and unexplained is not an alternative jndgment under section 72 of the Penal Code, though if a separate charge were framed in respect of each of the two depositions, there would be several offences charged within the view of the Criminal Procedure Code and the judgment might then be alternative within the view of the Criminal Procedure Code. Whether the prosecution elected to proceed upon one charge framed alternatively or upon two separate charges would be a matter of form as long as section 236 remains in the Code but if that section be eliminated the remaining sections as to joinder of charges would create difficulties especially if there happen to be an interval of more than a year between the two depositions.

The addition of illustration (*b*) to section 236 of the Act V of 1898 seems to show that in the view of the Legislature section 236 removes those difficulties, a view in accord with the Full Bench dicision of the Culcutta High Court as far back as 1874 in *Queen* v. *Mahomed Hoomayoon Shaw* (1).

A conviction is therefore in my opinion legal on an alternative charge of an offence under section 193 of the Indian Penal Code.

Then it was argued that the statements set out in the charge from the two depositions are not absolutely irreconcilable and therefore the conviction is bad in law.

That argument I understand to be based upon the decisions in *Queen* v. *Bidu Noshyo* (2) and *Queen-Empress* v. *Ramji* (3), and more especially upon a remark of Duthoit, J., in *Queen-Empress* v. *Ghulet* (4) : "Every possible presumption in favour of a reconciliation of the two statements should be made, and it must be found that they are absolutely irreconcilable before a convic-

(1) (1874) 13 Beng. L. R. 324.
(2) (1869) 13 Beng. L. R. 325 (*f. n.*).
(3) (1885) 10 Bom. 124.
(4) (1884) 7 All. 44, p. 68.

Digitized by Google

tion can be had upon the ground that one of them is necessarily false." That remark occurs in an exhaustive Judgment in which Duthoit, J., sets out the grounds for his opinion that "under the law of British India, it is not necessary that the charge should allege which of two contradictory statements upon oath is false, but it is sufficient (unless, indeed, some satisfactory explanation of the contradiction should be established) to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time, and a directly contrary statement at another,"(1)

That being the view of the law of British India which that elaborate Judgment upholds, a view which the Legislature as already shown has sought to affirm by adding the new ill. (*b*) to section 236 of the Criminal Procedure Code (Act V of 1898); it must be obvious that when Duthoit, J., said "every possible presumption in favour of a reconciliation between the two statements should be made," he did not mean to imply that it is any part of the duty of a Court of first instance (and far less of a Court of appeal or revision) to supply, *ab extra*, an explanation which the accused himself has not suggested, or an intention or knowledge which the accused has not claimed.

Section 106 of the Evidence Act (I of 1872) enacts that "when any fact is specially within the knowledge of any person the burden of proving that fact is upon him," and ill. (*a*) to that section runs: "when a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him."

To make my meaning plain I may refer to the ordinary rule in section 114, Evidence Act, ill. (*a*) that "a Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession."

But if an accused person in such circumstances were to offer no explanation and say he had none to offer, and a Magistrate were to convict him it would surely be, to quote words used by Sir Barnes Peacock in *Queen* v. *Mussamut Zumeerun*,[2] "trifling with the administration of justice" for an appellate or a revisional Court to reverse the conviction because the Magistrate had not taken into consideration some explanation not suggested by the accused but within the bounds of possibility, such as that the accused may have been hypnotised and the stolen property surreptitiously introduced into his pocket.

What the Court has to consider is the evidence and any explanation the accused may offer, not every possible explanation which ingenuity may imagine after the trial is over.

So in a trial for perjury when the course is adopted of framing a charge containing contradictory statements of such a nature that they, when taken in combination, disclose according to the prosecution the specific offence of intentionally giving false evidence, "it must be matter of evidence whether the contradictory statements contained in the charge are *per se* so irreconcilable that one of them is necessarily false, and also that the prisoner in making them intentionally spoke falsely in regard to one of them. This it is the province of the jury or Court to determine"—per Morris, J., in *Queen* v. *Mahomed Hoomayoon Shaw* (3)

At such a trial it is of the utmost importance that "the accused should have every possible opportunity of explaining the statements in question, and

(1) (1884) Ibid, p. 46. (2) (1866) 6 W. R. 65 at p. 68 (Cri. Rul.). (3) (1874) 13 Beng. L. R., p. 385.

Digitized by Google

of showing that the alleged contradiction does not really exist"—per Strachey, C. J., in *Queen-Empress* v. *Puran*(1)—and any evidence as to intention or knowledge and any explanation offered will form part of the evidence to be weighed and appreciated by the Court which tries the case and, where an appeal lies, by the appellate Court.

In *Queen-Empress* v. *Ramji*(2) Wedderburn, J., cited *Queen* v. *Bidu Noshyo*(3) as laying down the principle that "in charges founded upon supposed contradictory statements every presumption in favour of the possible reconciliation of the statements must be made." But in that Bombay case the Court was dealing with the question whether the impugned statements taken as they stood, in their ordinary meaning, were absolutely contradictory and it came to the conclusion that so viewed they were not contradictory.

In *Queen* v. *Bidu Noshyo*(3) the Court was dealing with supposed contradictory statements without explanation or evidence, *ab extra*, to show that the words used were used in other than their ordinary sense, or that their was no such intention or knowledge as the law requires. The statements were therefore examined as they stood to see whether as they stood they were so absolutely contradictory that it was impossible that both should be true; and it was in regard to such an examination that Markby, J., observed: "it is of course plain that before a prisoner can be convicted of perjury on the ground that he has made two contradictory statements without ascertaining which of the two is true, and which is false, every presumption in favour of the possible reconciliation of the statements must be made."

Remembering the sort of prosecution for which the above principle was laid down and bearing also in mind that it follows from the very definition of the offence of giving false evidance (sections 191, 193 of the Indian Penal Code) that even where the statements charged are *per se* irreconcilable or absolutely contradictory, the accused cannot be convicted if he can satisfy the Court by evidence or credible explanation that neither statement was false to his knowledge or intentionally false, the only question which now remains is whether there is evidence on the record to sustain the concurrent finding of fact of both the lower Courts that in one or the other of the depositions quoted in the charge the accused intentionally gave false evidence. That in fact is the true issue. Looking to the evidence before the Court of first instance already discussed in the Magistrate's Judgement it is impossible to say that this issue was decided merely upon the contradiction between the impugned statements, or to say that there is not evidence to sustain the Magistrate's finding.

That being so and the question before us being really one of appreciation of evidence, it would be in accordance with the practice of this Court, as I understand it, to refuse to interfere as a Court of revision, and I would accordingly decline to interfere.

But if we are to go into the evidence, then I would say that upon the evidence in this case there is in my opinion no room for reasonable doubt that the petitioner did in one or the other of the depositions quoted in the charge intentionally give false evidence.

I do not attach importance to the fact that the term "all the ancestral lands" in one deposition is changed to "all the immoveable property" in the other, the accused did not himself give any significance to this, when reiterated opportunities for explanation were given. In 1895 he says explicitly: "there is no partition," in 1901 he says: "it is 13 or 14 years back our partition

(1) (18[illegible]) All. W. N. 39 at p. 40.
(2) (1885) 10 Bom. 124 at p. 130.
(3) (186[illegible]) 13 Beng. L. R., p. 325 (*f. n.*).

Digitized by Google

took place; myself and Dhondiram divided in Shake 1808." In 1895 he says explicitly: "I have only given him (Dhondiram) the cloth-shop;" in 1901 he says equally explicitly: "it is not true what is stated in my deposition in case No. 429 of 1895 that only cloth-shop was given to Dhondiram"; and further: "Dhondiram separated before 12 or 13 years ond all division of property was made."

Confronted in 1901 with this contradiction he does not suggest that he was using the same words in different senses, or attempt to explain; on the contrary he says plainly that his earlier evidence was untrue.

There are the depositions themselves which by their tenor show with what intent the impugned statements were made on each occasion. When further opportunities are given, in the course of the criminal prosecution, for explanation, he twice reiterates (15th May and 5th August, 1903) that he has no explanation himself to offer.

It is unnecessary therefore to pursue further the evidence discussed in the Judgment of the Magistrate.

The Judges having thus differed, the case was referred to Jenkins, C. J., under section 429 of the Criminal Procedure Code.

Branson with *Gangaram B. Rele* for the applicant (accused):—wrong construction has been put upon the depositions of the accused. Even in his first deposition he says that he was divided from his brother Dhondiram. There was no division by metes and bounds. The three brothers divided the property according to their convenience. Further, the whole of the property was not divided because the accused distinctly says in his second deposition that two debtors and some property, which could not be partitioned, were kept intact. It was very hard upon the accused to ignore the fact that a long time had elapsed between the two depositions and that during the interval circumstances might have occurred which brought about a change in his opinion as to the state of things at two different times.

The second deposition does not, as is apparent from the way it has been recorded, represent the real state of affairs. In that deposition the accused is referred to his first deposition and is made to say something which he never said in his first deposition. There is no warrant in law to support such a course.

Great stress has been laid upon the inability of the accused to explain away the alleged inconsistencies in his depositions. But there is an explanation in the depositions themselves. If the two depositions be read together as a whole the apparent discrepancies vanish away. Our case has been prejudiced by selecting stay passages from the two depositions and comparing them together for making out the discrepancies. If there are apparent discrepancies, it is the duty of the Court to see whether there is anything in the case which can explain them. An accused person cannot be convicted simply on the ground that he is not able to explain the contradictions in his depositions. He can be convicted only if the discrepancies are in no way reconcilable.

Admitting for the sake of argument that the two depositions contain contradictory statements, still we contend that there was no necessity in the earlier suit to put questions with respect to partition. The questions were utterly irrelevant to the pleadings. Therefore it was not necessary to institute a comparison between the two depositions, Starling's Criminal Law, p. 242. Thus if the first deposition be eliminated, the second deposition stands by itself alone, and then there would be nothing on the record to show that it is false

Digitized by Google

Further, to support the conviction of the accused some other evidence is brought on the record. But that evidence was inadmissible and it was highly irregular to refer to it. The evidence consists of two statements made by Dhondiram and Shivnarayan, the brothers of the accused, in the trial against Dhondiram. There are two other Exhibits, one of them is a statement made by the accused which is in no way material to the present inquiry and the other is the joint written statement filed by the accused and his brothers in suit No. 429 of 1895. It is impossible to understand the object with which the written statement was brought on the record of this trial. The members of a family may be divided still there is nothing to prevent them from fileng a joint written statement.

The Spesial First Class Magistrate who tried the case has observed in his judgment that the accused has been entrapped and that the complainant is not the real prosecutor but there are some other persons behind the scene.

Our next contention is that the alternative charge cannot be sustained. Section 236 of the Criminal Procedure Code contemplates offences arising out of a single act or a series of acts. In the present case the two depositions were not given in the same suit and were not given at times which governed a series of acts. They were given in twe different suits, which were brought by different parties, with respect to different causes of action. Section 236 is, therefore, not applicable and the illustration to that section is not in accord with it. Our contention is fortified by the ruling of the Full Bench of this Court in *Queen-Empress* v. *Mugapa*.(1)

Rao Bahadur V. J. Kirtikar (Government Pleader), for the Crown :-The statements embodied in the charge clearly show that they are discrepant, and there is no explanation offered by the accused with respect to them though he was called upon by the Magistrate to do so.

[JENKINS, C. J. :—If there are discrepancies they are merely apparent and the depositions, when read together, clearly explain them away. Even in his first deposition the accused says that he was divided from his brother Dhondiram.]

The Magistrate has relied upon some other evidence to support the conviction. There are his own statements which incriminate him. They clearly show that he is not a man who tells the truth. The ruling in *Queen-Empress* v. *Mugapa*(1) was relied on but it is not applicable because one of the statements therein was made before a police officer.

[JENKINS, C.J. :—That is a ruling of the Full Bench of this Court and I am bound by it]

JENKINS, C.J.:—The accused, Bankatram Lachhram, having been convicted under section 193 of the Indian Penal Code of giving false evidence in a judicial proceeding, and sentenced to imprisonment and a fine, has applied to this Court in revision. In consequence, however, of a division in opinion on the part of the Judges composing the Bench, before whom the application was heard, the case has been laid before me as provided by section 439 of the Criminal Procedure Code.

The charge is based on the allegation that in two depositions, one given on the 3rd of December, 1906, the other on the 23rd of March, 1901, the accused has made contradictory statements, and the case of the prosecution is that on that ground, though it cannot be proved which of these alleged contradictory statements was false, the accused's conviction, should be upheld.

(1) (1893) 18 Bom. 377.

Digitized by Google

To convict an accused of giving false evidence it is necessary to show not only that he has made a statement which is false, but also that he either knew or believed it to be false or did not believe it to be true.

It has been said by very high authority, and the remark has manifest application to a case where, as in the present, it is sought to establish guilt solely on contradictory statements, that "although you may believe that on the one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief and from other circumstances at a subsequent time, be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time."(1)

It is clear therefore that one must approach a case resting merely on supposed contradictions with the greatest caution, and more particularly where, as here, a number of years intervenes between the two statements. In this case there is an additional occasion for caution in the motive and origin of this prosecution as described by the Magistrate, who says "complainant's conduct in the case could not but attract notice. He is an illiterate and ignorant peasant and seems evidently a tool in the hands of designing persons ill-disposed to the accused. The present case seems to be one got up from spite and accused well entrapped, unconscious of the dangerous net laid out for him."

The accused, it is said, belongs to the Marwadi class; but whatever he may be, he is entitled to demand that he shall only be convicted of an offence under the Penal Code on legal evidence. What then are the proofs on which his conviction rests?

The two statements are set out in the charge in the following terms:—

First statement.—"Dhondiram lives separate from me. I have only given him the cloth-shop. There is no partition. All the ancestral lands are in my possession and I manage them."

Second statement.—"I am plaintiff's elder brother" (plaintiff is Dhondiram). "We live separate. It is 13 or 14 years back our partition took place. Myself and Dhondiram divided in Shake 1808 or 1809. Dhondiram was aged 12 or 13. Dhondiram manages his estate since partition. It is not to true what is stated in my deposition in case No. 429 of 1895 that only the cloth-shop was given Dhondiram; that no share was given to him and that all the immovable property is in my possession; that the land in dispute has come to my share." "That it is true what I have stated that Dhondiram separated before 12 or 13 years and all division of the property was made."

In the opinion of both the lower Courts these statements were so contradictory as to be incapable of reasonable reconciliation.

It is common ground that in the second statement the accused made out that there had been a partition between him and his brother Dhondiram. Turning then to the first statement as set forth in the charge, we find the following words placed in the accused's mouth: "there is no partition." Here then, says the prosecution, is an irreconcilable contradiction, here are the undoubted proofs of guilt.

But to judge of the true meaning of any single phrase it is necessary to see what the accused said in the rest of his deposition; for perhaps there may be found that which will throw a fresh light on the words which form the subject of the charge. Yet I cannot find in the judgment of either of the lower Courts any trace of such an investigation: I say this because I fail to see how the rest of the depositions could have been read without its at once becoming apparent that an erroneous construction had been placed on the accused's testimony in the earlier deposition.

(1) Per Holroyd, J., in *R.* v. *Jackson* (1823) 1 Lewin C. C. 270.

Digitized by Google

Now going back but a few sentences earlier in the first statement than those on which the prosecution rely I find this is what the accused said on that occasion :

"I became divided from Dhondiram. There was no document made with respect to partition then. My brother Shivnarayan became divided about ten years ago. On that occasion also there was no document made with respect to partition. No memos., &c., were made relating to the property. Dhondiram lives separate from me. I have only given him a cloth-shop. No divisions (*i. e.*, allotments of shares) have been made. Rama Dhagya is my debtor.

Cross-examination: I myself am in possession of all ancestral lands and manage them."

This translation is approved on both sides and contains the so-called incriminating passage.

This then is the deposition from which, according to the Sessions Judge, it is evident that the accused "intended it to be believed that no partition of property had taken place between himself and his brother Dhondiram."

So far from the depositien evincing the intention imputed to it, in my opinion it points emphatically the other way: there is a distinct assertion of division from Dhondiram and of division from Shivnarayan, followed by the statement that Dhondiram lives separate from him. Here is the clearest statement of a partition, While the statement ascribed to the accused, "There is no partition, literally does not bear the meaning that has been placed on it: the proper rendering is "No divisions (*i. e.*, allotments of shares) have been made," and I say this not only because that has the approval of the Court interpreter, but also because it is obviously demanded by the context.

The meaning of the passage taken as a whole is obvious; it is that there has been a division, that is a partition, though there is no document evidencing it, and no partition by metes and bounds has been effected. Whether this statement is true or false is not shown, and in the circumstances is immaterial: the point to be kept in mind is that the conviction of the accused proceeds wholly upon the assumption that there is in this deposition a negation of partition, which is contradictory of the assertion of partition contained in the second deposition. I have shown that there is no warrant for the assumption, and with it the justification of the conviction so for as it rests on it completely disappears. The Magistrate seems to have seen a contradiction between the statements "All the ancestral lands are in my possession and I manage them" on the one hand and what the accused has stated in his second deposition on the other. It therefore becomes necessary to examine the second deposition, and when that is done it will be seen that there are omitted from the charge portions of the deposition which materially affect those included in it. Thus we have this sentence "It is 13 or 14 years back our partition took place": this might be taken to indicate a complete partition by metes and bounds, but the next sentence, which is omitted from the charge, shows this is not so, for there it is said "Three garden lands and two debtors, Jahagirdar and Deshpande, are left joint," showing that there was not a complete partition.

Then I feel bound to refer to another portion of the deposition for the purpose of showing the unsatisfactory materials on which the conviction is based. It runs as follows:— "What is stated above, *viz*, that it is 12 or 13 years since Dhondiram was separated and all was partitioned out to him is true": now the accused never had said this; he had made the statement to which I have already referred as pointing to an incomplete partition; yet this is a part of that on which the conviction was based. The deposition then

Digitized by Google

proceeds as follows:—"Only the cloth-shop was given to Dhondiram (on partition). What is written in my deposition in suit No. 429 of 1895, that no partition took place, that all immoveable estate is in my possession is not true."

But here again the accused had never said in his earlier deposition what is here ascribed to him , I have already pointed out that so far from alleging that no partition took place, he distinctly says that he became divided both from Dhondiram and from Shivnarayan : similarly he nevided beth from Dhondiram and from Shivnarayan : similarly he never said in the first deposition "All immoveable estate is in my possession" : what he did say is "I myself am in posession of all ancestral lands and manage them". I notice that in one of the judgments it is said that no importance is attached to this : I cannot understand this it appears to me completely to overlook the fact that besides the lands there was a house and also that in the first deposition the cloth-shop was stated to have been given to Dhondiram, so that while it might have been true that the ancestral lands were in the accused's possession, it would not have been true to say that all the immovable property was in his possession ; and thus there is an obvious and most material distinction between the two statements. That this was a distinction present to the accused's mind is apparent from the second deposition where he says, "Three garden lands . . . are left joint. House, &c , is not joint." Here we find a clear distinction drawn between the lands on the one hand and the house on the other, though they both were immovable property. It will be apparent from what I have here said that the second deposition was either recorded with great carelessness, or the examination of which it purports to be a record was conducted on lines that never should have been permitted, in that it ascribed to the witness prior statements he had not made. A more unsatisfactory foundation for a charge of giving false evidence there could not be ; but apart from this I am clear there are no such contradictions as can form the legal basis of a conviction.

Had the whole of the depositions been examined with care and not merely the statements contained in the charge, I cannot believe that the lower Courts would have come to the conclusion they did, and I have not the slightest hesitation in holding that a conviction on these materials was an error of law.

In the opinion however of one of the learned Judges from whom this reference is made this Court should decline to interfere, and in arriving at this view he has said "Looking to the evidence before the Court of First Instance already discussed in the Magistrate's judgment, it is impossible to say that this issue was decided merely upon the contradiction between the impugned statements, or to say that there is not evidence to sustain the Magistrate's finding". Now this additional evidence consists of Exhibits L, M, N and O. But it is clear that so far as the Magistrate rested his decision on the two first of these Exhibits he committed an error of law : they were, I am told, stetements by the accused's brothers, not made on oath in this case, and therefore obviously inadmissible. If, therefore, the Magistrate relied on them, that of itself would vitiate his judgment.

The other two Exhibits were made by the accused, but the prosecution, when challenged could not suggest that they had any real bearing on the case and at most would only show that the accused in other matters had been untruthful. It requires no citation of authority to show that their admission for such a purpose would be highly improper. The result therefore is this that so far as the Magistrate did not rely merely upon the contradiction he committed an additional error.

Digitized by Google

But the suggestion that this Court should not interfere calls for further notice, as it rests on a train of reasoning which I cannot pass without remark, though I conceive it to be inapplicable to the circumstances of this case,

The powers of the High Court are defined by the Code of Criminal Procedure and it is there that we must go to learn what its powers are. Section 435 empowers the High Court to call for and examine the record of any proceeding before any Criminal Court situate within the local limits of its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court.

Then by Section 439 it is provided that in the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of appeal by sections 195, 423, 426, 427 and 428 or on a Court by section 338.

The Legislature could not have expressed itself with greater clearness, but it has been suggested that the Courts have imposed on the plain terms of these sections a gloss which narrows the scope of the discretion vested in the High Courts.

If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion, and whenever it is argued that judicial decision has deprived us of the power that the Legislature has given us I recall the words of an eminent English Judge. "I desire to repeat," he said, "what I have said before, that this controlling power of the Court is a discretionary power, and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly. For myself I say emphatically that this discretion ought not to be crystallized as it would become in course of time by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion, which the Legislature has committed to them. This discretion, like all other judicial discretions, ought as far as practicable to be left untrammelled and free so as to be fairly exercised according to the exigencies of each case."

These weighty words appear to me to breathe the spirit that should guide us in the exercise of our discretionary powers of revision. This may perhaps increase our responsibilities and add to our labours, but no one would shirk the one or grudge the other.

The exigencies of the case now in hand emphatically call for the interference of this Court, and my opinion is that the conviction and the sentence should be set aside and the accused acquitted, and the fine (if paid) refunded.

Though at one time I thought otherwise, on further reflection I think the decision of the Full Bench of this Court consisting of Sir Charles Sargent, C.J. and Telang, Candy and Fulton, JJ., in *Queen-Empress* v. *Mugapa* (1) does not cover this case.

---

(1) (1893) 18 Bom. 377.

Digitized by Google

VOLUME XXIX.

1904. *July* 18. I. L. R. 29 Bom. 35.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

EMPEROR v. NADIRSHA H. E. SUKHIA. §

City of Bombay Municipal Act (Bom. Act III of 1888), sections 231 and 471—Municipal Commissioner—Notice to construct drains—Effect of Negotiations—Limitation.

Accused was convicted and fined Rs. 25 for not complying with a notice issued by the Municipal Commissioner of Bombay under section 231 of Bombay Act III of 1888. The notice required him to make an open drain in the gully on the west of his premises, this drain to be so constructed as to adjoin the west wall of his building.

Held (reversing the conviction and sentence), that the notice was *ultra vires* inasmuch as it required the accused to construct a drain, adjoining a particular part of his premises.

Held, that on a notice being served by the Municipal Commissioner of Bombay, under section 231 of Bombay Act III of 1888, if negotiations ensue, which are tantamount to a request by the party, served with the notice, and a consent by the Commissioner, to reconsider the matter, such negotiations will have the effect of waiving the notice, and it is competent to the Commissioner to issue a fresh notice after the negotiations have closed. Limitation, in this event, under section 514 of the Municipal Act, will not run from the original notice.

APPLICATION under section 435 of the Code of Criminal Procedure (Act V of 1898).

On the 27th May, 1903, the Municipal Commissioner of Bombay issued a notice to the accused under section 231 of the Bombay Municipal Act, III of 1888.

The notice required him to construct a drain or drains from such parts of his premises as required to be drained, and to execute certain other works.

On the 29th may, 1903, the accused wrote to the Municipal Commissioner a letter, which contained, *inter alia*, the following Passages :—

"With reference to your notice No. D.-435 of the 27th instant, served on me after my letters of complaint, dated the 30th April and 22nd May and the 24th February and the 20th and 21st March, 1903, I have the honour to inform you that it is not only incorrect but actully wrong to allege that my premises are 'without sufficient means of effectual drainage.'

"I am quite ready to defend again, up to the highest tribunal, to show how capricious and frivolous are the alleged objections of the department, but without prejudice, and before I finally reply to your requisition, I request you to let me know—

"(a) Whether the department wants me to do only that work in the house gully, which is shown in the block plan, that accompanied your notice, *i. e.*, in accordance with the detailed directions Nos. 2 to 5 only, or whether it wants me to overhaul all present existing drainage arrangements, as per detailed directions Nos. 6 and others?

"(b) Whether the department wants to insist upon two separate channels, as shown in the block plan, or only a central one for the combined purpose, as is allowed at various places in the city, *i.e.*, whether the department wants to exercise the option, given to it under detailed direction No. 2, in the present case of my premises?

"(c) Whether the department instead of a 4 "half round stoneware channel, can allow a more costly and better one of 6"?"

On the 30th May, 1903, the Municipal Commissioner informed the accused that enquiries would be made in the matter.

Correspondence thereupon ensued between the Municipal Commissioner and the Engineering Department of the Municipality on the subject.

On the 3rd October, 1903, the Municipal Commissioner of Bombay again issued a notice to the accused under section 231 of the Bombay Municipal Act, III of 1888.

This notice required him, *inter alia*, within one month from the receipt thereof, "to make an open drain in the gully on the west of your premises, this drain to be so constructed that it shall adjoin the west wall of your building"

§ Criminal application for Revision, No. 93 of 1904.

Digitized by Google

On the 23rd February, 1904, the accused was convicted by Karsondas Chhabildas, Third Presidency Magistrate of Bombay, under section 471 of the Bombay Municipal Act, III of 1888, with having failed to comply with the abovenamed requisitions and sentenced to pay a fine of Rs. 25.

Robertson for the applicant :—The complaint is time-barred under section 514 of the Bombay Municipal Act, 1888. Section 231 does not apply. The Magistrate wrongly presumed that the drains of the accused were injurious to health. This should have been proved, in order to satisfy the requirements of clause (c) of section 231 of the Act. On the other hand, the evidence tendered by the accused, that the provisions of section 234 had been complied with, was wrongly rejected. Further, the requisitions contained in the notice of the Municipal Commissioner of October 3rd, 1903, were *ultra vires: In re Khimji Jairan.* (1)

Strangman for the Municipality.

[CHANDAVARKAR, J.:—We only wish to hear you on two points. (1) as to limitation, (2) as to the validity of the notice.]

Strangman :—The offence consists in non-compliance with the notice. There is nothing in the Act to prevent repeated notices being issued by the Municipal Commissioner, and the non-compliance with each of such notices would be a separate offence.

The requisitions contained in the notice of October 3rd, 1903, differed from those contained in the previous notice.

Then as to *ultra vires*, section 239, read with section 231 of the Act, implies the power of the Municipal Commissioner to specify the position of the drain.

PER CURIAM:—This is an application made by Dr. Nadirsha Hormusji Edulji Sukhia for a revision of the judgment of the Third Presidency Magistrate, convictng the petitioner of the offence, punishable under section 471 of the Bombay Municipal Act, of failure to comply with a lawful requisition made by the Municipal Commissioner under section 231 of the Act. The requisition was contained in a written notice given to Dr. Sukhia by the Commissioner on the 3rd of October, 1903; and one of the points made before us by Mr. Robertson, the pettioner's Counsel, is that this complaint based on the said requisition is beyond the period prescribed in section 514 of the Municipal Act, because though it was laid before the Magistrate within the period of three months computed from the date of the requisition. that requisition was no more than a repetition of a previous requisition made by the Commissioner on the 27th of May, 1903. It is contended that the petitioner having failed to comply with the latter requisition, the offence charged in the complaint was virtually a failure to comply with it, and the prosecution ought to have been instituted within three months from the 27th of May, 1903.

It is necessary for the disposal of this point to state certain facts which are not in dispute and which appear upon the record. A written notice was served on Dr. Sukhia by the Municipal Commissioner on the 27th of May, 1903, under section 231 of the Act. By that written notice Dr. Sukhia was required to construct a drain or drains from such parts of his premises as required to be drained and to execute certain other works. The notice fixed a fortnight as the period within which the works were to be completed. Upon service of the notice Dr. Sukhia addressed a letter to the Commissioner, dated

(1) (1899) 24 Bom. 75.

Digitized by Google

the 29th of May, 1903, complaining that it was "not only incorrect but actually wrong to allege" that his premises were "without sufficient means of effectual drainage" And he further requested the Commissioner to enlighten him on certain points on which he said he required information with regard to the works he was directed to execute. In reply to this letter the Commissioner informed Dr. Sukhia on the 30th of May, 1903, that enquiries would be made in the matter of his complaint. There seems to have been after that, correspondence on the subject between the Municipal Commissioner and the Engineering Department of the Municipality with reference to the works which Dr. Sukhia was called upon to carry out and it resulted in the requisition of the 3rd of October, 1903, which forms the basis of the complaint laid before the Magistrate.

This statement of the facts leaves no doubt that as far as the requisition of the 27th of May, 1903, is concerned, it was at the instance of Dr. Sukhia himself that the Commissioner was led to make enquiries with reference to it. It was Dr. Sukhia who invited the Commissioner to look into the matter again and more carefully. The Commissioner acquiesced in that and seems to have made enquiries. After that neither Dr. Sukhia nor the Commissioner could treat the requisition as in force. When Dr. Sukhia complained that the requisition had been made unjustly, he virtually asked the Commissioner not to enforce the notice but to reconsider the matter; and the Commissioner must be regarded as having consented when in reply he wrote that he would enquire. The parties were after that in a state of negotiation, as it were, and neither could say as against the other that the notice of the 27th of May, 1903, was operative. These facts of the case clearly bring it within what Earl Cairns in *Hughes* v. *Metropolitan Railway company*(1) describes as "the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties." This principle is, we think, applicable in a criminal case when the complaint is as to an offence of non-compliance with a requisition that can be kept in abeyance or cancelled by the authority making the requisition. Here the Legislature gave authority to the Commissioner to require Dr. Sukhia to do certain acts within a certain period. Failure on Dr. Sukhia's part to do them within that period involved the result of subjecting him to certain penalties in a criminal prosecution. But both Dr. Sukhia and the Commissioner entered upon a course of negotiation which had the effect of keeping the notice in abeyance, leading Dr. Sukhia to believe that the Municipal Commissioner would not enforce the strict rights arising under it. Both the parties must be regarded after that as having waived the notice and treated it as non-existent and unenforceable. It was, therefore, competent to the Commissioner to issue a fresh notice after the negotiations had closed, as the result of the enquiry he had made on Dr. Sukhia's invitation. The requisition, therefore, of the 3rd of October, 1903, was so far valid and legal and the complaint was not time-barred.

But the more important question remains whether the requisition in question is lawful in the sense that the works which Dr. Sukhia has been called

(1) (1877) 2 App. Cas. 439 at p. 448.

Digitized by Google

upon to execute are such works as are contemplated by and within the purveiw of section 231, under which the requisition purports to be made. The object of that section, as its language shows, is to provide " sufficient means of effectual drainage " for undrained premises by making a drain which will connect them with "a Municipal drain or some place legally set apart for the discharge of drainage," The essential part of a requisition under the section consists in the making of such a drain. But in the notice given to Dr. Sukhia the Commissioner has not only required him to make a drain of the kind described in clause(*a*) of the section but he has also directed him to make the drain "in the gully on the west of" his "premises, this drain to be so constructed that it shall adjoin the west wall of the building." Dr. Sukhia complains that the Commissioner has no power to tie him down to any particular portion of his premises for the making of the drain and we think he is right. Clause (*a*) merely gives the Commissioner power to require that a drain should be made " of such material, size and description and laid at such level and with such fall and outlet as may appear to the Commissioner necessary, emptying into such Municipal drain or place aforesaid." There is nothing in the language of the section authorising the Commissioner to direct that the drain shall be made so as to adjoin any particular part or wall of the premises. In *In re Khimji Jaiaram*(1) there was a notice given by the Municipal Commissioner under section 249 of the Act requiring the accused to construct a urinal of six compartments in the open space inside the entrance gateway to the cloth market from Champawady and a water-closet in the corner of the entrance from Ist Ganeshwady near the fire-engine station. This Court held the notice to be bad, because section 249 did not give power to the Commissioner to direct that the urinals should be consrtucted in a particular place in the accused's premises. The principle of that ruling applies to section 231 of the Act. The notice served on Dr. Sukhia contains no doubt other requisitions under clauses (*b*) and (*c*) of section 231 and under section 239 and these may be lawful, but all these requisitions are more or less ancillary to the principal requisition which is the making of the open drain. The former requisitions follow as subsidiary to the latter which is the paramount object of the notice under section 231. The making of the drain being then the essential part of the whole notice, leading to the other requisitions, and the requisition in respect of that part being *ultra vires* of the Commissioner, we must treat the notice as illegal and reverse the conviction and sentence and direct the fine, if paid, to be refunded. It will be open to the Commissioner to give a fresh notice according to law.

Conviction and sentence reversed.

1904. *August* 10. I. L. R. 29 Bom. 193.

Before Mr. Justice Batty and Mr. Justice Aston.

EMPEROR *v.* WALLACE FLOUR MILL COMPANY.*

Bombay Municipal Act (111 of 1888), section 394.—Storing of oil,—what amounts to "storing.

The wording of section 394 of the City of Bombay Municipal Act requires that the premises, in order to attract the operation of the section, should be used for the purpose of storing. The phrase " for the purpose " indicates that it must be the intention of those using the premises to store ; that storing must be the object aimed at ;—the final cause for which the premises are used. There is nothing in the exemption which sub-section 3 declares in favour

* Criminal Ap No. 222 of 1904.
(1) (189 Bom. 75.

Digitized by Google

of the mills specified to imply that sub-section 1 was intended in the case of premises not so exempted, to include any use to which they might be put which was merely fnoidental or subsidiary to the paramount purpose to which the premises are devoted.

APPEAL under the Criminal Procedure Code, Act V of 1898, section 417, from the judgment of J. W. S. Dracup, Fourth Presidency Magistrate, acquitting the accused. The facta of this case are fully set out in the Magistrate's judgment, which ran as follows :—

"The question for consideration in this case is whether the quantity of oil found on the premises of the Wallace Flour Mill on the 26th September last was such as to amount to 'storing' within the meaning of section 394 of the Municipal Act III of 1888.

"According to the evidence of the two Municipal Inspectors, Muncherji Bomanji Modi and Nawroji Bhikaji, who visited the Mill on the 26th September, there were 115 gallons of different kinds of oil on the premises that day contained in two iron tanks and three barrels.

"On the other hand, it appears from the evidence of Khatoo Vallabji, who is a store clerk in the Mill, that according to the storebook kept the balance of oil in stock on the date in question was 59$\frac{4}{8}$ gallons.

"The evidence regarding the measurement of the oil in the tanks and barrels is conflicting. Inspector Muncherji says the oil was measured by an employi of the Mill named Gandhabhoy with a rod and that Gandhabhoy read out the measurements which he noted down. He also states that he did not touch the rod nor did he check the measurements. The other Inspector Mr. Nawroji contradicts Inspector Muncherji and says the latter first read the gauge and asked Gandhabhoy if the reading was correct and he answered 'yes,' Gandabhoy says he never read the measurements at all. It may here be noted that only two of the tanks have gauges marked on them while the barrels have no such gauges and from the evidence of Inspector Nawroji it appears that the oil in the barrels was roughly measured. It also appears that the capacity of oil tanks in India varies according to the temperature. Taking all these circnmstances into consideration it is clear that the figures given by the Inspectors cannot be accepted as correct.

"It appears that the oil is kept in the Mill for lubricating purposes and when supply runs low or is exhausted a fresh supply is obtained. For the defence it is contended that no license is required for keeping oil for such purposes and that the quantity so kept does not amount to 'storing.' It is clear, however, from sub-section (1) of section 394 of the Municipal Act and Schedule M that no person shall use any premises for storing oil without a license irrespective of the purpose for which the oil is stored, and the only point for determination is whether the quantity of oil kept in the Mill amounts to 'storing' although the evidence regarding the quantity of oil found on the Mill premises ou the 26th of September is conflicting; it is admitted by the defence that the average quantity of oil kept in the Mill during the months of August, September and October was 119 gallons. From the evidence of Mr. May, the Manager of the Mill, it appears that on an average about 8 or 9 gallons of oil are used daily. At this rate therefore the quantity kept would last for 13 or 14 days. Taking these facts into consideration, the Court is of opinion that the quantity of oil kept does not amount to 'storing' within the meaning of the Act. What does or does not amount to 'storing' is entirely a question of fact and cannot be decided bv merely considering the quantity kept, as what may amount to 'storing' in one case may not be so in another. If quantity is the only criterion then every house-holder who keeps a tin of kerosine oil, which lasted for 10 or 15 days, would be liable to take out a license for storing oil, which is certainly not the intention of the Act. In determining therefore what is 'storing' it is necessary to consider not only the quantity kept but also the quantity consumed. If compared with the consumption the quantity kept is excessive this would no doubt amount to 'storing.' In the present case having regard to the quantity consumed daily, the Court is of opinion that the quantity of oil kept cannot be regarded as excessive and such as would amount to 'storing.' The Court, therefore, holds that no license was required and acquits and discharges the accused under section 245 of the Criminal Procedure Code."

From this judgment an appeal was presented to the High Court.

Basil Scott (Advocate General), for the Crown.

The keeping of oil under these circumstances was such an use of the premises as to render a license necessary under section 394 of the City of Bombay Municipal Act. Sub-section 3 of section 394 shows that the maxim *expressionnius est exclusio alterius* applies in such cases, *i. e.* only Mills therein specified are exempted from the provision of section 394.

Davar for the accused.

There is no evidence of exclusive use of the room for storing purposes. Spinning and weaving Mills require lubricating oil which is not combustible.

Digitized by Google

It would be most inconvenient to send out for oil every day. Section 394 of the Municipal Act must be read with Schedule M of the Act.

These premises were used for grinding corn and not for storing oil.

The implication of what is not expressly mentioned must be a clear one, Maxwell on the interpretation of Statutes. Chapter XV of the Municipal Act relates to sanitary provisions and the regulation of factories and trades.

BATTY, J.:—This is an appeal presented by the Bombay Government against the acquittal of the accused who was charged under clause (*a*), sub-section (1) of section 394 of the City of Bombay Municipal Act. The effect of that clause is to declare that no person shall use any premises for any of the purposes specified in Schedule M. Schedule M enumerates *inter alia* the storing of oil. The accused are the proprietors of a Flour Mill. In a room on their premises 20 gallons of castor oil together with other oil of lubricating properties amounting in all to 115 gallons were found. It is not denied that oil about the same in quantity, a little more or less as occasion requires, is kept in the same room for use from time to time.

The Advocate General for the Crown contends that the keeping of oil in the circumstances stated was such a use of the premises as to render a license necessary under the section above cited. If this contention is correct, then no one in Bombay can without license keep a supply, however small, of any of the articles mentioned in the 4th part of Schedule M. Several of the articles mentioned in that part of the schedule are such as may be required for constant use in almost every private house. Candles, fish, matches, meat, oil cloth, soap and wool are obvious instances. It is difficult to believe that the section in question was intended so to be applied. And it is urged for the defence that as its provisions impose a burden on the subject and restrict his liberty, they should, if ambiguous, receive a strict interpretation in his favour.

I think the wording of the section is certainly susceptible of a construction more favourable to the subject than that which the Advocate General suggests. That wording requires that the premises, in order to attract the operation of the section, should be used for the purpose of storing. The phrase "for the purpose" indicates that it must be the intention of those using the premises to store: that storing must be the object aimed at;—the final cause for which the premises are used.

The actual use is by itself insufficient in the absence of proof as to the object aimed at. It would be appropriate to speak of a promenade or exercise ground as used for the purpose of walking. It would be a strain of language to speak of a portion of a factory as used for the purpose of walking merely because it was necessary to walk over it to get from one part to another. And so with storing. The purpose to store must be the dominant motive. The use of a part of the premises for storing may be incidental and unavoidable. But this is insufficient if storing is not the thing aimed at. It is not urged that the Flour Mill Company desired the accumulation of oil on their premises. On the contrary, the record shows their supply was for use, not storage.

The learned Advocate General has cited sub-section (3) of section 394 as showing that on the maxim *expressio unius est exclusio alterius* only mills therein specified are exempted from the provisions of section 394. Sub-section 3 is somewhat infelicitously drafted. It is, I think, clearly intended only to give an exemption to mills for spinning or weaving cotton, wool, silk, or jute, in respect of those particular articles with which these mills are concerned, and was not intended to touch or in any way affect their liability in respect of any

Digitized by Google

other articles mentioned in Schedule M." The sub-section could not have been intended, for instance, to exempt such premises if used for the purpose of storing dynamite, fireworks, gunpowder, bones or manure, &c. There is nothing in the exemption which sub section (3) declares in favour of these specified mills, to imply that sub-section (1) was intended, in the case of premises not so exempted, to include any use to which they might be put which was merely incidental or subsidiary to the paramount purpose to which the premises are devoted.

The marginal note suggests that the section has reference to *trades*. In *Kameshar* v. *Bhikhan* (1) it was held that marginal notes might be consulted in case of ambiguity. But even if this be not permissible, the position of the section in a part of the Act dealing with the regulation of factories and trades, indicates that the main intention of the Legislature in this section was to control the use of premises for the purposes specified, where such purposes constitute the object of a trade or business carried on there. It is true this may not be the sole intention of the sub-section. And clause (*d*) of sub-section (1) has been referred to by the Advocate General as suggesting that the storing contemplated in the other clauses would include storing even for domestic use. No doubt the articles mentioned in clause (*d*), such as hay and fuel, are not uncommonly stored in considerable quantities by persons who neither require them for purely domestic use nor for the purpose of trading in them but who have a continuous demand for them and wish to guard against a rise in the price of such articles. And in such bulky materials this object could not in any case be attained unless a considerable quantity were kept in hand. Storage in this case is therefore exempted, even though it is deliberately made—provided it is only for domestic use. In this case, therefore, even though the storing is " for the purpose of storing " and is deliberate and intentional yet it is allowed within the specified limits of the maximum required for domestic use. In the cases mentioned in the other clauses, the test is not whether the storing is for domestic consumption or not, but whether there is a deliberate intention to store at all. And where articles are kept on the premises, not because of a purpose of storing them, but merely because they have not been consumed as rapidly as anticipated or for other similar reason, it cannot reasonably be said that the premises are used on purpose for storing The purpose or intention is the test. No doubt the relative quantity of the articles kept, in proportion to the exigencies of consumption, must in each case be important evidence as to the purpose or intention. But such an intention is negatived if the quantity retained is only reasonably sufficient for the varying exigencies of consumption. In the present case the supply in hand would have sufficed only for about 12 days' use. And it seems only reasonable to suppose that in keeping the oil on the premises, the purpose was to consume it, and that there was no desire to use the premises for the purpose of storing it. The temporary storage in such a case is not designed but unavoidable. I would therefore dismiss the appeal.

ASTON, J. :—The question is one of degree and intention to be decided upon the facts of each particular case.

In this case the quantity of oil, less than a fortnight's supply; kept in a room in the mill premises, was not unreasonably in excess of current requirements for use or consumption, and " storing " was not in itself an object in view in keeping a supply limited to such requirements. In my opinion, therefore, use of the premises for the purpose of storing is not established in this case, and an

(1) (1898) 20 Cal. 609 at p. 628.

Digitized by Google

offence under section 394, clause (*a*), sub-section (1) of the City of Bombay Municipal Act is not proved.

Appeal dismissed.

Attorneys for the Crown :—*The Public Prosecutor.*

Attorneys for the accused :—*Messrs. Bhaishanker, Kanga and Girdharlal.*

W. L. W.

1904, *December* 14. I. L. R. 29 Bom. 226.

Before Mr. Justice Batty and Mr. Justice Aston.

EMPEROR *v.* WALIA MUSAJI AND ANOTHER. *

Gambling Act (Bombay Act IV of 1887), secs. 4, 5, 7 §—Common gaming house—Jamatkhana of the Borah community.

The accused were found playing for money with cards in a building ordinarily used as a *Jamatkhana*, but accessible to such members of the Borah community as have no place to live in and are too poor to afford the rent of a room. This place was frequented by the petitioners and others and instruments of gaming were found there when the accused were arrested. The Magistrate convicted the accused of offences under sections 4 and 5 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887);

Held, that it was open to the magistrate to rely on the presumption which under section 7 of the Act might be drawn that this place was used as a common gaming house unless the contrary was made to appear by the evidence before him : there was, therefore, no ground to interfere in revision with the convictions under section 5 of the Act.

Held, further, that no presumption arose under section 7 of the Act that the place was "kept" by any person as a common gaming house : the conviction under section 4 was therefore wrong.

---

* Criminal application for Revision No. 248 of 1904.

§ Sections 4, 5 and 7 of the Bombay Prevention of Gambling Act provide as follows :

"4. whoever—

(*a*) being the owner or occupier or having the use of any house, room or place, opens, keeps or uses the same for the purpose of a common gaming house,

(*b*) being the owner or occupier of any such house, room or place knowingly or wilfully permits the same to be opened, occupied, kept or used by any other person for the purpose aforesaid,

(*c*) has the care or management of, or in any manner assists in conducting the business of any such house, room or place opened, occupied, kept or used for the purpose aforesaid,

(*d*) advances or furnishes money for the purpose of gaming with persons frequenting any such house room or place,

shall be punished with fine which may extend to five hundred rupees, or with imprisonment which may extend to three months.

"5. Whoever is found in any common gaming-house, playing or gaming with cards, dice, counters or other instruments of gaming, or is found there present for the purpose of gaming, whether by playing for any money, wager, stake or otherwise, shall be punished with fine which may extend to two hundred rupees, or with imprisonment which may extend to one month.

"Any person found in any common gaming-house during any gaming or playing therein shall be presumed, until the contrary be made to appear, to have been there for the purpose of gaming.

"7. When any cards, dice, gaming-table, counters, cloth, board or other instruments of gaming used in playing any game, not being a game of mere skill, are found in any house, room or place entered under warrant issued under the provisions of the last preceding section or about the person of any of those who are found therein, it shall be evidence, until the contrary is made to appear, that such house, room or place is used as a common gaming-house, and that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the Magistrate or Police Officer or by any person acting under the authority of either of them.

Digitized by Google

In order to constitute an offence under section 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), of keeping a common gaming house, it is necessary to show, in the first place, that the person charged with that offence is the owner, or occupier, or a person "having the use" of the place alleged to be kept as a common gaming house. It is not sufficient to show that the accused used the place in question for the purpose of gaming there.

APPLICATION under section 435 of the Criminal Procedure Code (Act V of 1898) against convictions and sentences passed by Karsondas Chhabildas, Third Presidency Magistrate of Bombay.

The accused with thirteen others, all belonging to the Borah community, were found gaming in a building known as the Borah *Jamatkhana* (*i. e.*, a place where usually feasts are held). The place or room where the accused were arrested was accessible only to the members of the Borah community, and was kept open day and night to enable it to be used by any member of the Borah community who had no place to live in and who was too poor to afford the rent of a room. The accused (1 and 2) were charged under sections 4 and 5 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) with keeping a common gaming house and gaming therein while the rest were charged under section 5 of the Act with gaming therein.

The Magistrate convicted the accused of the offences charged and sentenced accused No. I to undergo two months' rigorous imprisonment, and accused No. 2 to a fine of Rs. 150.

H. C. Coyaji, for the accused.

Scott (Advocate General), with the Public Prosecutor for the Crown.

ASTON, J.:—"Common gaming house" means "a house, room, or place in which cards, dice, tables, or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room, or place, whether by a charge for use of the instruments of gaming, or of the house, room or place, or otherwise howsoever."

The petitioners, when arrested, were playing for money with cards in building ordinarily used as a *Jamatkhana*, but accessible to such members of the Borah community as have no place to live in and are too poor to afford the rent of a room.

This place was frequented by the petitioners and others and instruments of gaming were found there when the place was entered under warrant issued under the provisions of section 6 of Bombay Act IV of 1887.

It was open to the Magistrate to rely on the presumption which under section 7 of the Act may be drawn that this place is used as a common gaming house unless the contrary was made to appear by the evidence before him. There is, therefore, no ground to interfere in revision with the convictions under section 5 of the Act. But no presumption arises under section 7 that the place was "kept" by any person as a common gaming house.

In order to establish an offence under section 4 of keeping a common gaming house, it is necessary to show, in the first place, that the person charged with that offence is the owner, or occupier, or a person "having the use" of the place alleged to be kept as a common gaming house.

It is not sufficient to show that either of the accused used the place in question for the purpose of gaming there.

The conviction under section 4 of the Act must, therefore, be set aside.

As to punishments, there being nothing to show that the place where the petitioners were gaming was a resort of disorderly persons, or was other-

Digitized by Google

wise a nuisance, the sentences appear to us to be unduly severe and we set aside the unexpired portion of the sentence of two months' rigorous imprisonment passed on accused No. 1 and reduce the fine in the case of accused No. 2 to Rs. 15, the balance, if paid, to be returned to accused 2.

R. R.

1904. *October* 14. **I. L. R. 29 Bom. 264.**

Before Mr. Justice Batty and Mr. Justice Aston.

EMPEROR *v.* LAKHAMSI MALSI.§

Bombay Prevention of Gambling Act (Bombay Act IV of 1887), sections 3, 4 (a)*—Instrument of gaming—Single page of paper used for registering wagers.

The expression "instruments of gaming" as defined in section 3 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) includes a single page of paper used for registering wagers.

APPEAL from conviction and sentence recorded by J. Sandars Slater Chief Presidency Magistrate of Bombay.

The accused was charged with an offence under section 4 (1) of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), in that he kept a place which was used as a common gaming house. A warrant was issued by the Commissioner of Police at Bombay to search the said place. On a search being made, a piece of paper (Exhibit B) dated Vad 14th Saturday was found. It was admitted that the accused was the owner or occupier of the place in question and carried on business therein.

The Magistrate found the accused guilty of an offence under section 4 (*a*) of the Bombay Prevention of Gambling Act (Act IV of 1887) and sentenced him to pay a fine of Rs. 400 or in default to undergo two months' rigorous imprisonment. The grounds of his decision were as follows :—

"Now it is in evidence that this paper Exhibit B comprises a complete soda and valan—that is a complete list of bets entered into on one day and a complete account of the result of those bets. This is the evidence of the witness Tribhovandas Vijbhookundas whom I regard as the most intelligent and straightforward of those who have given evidence upon this very involved and technical subject in this case, and I believe his evidence, which I accept as that of an expert. He says that Exhibit B could only apply to May 14th last and he gives his reasons for coming to such a conclusion. It is unnecessary to go further back than August 2nd, 1902—it is really unnecessary to go nearly so far back, for prior to the 'stoppage' of the jota in February last the usual way of recording bets was in the soda book, then brokers who were authorized to take bets being provided with books for the purpose not only of entering their transactions in, but also of testifying the fact that they were what I may call 'licensed brokers'—licensed by the association or Mahajan of which Virji Tricam was manager. Since February last these membership books have been discontinued and the business has been recorded on slips of paper, which could be readily destroyed after the bets had been settled, and so would afford no evidence against the pedhi holder. Then the finding of this list in the pedhi with other papers on the 16th May renders it extremly probable that it referred to the previous day's betting (Sunday being a *dies non*). and I have no hesitation in accepting the evidence I have referred to above as being correct, and finding that Exhibit B does constitute the soda and

---

§ Criminal Appeal No. 386 of 1904.

* Section 3, clause 2, and section 4, clause (*a*), of the Bombay Prevention of Gambling Act (Bombay act IV of 1887) run as follows :—

Section 3—" \$ \$ \$ \$ In this Act the expression 'instruments of gaming' includes any article used as a subject or means of gaming."

Section 4—Whoever—

(*a*) being the owner or occupier or having the use of any house, room or place, opens, keeps or uses the same for the purposes of a common gaming house,

§ § § § § § §

shall be punished with fine which may extend to five hundred rupees, or with imprisonment which may extend to three months.

Digitized by Google

valan of accused's pedhi for the 14th May last, and that it constitutes an instrument of gaming within section 7 of the Act."

The accused appealed to the High Court on the ground, *inter alia* that the Magistrate erred in holding that Exhibit B was an instrument of gaming.

Binning (with him *Hiralal Dayabhai* and *Manilal Dayabhai*) for the appellant :—The Magistrate designates Exhibit B as an instrument of gaming, because, he says, it comprises a complete soda and valan. But there are several entries in the Exhibit which show that they do not refer to jota satta transactions, as neither the words T (*i. e.* Teji), M (*i. e.* Mondi) or J (*i. e.*, Jota) are written there. At any rate the record of bets is not complete and Exhibit B cannot therefore be said to be an instrument of gaming In *Emperor* v. *Jamnadas* (1) and *Emperor* v. *Chhaganlal Jivraj*(2), regular books were issued by the accused and given by him to his constituents for the purpose of carrying on satta transactions. A sheet of paper like Exhibit B cannot be called an instrument of gaming. If that be not so, even the pen and ink used will have to be classed under the same head.

Moreover there is no evidence to show that Exhibit B belonged to the accused, or that the same was used by him for his profit or gain. As the satta in this case is not any sense a game, the presumption under section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) is not applicable *Emperor* v. *Tribhovandas*(3)

There was no appearance for the the Crown.

PER CURIAM :—We agree with the conclusions arrived at by the Magistrate on the facts.

As to the argument that a single page of paper used for registering wagers is not on the same footing as a book, the difference is one of degree and the presumption allowed by section 7 of tte Gambling Act IV of 1887 would only be the more easily rebutted. As it has not been rebutted, we think, looking at the course of decisions reported in *Emperor* v. *Tribhovandas*(3), *King-Emperor* v. *Jamnadas*(1) and *Emperor* v. *Chhaganlal*(2), we must confirm the conviction and sentence.

It was suggested that the paper used would be no more the means of betting than the pen or pencil used. We are unable to accept such an argument. The pen or pencil could be used for many other purposes. It is not suggested that there is any use except that of facilitating this particular kind of wagering to which the paper now in question was adapted or for which it could have been used. With regard to the objection that the conviction is based partly on the evidence of the accomplice, we think that the general rule under which the evidence of accomplices is discredited, must, as the illustration given in the Evidence Act shows, be subject to the qualification that the less heinous the offence disclosed, the less liable would the evidence of the accomplice be to suspicion and discredit. We think that gambling is not an offence so grave as entirely to deprive the evidence of an accomplice therein of credibility. Moreover that evidence is not in this case without corroboration.

We confirm the conviction recorded and sentence passed on the accused.

R. R.

---

(1) (1903) 5 Bom. L. R. 129.
(2) (1904) 6 Bom. L. R. 249.
(3) (1902) 26 Bom. 533; 4 Bom. L. R. 271.

Digitized by Google

1905, *February* 22. I. L. R. 29 Bom. 386.

Before Mr. Justice Russell and Mr. Justice Batty.

EMPEROR v. JUSUB ALLY. *

Bomday Prevention of Gambling Act (Bombay Act IV of 1887), sections 3, 4, 12 §—Gambling in a machhwa—Public place—Bombay Harbour.

The accused, fourteen in number, chartered a *machhwa* (boat), and, having got it anchored in the Bombay Harbour a mile away from the land, carried on gambling there. For this they were convicted of an offence under section 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) for gaming in a public place:

Held, that the accued were not guilty of an offence under section 12 of the Act, since they cannot be said to be gambling in a pubic place.

PER BATTY J.:—The word "place" which is patient of many differeent meanings, must necessarily, in each instance in which it is used by the Legislature, be construed with reference to the intention to be inferred from the context. Thus in section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) or in section 3 of 36 and 37 Vict., c. 38, in connection with such words as roads, streets and thoroughfares, it has a very different meaning from that which it bears in section 4 of the Act, and from that given to it in connection with section 8 of 16 and 17 Vict., c. 119, by judicial decisions.

The mischief aimed at in section 4 of the Act is a mischief clearly distinct from that aimed at in section 12 of the Act. In the former, the mischief aimed at is the practice of individuals making a profit by providing a spot of their own selection known as a place where gambling is to be carried on, and making a livelihood by attracting people to a place which they would not otherwise frequent. In the latter, the offence is not that the individual members are making a profit at all but simply that they are carrying on their gambling with such publicity that the ordinary passer-by cannot well avoid seeing it and being enticed—if his inclinations lie that way—to join in or follow the bad example openly placed in his way. In the one case comparative privacy for profit, in the other the bad public example and accessibility to the public, would seem to constitute the gravamen of the offence.

Section 12 of the Bombay Prevention of Gambling Act (Bom Act IV of 1887) aims at gambling *in* a public place or thoroughfare, ordinarily with no intervening obstruction to the public view, where there is voluntary publicity.

THIS was an application for revision under section 435 of the Criminal Procedure Code (Act V of 1898) against convictions and sentences recorded by Karsondas Chabildas, Third Presidency Magistrate of Bombay.

---

* Criminal application for Revision No. 305 of 1904.

§ The Bombay Prevention of Gambling Act (Bom. Act IV of 1887), sections 3, 4 and 12 run as follows:—

3. § § § In this Act "common gaming house" means a house, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying using or keeping such house (room or place) whether by a charge for the use of the instruments of gaming or of the house (room or place) or otherwise howsoever.

4. Whoever.

(*a*) being the owner or occupier or having the use of any house, room or place, opens, keeps or uses the same for the purposn of a common gaming house;

(*b*) being the owner or occupier of any such house, room or place knowingly or wilfully permits the same to be opened, occupied, kept or used, by any other person for the purpose aforesaid;

(*c*) has the care or management of, or in any manner assists in conducting the business of any such house, room or place opened, occupaid kept or used for the purpose aforesaid;

(*d*) advances or furnishes money for the purpose of gaming with persons frequenting any such house, room or place,

shall be punished with fine which may extend to five hundred rupees, or with imprisonment which may extend to three months.

12. A Police officer may apprehend without warrant—

(*a*) any person found playing for money or other valuable thing with cards, dice, counters or other instruments of gaming used in playing any game, not being a game of mere skill, in any public street, place or thoroughfare;

§ § § § § § § § §

Any such person shall, on conviction, be punished with fine which may extend to fifty rupees, or with imprisonment which may extend to one month.

§ § § § § § § § §

Digitized by Google

The accused, fourteen in number, chartered a *machhwa* (a boat licensed for hire), and got it anchored opposite Gun Powder Bunder in the Bombay Harbour, a mile away from the land. They were found there gambling with dice and money on a canvas which was stretched out in the centre of the boat.

They were tried by the Magistrate for an offence under section 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), and were convicted and sentenced each to undergo three weeks rigorous imprisonment.

The accused applied to the High Court under its criminal revisional jurisdiction, chiefly on the grounds that the lower Court erred in law in holding that the said boat was a " public place " within the meaning of section 12 of the Act, notwithstanding the fact that it had been exclusively engaged by the accused, and that the lower Court erred in holding that part of the harbour where the *machhwa* was cruising was a " thoroughfare ,' or a " public place " within the meaning of section 12.

Branson (with him *H. C. Coyaji* and *F. Olivera*), for the applicants.

Raikes (acting Advocate General) with the Public Prosecutor, for the Crown.

BATTY, J. ;—The only question in this case is whether gambling in a *machhwa* which was chartered by the accused and was used by them for the purpose in the Bombay Harbour, could be said to be gambling in a public place, street, or thoroughfare, within the meaning of section 12 of the Bombay Gambling Act. The first two of these phrases *viz*, ' 'place ' and ' street ' have unambiguous meanings attached to them as legislative expressions by judicial decisions. The second of them, the word ' street, ' is manifestly inapplicable in this case. It is contended that the third expression, ' thoroughfare, ' is applicable to the Bombay harbour in which the *machhwa* containing the gambling party was found. We do not think that it can be said of the accused that they were gambling in a public place or thoroughfare in the ordinary acceptation of those terms. We think that the word ' place, ' which is patient of many different meanings. must necessarily, in each instance in which it is used by the Legislature, be construed with reference to the intention to be inferred from the context. Thus, it is obvious that when used as in section 12 of the Bombay Gambling Act, or in section 3 of 36 and 37 Vict, c. 38, in connection with such words as roads, streets, and thoroughfares, it has very different meaning from that which it bears in section 4 of the Bombay Gambling Act, and from that given to it in connection with section 3 of 16 and 17 Vict, c. 119, by judicial decisions in *Shaw* v. *Morley*(1) ; *Bows* v. *Fenwick*(2) ; *Gallaway* v. *Maries*(3) ; *Liddell* v. *Lofthouse*(4) ; *McInaney* v. *Hildreth*(5) ; or in *Powell* v. *Kempton Park Racecourse Company*[6], where the Court of Appeal disapproved *Hawke* v. *Dunn*[7].

These cases just cited construe the word when used with such words as house, room, or office, as meaning a " defined " or " ascertained fixed spot, " that is with certain circumscribing limits and so for *ejusdem generis* with a house, room or office. And in *Snow* v. *Hill*(8) where the appellant had been " simply walking about the field " it was held that he did not come within the purview of the Act 16 & 17 Vict. c. 119. That Act treats of houses, rooms, offices or other places opened, kept or used for the purpose of the owner etc. betting with persons resorting thereto. The mischief aimed at in section 3 of that Act and in section 4 of the Bombay Gambling Act is a mischief clearly

(1) (1868) L. R. 3 Ex. 137. (2) (1874) L. R. 9 C. P. 339. (3) (1881) 8 Q. B. D. 275.
(4) (1896) 1 Q. B. 295. (5) (1897) 1 Q. B. 600. (6) (1897) 2 Q. B. 242.
(7) (1897) 1 Q. B. 579. (8) 1885 14 Q. B. D. 588

Digitized by Google

distinct from that aimed at in 36 & 37 Vict c. 38 and in section 12 of the Bombay Gambling Act. In the first two enactments mentioned the mischief aimed at is the practice of individuals making a profit by providing a spot of their own selection known as a place where gambling is to be carried on, and making a livelihood by attracting people to a place which they would not otherwise frequent. In the other two enactments, however, the offence is, not that the individual members are making a profit at all, but simply that they are carrying on their gambling with such publicity that the ordinary passer-by cannot well avoid seeing it and being enticed—if his inclinations lie that way—to join in or follow the bad example openly placed in his way. In the one case comparative privacy for profit, in the other the bad public example and accessibility to the public, would seem to constitute the gravamen of the offence. Thus, the very fact that special accomodation and privacy had been furnished, which would be essential in a case under section 4 of the Bombay Gambling Act, would be a ground for excluding the case from the purview of section 12. If people *gratuitously* allow gambling on their private premises, the law does not interfere with them, presumably because in that case they have no special inducement to tempt outsiders to join them. The law does interfere, however, if whether for private gain or not, they expose temptation where the general public have a right to come. Thus an omnibus may be a public place for the purposes of an enactment aiming at acts committed *ad commune nocumentum* *Queen* v. *Holmes*. (1) So may a roof at the back of a house, exposed to view, where the offence consists in exposure : *Queen* v. *Thallman*. (2) But gaming in a railway carriage which was not being used or travelling along the line, but was shunted a way in a yard or warehouse, was held not to be playing or betting in an open and public place: *Ex parte Freestone*.[3] The obvious ground of distinction is that the public had no right of access to the carriage and that the gaming was not so exposed as to be patient to the passer-by. In *Langrish* v. *Archer*, [4] on the other hand, where the railway carriage in which gaming was going on was travelling on its journey, it was held to be a public place within the meaning of 36 & 37 Vict c. 38, section 3 because the public had access thereto. And obviously any person getting into such a carriage would at once have the fact, that gambling was going on there, forced on his notice. But we think that in the case of a *machhwa* chartered by a private party, the public had not such right of access as would suffice to bring the gamblig carried on in it within section 12 of the Bombay Gambling Act. It is true the *machhwa* was in the harbour which may be regarded as a thorough are for certain purposes. But a *machhwa* is not exposed to the public view of persons using that particular kind of thoroughfare in the same way as a carriage is in a public street. It is rather of the nature of an enclosure, and we do not think it reasonable to suppose that anybody using the harbour as a thoroughfare in the ordinary way could have known the use to which the *machhwa* was being put. In the case of *Queen-Empress* v. *Srilal*, [5] a *Chabutra*, a terrace or platform adjoining a public thoroughfare, was held not to be a public place within the meaning of section 159 and 160 Indian Penal Code, because the public had not a right of access thereto, though "it was visible from the thoroughfare and the public could see what was taking place." But the case of a *machhwa* in the harbour is, we think, much stronger, for it would be, in our opinion, unreasonable to suppose that the public in the ordinary exercise of their right of user of the harbour could have known that gambling was going on in it.

(1) (1853) 22 L. J. (N. S.) M. C. 122. (2) (1868) 33 L. J. (N. S.) M. C. 58.
(3) (1856) 25 L. J. (N. S.) M. C. 121. (4) (1882) 10 Q. B. D. 44. (5) (1895) 17 All. 166.

Digitized by Google

Section 12 aims at gambling *in* a public place or thoroughfare, ordinarily with no intervening obstruction to the public view, where there is voluntary publicity. In our opinion, without straining words, the *machhwa* must be considered to have been a place within the meaning of section 4 rather than of section 12, being more of the nature of a house or room than of a place *ejusdem generis* with a street or thoroughfare. Had it been so used for the profit or gain of any person owning, occupying, using or keeping it, then the case would, we think, have come within sections 3 and 4 of the Bombay Gambling Act. But what the party apparently aimed at was seclusion and not publicity, and we think that their manifest object of avoiding notice would have been attained as far as the public was concerned and that, save for the exceptionally close scrutiny of the police, the structure sufficed to exclude both the access and the observation of the public. We desire to add that the view we take in this particular instance by no means involves as a corollary that people gambling in a carriage in a street or ordinary thoroughfare would be exempt from liability unber section 12. We do not think that the accused in this particular case were in a similar position, and reverse the convictions and sentences passed on the accused.

R. R.

1905. *April* 10. **I. L. R. 29 Bom 423.**

Before Mr. Justice Russell and Mr. Justice Batty.

EMPEROR *v.* RAMPRATAP MAGNIRAM.*

Indian Factories Act (XV of 1881), sections 12, 15 (1) (e) (1)—Fencing Machinery—Manager—Occupier—Liability.

The accused who was the manager of a ginning factory at Dhulia resided in a part of the premises on which the factory stood. He was charged under section 15 [1] [*e*] of the Indian Factories Act [XV of 1881] with having neglected to fence certain machinery in the factory ; and he was convicted and sentenced by the Magistrate. On appeal, the Sessions Judge reversed the conviction and sentence and acquitted the accused. On appeal by the Government of Bombay against this order of acquittal :—

Held, that the accused was not liable to conviction under section 15 [1] [*e*] of the Indian Factories Act [XV of 1881], since the manager of a factory cannot be said with truth to have been the occupier thereof.

APPEAL by the Government of Bombay against an order of acquittal passed by E. M. Pratt, Sessions Judge of Dhulia.

The accused, Rampratap Magniram, the manager of Ramnarayan Baldev Ginning Factory at Dhulia, was charged with neglecting to fence machinery, an offence punishable under section 15 (1) (*e*) of the Indian Factories Act (XV

---

* Criminal Appeal No. 595 of 1904.

(1) The Indian Factories Act (XV of 1881), sections 12 and 15 (1) (*e*) run as follows :—

Section 12.—(*a*) Every fly-wheel directly connected with a stem-engine, water-wheel, or ther mechanical power in any part of a factory, and every part of a steam-engine or water-wheel,

(*b*) every hoist or teagle near which any person is liable to pass or be employed, and

(c) every other part of the machinery or mill-gearing of a factory which may, in the opinion of the local Inspector, be dangerous if left unfenced, and which he may have ordered to be fenced,

shall, while the same is in motion, be kept by the occupier of such factory securely fenced.

Section 15.—Any person who, in breach of this Act or of any order or rule made thereunder,—

* * * * * * *

(*e*) neglects to fence any machinery or mill-gearing in any factory

* * * * * * *

shall be punished with fine which may extend to two hundred rupees.

Digitized by Google

of 1881). On the 17th January 1903, the Presidency Inspector visited the factory and passed an order in writing that the second motion pulley should be guarded with a strong iron fencing within 15 days. This order the accused failed to carry out, and he was convicted of the offence charged by the First Class Magistrate of Dhulia and was sentenced to pay a fine of Rs. 60

On appeal, the Sessions Judge of Dhulia reversed the conviction and sentence and acquitted the accused. The grounds of his decision were expressed as follows :—

The evidence ....is of two witnesses who say the accused lived on the premises of the factory and paid the land revenue. Mr. Hartley and the other witnesses have said that he is the manager and the Public Prosecutor admits that the accused was resident manager. The occupier under the Act is the person who gives notice of occupation under section 14. It is admitted that no such notice was given by the accused. He is, therefore, not the occupier and cannot be made liable unless the occupier has exonerated himself : see section 17 and the remarks in the case of *Chairman of the Serampore Municipality* v. *Inspector of Factories*, I. L. R. 25 Cal. at page 458.

Against this order of acquittal, the Government of Bombay appealed to the High Court, on the following, among other, grounds : (1) that the lower appellate Court erred in starting an objection of its own and holding that the accused was not an "occupier" within the meaning of section 15 of the Indian Factories Act (XV of 1881); that there was distinct evidence that the accused though described as manager was a resident manager of the factory, in physical occupation of the factory, the owner himself living at Indore : and that the lower appellate Court erred in holding that the expression "occupier" applies only to one, who has given notice of occupation under section 14 of the Act.

PER CURIAM.—In this case the accused was the manager of the Ramnarayan Baldev Ginning Factory at Dhulia and he resided in a part of the premises in which the factory is. He was charged before the City Magistrate of Dhulia with having neglected to fence certain machinery in the Factory and thereby to have committed an offence punishable under section 15 (1) (*c*) of the Indian Factories Act (XV of 1881). The City Magistrate convicted him and sentenced him to pay a fine of Rs. 60. On appeal, the Sessions Judge of Khandesh reversed the conviction and sentence and ordered the fine if paid to be refunded. The Government of Bombay have appealed from this acquittal and appeared by the Advocate General, Mr. Coyaji representing the accused.

The grounds on which the learned Sessions Judge proceeded were that inasmuch as the accused had not given the notice of occupation under section 14 of the Act he was not the occupier. But these grounds are clearly untenable as appears from the case of *Queen-Empress* v. *Manordas Harakhchand* (page 902 of the Unreported Criminal Cases of the High Court of Bombay by Ratanlal) ; there it was held (*inter alia*) by Parsons and Ranade, JJ., that the proprietor in that case was none the less an " occupier " because he had not sent in any notice under section 14 as no notice is obligatory. The above case was not brought to the attention of the Sessions Judge and was not cited before us.

But an important and interesting question arises whether the accused was the " occupier " of the Factory within the meaning of the Act.

In the first place the preliminary sections of the Act XV of 1881 must be referred to.

Section 2 provides (*inter alia*) that any part of a factory should be deemed to be a Factory except any part used exclusively as a dwelling. In the present case no evidence was given to show whether the place where the accused resided was used exclusively as a dwelling.

Digitized by Google

By Act XV of 1881 as amended by XI of 1891 (Indian Factories Act, 1891) " any manager " comes under the heading of " All Operatives," section 5B. The prohibitions and directions contained in sections 8, 9, 10 and 11 of the Act XV of 1881, as amended by the Indian Factories Act, 1891, are directed to the occupiers of Factories. Section 12 of the Act imposes the obligation to fence machinery upon the occupier.

Section 15 as amended by Indian Factories Act, 1891, provides that any person who, in breach of this Act or of any order or rule made thereunder, (e) neglects to fence any machinery should be punished with fine which may extend to Rs. 200. Section 17 (as amended) provides that every occupier of a factory shall be deemed primarily liable for any breach of this Act or of any order or rule made thereunder; brt he may discharge himself from such liability by proof thatsuch breach was committed by some other person without his knowledge or consent, and in that case the person committing such breach shall be liable therefor.

This Act does not give any definition of " occupier " and in this respect resembles the English Factory and Workshop Act, 1895 (58 and 59 Victoria, chapter 37), as to which see *Carrington* v. *Bannister & Co.* (1) and *Merrill* v. *Wilson Sons & Co., Limited* (2).

To ascertain the meaning of the word, therefore, we must consider the cases bearing on the point and general principles. Before doing so, however, it is material to observe that the Indian Factories Act, XV of 1881, does by section 13 observe a distinction between an occupier and a manager. For by that section notice of accidents is to be given " by the occupier of such factory or, in his absence, his principal agent in the management of such factory. " From this we may infer that if the Legislature had intended to make the manager of a factory liable to fence the machinery it would have done so in direct terms.

Strictly speaking an occupier is one who can maintain an action of trespass ; see *Sheppard* v. *Bradford* (3), *The King* v. *Sutton* (4) . In the present case if an action of trespass in the factory had been brought by the accused, the defendant therein would have successfully pleaded that the factory was not the plaintiff's ; see Bullen and Leake's Precedents of Pleadings, Title Trespass, and the Pleas to such action, pages 417, 810, 3rd edition. No doubt, on the other hand, the word " occupier " has had an extended meaning given to it in *The Manchester S. and L. Railway Company* v. *Wallis* (5) where it was held that section 68 of the Railway Clauses Act (8 and 9 Victoria, chapter 20) obliged Railway Companies " to fence, so as to keep the cattle of the owners or occupiers of the abjoining lands not taken, from straying thereout...." and that "whilst cattle are passing along a highway, the owners of such cattle are using it according to the dedication of the owner of the soil, and, being there with his consent, the owners are strictly occupying the highway. In *Charman* v. *South-Eastern Railway Company* (6) Lord Esher M R. describes that case as a "strong decision, but it was the decision of a wery strong Court, " But looking at the above sections of the Indian Factiories Act we do not think we can hold that the manager of the factory in question herein can be said with truth to have been the occupier thereof. The Records from the Collector's office show that this factory is there registered under the names of Javermal Jamnadas Brothers as the occupiers. In the case of *Imperator* v *Manordas Harakhchand* (7) above

(1) (1901) 1 K. B. 20. (2) (1901) 1 K. B. 35. (3) (1864) 16 C. B. N. S. 369 at p. 378.
(4) (1835) 3 Ad. & E. 597. (5) (1851) 14 C. B. 213, at pp. 223, 224 : 22 R. C. 315 at p. 322.
(6) (1888) 21 Q. B. D. 524 at p. 527. (7) Ratanlal's Unrep. Cr. C. p. 202.

Digitized by Google

referred to, it was the proprietor of the factory who lived in a house on the factory premises for the greater part of the year.

Again in *Chairman of the Serampore Municipality* v. *Inspector of Factories, Hoogaly* (1) it was held *inter alia*, that it lay upon the occupier of the factory as being primarily liable for breach of any of the provisions of the Factories Act, to give the strictest proof of circumstances exonerating himself from the liablity to fix it on any other persons. For these reasons we must dismiss the appeal.

The result is to be greatly regretted. In the present case the occupiers, we are told, live at Indore outside British Jurisdiction. We are also told that in Khandesh there are several factories the occupiers of which reside in England. It is obvious, in such cases, that the result of our decision must make the provisions of the Act nugatory for a considerable time at all events that is until steps can be taken to summon the occupiers of the factories during which time of course the employes of the factory will be exposed to all the dangers if the machinery not properly fenced. But we have only to construe the words of the Legislature irrespective of the possibly injurious consequences to a class of persons incapable of protecting themselves.

R. R.

1905. *May* 29. I. L. R. 29 Bom. 449.

Before Mr. Justice Russell and Mr, Justice Aston : on reference before Mr. Justice Batty.

EMPEROR *v.* JETHALAL HURLOCHAND §

Criminal Procedure Code (Act V of 1898), sections 233, 239—Joint trial of different accused—Receiving stolen property at different times and from different persons—Same transaction—Indian Penal Code (Act XLV of 1860), section 411.

A theft was committed of certain property including ornaments. S was one of the persons who received the stolen property from the thieves S disposed of the property to several persons, and being indebted to J he gave a portion of the property to J in satisfaction of his debt. K was found to have in his possession a portion of the property identified as stolen in the same theft, but there was nothing to show when he received it and from whom. Under these circumstances the three persons S, J and K were tried together at one trial on charges of receiving stolen property knowing it to be stolen :

Held by RUSSELL and BATTY, JJ., that that the three offences against the three accused S. J and K were distinct offences which could not be regarded as offences committed in the same transaction within the meaning of section 239 of the Criminal Procedure Code, and that the trial of the three accused together was in contravention of the provisions of section 233 of the Code and was therefore illegal.

Per BATTY, J. :—" The offence punishable under section 414 of the Indian Penal Code is that of voluntarily assisting in disposing of stolen property and therefore must necessarily form part of the same transaction as the receipt by the person to whom it is so disposed of. It necessarily involves manifest criminality in both persons at one and the same time when both offences are committed."

" The words of section 239 of the Criminal Procedure, 1898, are, to say the least of it, ambiguous, if intended to include in the same transaction a series of acts one or more of which had been done at a time before the parties to the subsequent acts had anything to do with that transaction. The illustrations to the section seem to suggest that the persons to be jointly tried must have been associated from the first in the series of acts which form the same transaction."

" The inevitable result appears to be that that the proceedings of the Magistrate were illegal and a nullity . . . There has been no legal trial. There has therefore been no legal acquittal and there is therefore neither appeal against acquittal nor acquittal to reverse, and the question whether the accused should now be legally tried is a question not for judicial decision but for the consideration of the authorities with whom it rests to proceed with a prosecution."

Subrahmania Ayyar v. *King-Emperor* (2) followed.

---

§ Criminal Appeal No. 571 of 1904.

(1) (1898) 25 Cal. 151. (2) (1901) 25 Mad. 61.

Digitized by Google

APPEAL under section 417 of the Criminal procedure Code (Act V of 1898), by the Government of Bombay, from the order of acquittal passed by S. Padamji Addtional Sessions Judge of Ahmedabad, in appeal from conviction and sentence recorded by C. V. Vernon, 1st Class Magistrate of Panch Mahals.

On the 22nd August 1903 a theft was committed by certain Bhils at Baroda, of property valued at Rs. 7,000 The Bhils disposed of the property to several persons, of whom Sahebdin (accused No. 1) was one On about the 8th September 1903 Sahebdin disposed of the property to Chhotalal and Mansukh and gave a portion of the property to Jethalal (accused No. 2) in satisfaction of the debt of Rs. 1,185, which was due by Sahebdin to Jethalal, and which was the balance due on an account which had been running 10 or 12 years. A further portion of the property, identified as stolen, was found hidden in Kila's (accused No.3) field in an earthen pot and Kila's explanation regarding the same was that it was placed there with his knowledge and consent by a Bata. Beyond this statement of Kila there was no evidence in the case to show how he came by that property.

The three persons, Sahebdin (No. 1), Jethalal (No. 2) and Kila (No. 3), were under these circumstances tried together at one trial by the 1st Class Magistrate of Panch Mahals for the offences under sections 411 and 414 of the Indian Penal Code. At the trial the charge under section 414 of the Indian Penal Code was withdrawn, " as section 411 contained the gist of the charge against " the accused.

The three accused were convicted of the offence charged, and Sahebdin was sentenced to suffer two years' rigorous imprisonment ; Jethalal was ordered to undergo three months' simple imprisonment and to pay a fine of Rs. 1,000 : while the sentence that was passed upon Kila was one month's rigorous imprisonment.

Jethalal alone appealed against the conviction and sentence, and the Additional Sessions Judge of Ahmedabad reversed both on a consideration of the merits of the case against the accused and acquitted him.

The Government of Bombay appealed to the High Court, under section 417 of the Criminal Procedure Code (Act V of 1898), against this order of acquittal.

In the High Court it was contended on behalf of the accused that his trial, which took place along with his co-accused Sahebdin and Kila, was irregular and illegal.

The appeal was first argued before a bench composed of Russell and Aston, JJ., but their Lordships, having differed in opinion, delivered the following judgments.

RUSSELL, J. :—The second accused in this case, Jethalal Harlochand, was convicted by the Magistrate, 1 st Class, Panch Mahals, of receiving stolen property knowing the same to be stolen (section 411 of Indian Penal Code) and sentenced to three months' simple imprisonment and Rs. 1,000 fine or, in default, further simple imprisonment for three months.

The second accused appealed and on the 9th June 1904 the Sessions Judge of Ahmedabad ordered that the accused be discharged and the fine, if paid, refunded.

The Government of Bombay appealed from this order and the case was fully argued before us by Mr. Branson for the accused and the Advocate General and Government Pleader for the Crown.

Digitized by Google

Before dealing with the arguments it is necessary to state some preliminary facts.

In the month of August 1903 a large quantity of property comprising gold and pearl ornaments, diamond ornaments, silver ornaments and pots and clothes were stolen from the house of one Khanderao Ganesh of Baroda City. The value of the said property was Rs. 7,000 or thereabouts. The complainant at once gave a list of the stolen articles to the Baroda Police. Inquiries were made in Baroda and British Territory and in October the Chief Constable of Kalol got information that the thieves and property were in Kalol, but owing, it is said, to delay in getting detailed particulars from Baroda he was unable to carry on a regular investigation till December. In that month the Baroda Police and complainant joined him and the result of their inquiries was the production of property roughly valued at Rs. 1,700 and in the institution of proceedings against both thieves and three receivers who were Sahebdin (No. 1), Jethalal (accused herein) (No. 2) and Kila Ranchhod (No. 3) in this case. On the night of 1st March 1904 the whole of this property including an acquittance (Exhibit Z) was stolen from the Police guard.

The first point raised by Mr. Branson for Jethalal was that, having regard to section 239 of the Criminal Procedure Code, these three alleged receivers should not have been charged and tried jointly. It should be here mentioned that all the three accused were charged with offences under section 411 and section 414 of the Indian Penal Code, but the Magistrate at the beginning of his judgment says:—" As section 411 contains the gist of the charge against them section 414 is *withdrawn.* " I now read *in extenso* the charges framed against the three accused at pages 270, 271 and 272 of the Record. From these charges it will be seen : (1) that Sahebdin (No. 1) is charged (*a*) during the latter part of 1903 at Goraj or elsewhere in Kalol having in his possession certain of the property specified with guilty knowledge, (*b*) with assisting in disposing of the same to three Banias Chhotalal, Mansukh and Jethalal, (*c*) with a previous conviction for a similar offence : (2) Jethalal is charged that he between August and December 1903 at Kalol received from Sahebdin and retained certain of the property with guilty knowledge : (3) Kila is charged with in the latter part of 1903 having retained in his possession a silk border which he had reason to believe was stolen.

From these it appears that there were the following transactions:—

(1) As to Sahebdin

(*a*) having in his possession certain of the property at Goraj or elsewhere;

(*b*) assisting in disposing of the same

(i) to Chhotalal,
(ii) to Mansukh,
(iii) to Jethalal,

(*c*) a previous conviction for a similar offence.

(2) As to Jetalal having received from Sahebdin at Kalol and retained certain of the property.

(3) As to Kila having retained property (a *sàri*) at a place not specified.

It is important to observe here that the charge under section 414 of the Indian Penal Code of assisting in concealing stolen property was withdrawn by the Magistrate. Therefore the only charge we have to deal with is receiving stolen property with guilty knowledge. This being so it is clear from the above charges that the different receivings of the stolen property are all different tran-

Digitized by Google

sactions. Each alleged receiving took place at a different time and a different place. Again as to the property received, Sahebdin received more of it than Jethalal is said to have received, while Kila received property with which neither of the other two had anything whatever to do. Neither of the accused is charged with abetting the other, as in fact they could not be.

I fail to see how the different offences charged against the three accused can be said to have been committed in "the same transaction." The transactions were all different. The decision of *Queen-Empress* v. *Fakirapa*(1) is directly applicable. There it was held that if in any case either the accused are likely to be bewildered in their defence by having to meet many disconnected charges or the prospect of a fair trial is likely to be endangered by the production of a mass of evidence directed to many different matters and tending by its mere accumulation to induce an undue suspicion against the accused, then the propriety of combining the charges may well be questioned.

I shall proceed to show how accused 2 must have been bewildered in his defence and his fair trial endangered by the production of a mass of evidence directed to many different matters with which he had nothing to do. In the first place, what possible connection was there between Jethalal and accused No. 3? You have only to read the Magistrate's Judgment as to No. 3 (which I do at page 20 of his judgment) to see thet the case of No. 3 has nothing whatever to do with that against No. 2 or No. 1. Again, how could it possibly be relevant to the case against No. 2 that No. 1 had been ten years before convicted of having received stolen property? No. 2 when he was cross examined by the Magistrate denied knowledge of No. 1's conviction. Even if he had known of it could it be relevant against him ?. Suppose that No. 1 was giving evidence against No. 2, could Counsel for the prosecution have been allowed to ask No. 1 if he had been so previously convicted ?

Again, what possible evidence against No. 2 do the following witnesses give, *viz*, Nos. 4, 5, 6, 7, 8, 10, 11 ? Absolutely none. It is true that Nos. 5 and 6 were questioned in cross-examination as to Jethalal's being at the Police gate but neither of them know anything about it,

But the most grievous injustice was done to Jethalal by the fact that his pleader had no opportunity of cross-examining Sahebdin. Jethalal was the only accused who appeared by a pleader, Sahebdin and Kila being unrepresented by any pleader. Jethalal's case was that he had had an account with Sahebdin which was adjusted in April 1903 when Rs. 1,185 were found due by Sahebdin to Jethalal. That on or about the 9th September Exhibit 29 (1) was written by Jethalal which showed that that account was squared by the ornaments being taken over in satisfaction of the debt (Rs. 51 being remitted). That on the 19th September Jethalal gave Exhibit Z to Sahebdin which was an acquittance. In his statement to the Magistrate in writing Jethalal sets forth his case at length. That statement has been received in evidence and filed in the Record and must be taken into consideration. Sahebdin's case as disclosed in his cross-examination by the Magistrate was that the ornaments were not taken by Jethalal in satisfaction of debt, but on the contrary he himself paid cash to Jethalal at Halol and that he had received the cash from the sale of cotton, &c., not a very likely story when we have regard to the pecuniary position of Sahebdin as disclosed in the evidence. Sahebdin's statement to the Magistrate is nothing like a confession, on the contrary, it is wholly self-exculpatory and looking at Jethalal's case is absolutely condemnatory thereof Jethalal by the course pursued at the trial has had no opportunity of cross-examining Sahebdin

[1] (1890) 15 Bom. 491.

Digitized by Google

on his statements and in my opinion has not had anything like a fair trial. The Government Pleader in his reply was driven to suggest that questions put to Sahebdin by the Court at the instance of Jethalal's pleader should be deemed equivalent to a cross-examination of Sahebdin. I cannot agree with this suggestion. On this question of mis-joinder of charges I would refer to *Kumudini Kanta Guha* v. *The Queen-Empress* (1). In my opinion the above combination of charges is not a matter which can be cured by the application of section 537 of the Code of Criminal procedure: see *Subramania Iyer* v. *King Emperor* (2), and although the point was not taken in the Court below it is competent for this Court to entertain it. For no consent of the accused or his pleader will cure any want of jurisdiction or any irregularity in the trial which may have affected the result so as to cause a failure of justice: see *The Queen* v. *Bholanath Sen* (3), and compare *The Queen* v. *Bishonath Pal* (4).

Inasmuch however as after the careful discussion of the case against accused No. 2 it is undesirable to decide this case on a technical objection I proceed to deal shortly with the merits, and upon these I am not prepared to find No. 2 guilty of an offence under section 411. In the first place I am satisfied that in April 1903 there was an adjustment between him and Sahebdin when Rs. 1, 185 were found to be due to him. The book containing the adjustment has been handed back to Jethalal which would not, I apprehend, have been done if the prosecution were satisfied that that entry was a false one. This then establishes the foundation of Jethalal's case. The next fact which I think is proved is that witness No. 9, Ishwar Ranchhod, was given some pearls of Jethalal's by Gordhan Master to be valued. Ishwar is a witness for the prosecution. and I see no foundation for suggesting that he is not a witness to be believed, Gordhan who is called for the defence corroborates Ishwar. Again, the witness Dalpat Naran for the defence (No. 30) who formed one of the Panch to value the ornaments in question of Jethalal gives evidence which I see no reason to disbelieve. Dalpat says the other member of the Panch was Premanand. Premanand was called for the defence (No. 32). Now this witness disappeared and a warrant had to be issued for his arrest. He has a house next to the Chief Constable although he says he does not live there. In examination he says "I do not remember that Jethalal received any ornaments from Sahebdin. I do not remember any discussion with Dalpat. I have no information as to whether there was such discussion or not. I did not know at all what evidence was expected from me in the case." The question occurs to me on this:—If so why did he abscond? I have no hesitation, having read this witness' evidence over carefully, in saying that in my opinion this witness has been "got at" by some person or persons on the part of the prosecution. If this be so, what inference can we draw except that the accused No. 2 has not been fairly dealt with?

In my opinion, therefore, there is no sufficient reason to disbelieve accused No. 2's story that he did get the ornaments valued before he took them over in satisfaction of his debt. If this is so, is it likely that the accused, if he believed or had reason to believe the things he took over were stolen property, would have consulted five persons as to what the value of the things was? It seems to me that such conduct is utterly inconsistent with his believing or having reason to believe that the things were stolen.

The next point to consider is whether Jethalal, if he had the guilty knowledge imputed to him, would have been likely to prepare Exhibit 29 (1)

(1) (1900) 28 Cal. 104. (3) (1876) 2 Cal. 23. (2) (1901) 28 I. A. 257: 25 Mad 61; (4) (1869) 3 Beng. L. R. A. J. Cr. 2; 3 Bom. L. R. 540.

Digitized by Google

which on its face shows that the ornaments in detail were in his possession. I cannot conceive how he could have done so if he had the guilty knowledge. Then it is said if this was a genuine and innocent transaction why does it not appear in Jethalal's books. No doubt if it had so appeared it would have gone further to establish his innocence, but the absence of this entry from the books does not to my mind outweigh the consideration I have above referred to. As to the discovery of 29 (1) I see nothing incredible in it nor do I think that any inference is to be drawn against Jethalal by the fact of his advocate handing it in a sealed packet to the Magistrate at the time he did with the request that it should not for the present be disclosed to anybody. Looking at the way in which the witness Premanand was tampered with I should say it was a wise precaution not to let the prosecution see Exhidit 29 (1), otherwise they might have attempted to discount it. I cannot believe in the theory put forward by the Government Pleader that 29 (1) was fabricated in jail by accused and handed to Gordhan there.

Mr. Branson made a great point of the statements of the Chief Constable as to the alleged benial by Jethalal of possession of the ornaments and of all knowledge of accused No. 1. The complainant has also given a quantity of evidence as to Jethalal's denial of the possession of the anklet (E). I am not disposed to place implicit reliance on the Chief Constable on this point nor on the complainant. It all depends upon how the questions were exactly put to the accused. If he had taken the ornaments over from Sahebdin in the way his case is he did, I can understand his at first admitting that they were stolen property.

Lastly, we must have regard to the words of section 411 as to which it has been held that it is not sufficient to show that the accused person was careless, or had reason to suspect that the property was stolen, or that he did not make sufficient inquiry to ascertain whether it had been honestly acquired. per Melvill J. in *Empress* v. *Rango Timaji* (1). Upon the whole, therefore, I am of opinion that the order of the Sessions Judge for the acquittal of Jethalal should be confirmed. For, looking at the opinion I have formed on the merits of the case, it would in my opinion be a useless waste of public time and money for the accused to be sent for a fresh trial. The present case has been hanging over his head for 16 months and I am clearly of opinion that he should not be tried again.

ASTON, J.—This appeal was argued on Thursday afternoon last and Mr. Branson for the respondent, Jethalal accused No. 2, had taken some time in replying for the respondent. It was next day when in resuming his address he took the point that the accused No. 2 ought to have been tried separately, and urged that Jethalal was prejudiced in his defence because he was not able to call accused No. 1, Sahebdih, as a witness. No such point had been raised in either of the lower Courts. Although Sahebdin denied that he had disposed of any of the property to Jethalal, it was the case for the prosecution that the property recovered by the Polce from Jethalal had been received by him from Sahebdin, and this was the account which Jethalal himself relied on at his trial and it was part of case for the prosecution which the Magistrate believed. Yet it has been contended at this late stage that Jethalal was prejudiced because he could not *cross-examine* Sahebdin.

As to the legal merits of the objection. It is clear from the record that each of the accused was charged under both sections 411 and 414 of the Indian

(1) (1880) 6 Bom. 402.

Digitized by Google

Penal Code and stood so charged up to when the Magistrate was writing his judgment. The Magistrate in his judgment does say that the charges under section 414 are withdrawn, but it is clear that this was merely an inaccurate mode of expressing his intention to suspend inquiry into the charges under section 414 as in his opinion the gist of the charge against the accused was contained in section 411.

The record shows that the case and evidence for the prosecution were that Sahebdin accused 1 had dishonestly received stolen property and disposed of it to Jethalal accused 2 who in turn had dishonestly received such property from Sahebdin knowing or having reason to believe it to be stolen. Such charges can be tried together: see section 239, Criminal Procedure Code, and *Emperor* v. *Keshav Krishna* (1) In this view it is not necessary for me to discuss the wider question whether the word "transaction" being a word of wide significance the various receipts and disposals of the proceeds of one and the same theft are not ramifications of the same transaction. But I will add here that looking to the very late stage at which this objection to the joinder of charges has been raised, I would if I had arrived at a different conclusion on the above point have held that the accused No. 2 Jethalal should be retried. For this is an appeal by the Crown to which the right of appeal from an order of acquittal is given by the Legislature and we are asked to reverse the Additional Sessions Judge's appellate order of acquittal because it was made in a perfunctory inquiry on arbitrary grounds. To concede the contention of the respondent's Counsel that to order a retrial would be persecution of the respondent would be to render nugatory the right of appeal accorded to the Crown by the Legislature and I am unable to adopt the view that the Crown in suing for justice in this Court is seeking what will amount to persecution of the respondent who made no objection in either of the lower Courts to the joinder of charges and adduced all his evidence to answer the charges.

The evidence in the case has been reviewed and discussed by the First Class Magistrate, Mr. Vernon, in a conspicuously fair and painstaking judgment. It has been dealt with in an unsatisfactory manner in the perfunctory judgment recorded by the Additional Sessions Judge who has entirely failed to grasp the leading features in the case.

The First Class Magistrate has put out of consideration part of the prosecution evidence which, when the whole evidence is weighed together, seems to me to be of more weight than the Magistrate attached to it. In so doing he seems to have been influenced by the fact that at a late stage a narrative prepared for the defence was put in by the defence accusing the Chief Constable of trying to obtain a bribe from the accused Jethalal.

If it were necessary to decide in this case how much truth or appearance of truth there is in that accusation, then as witnesses, including Police witnesses, ought to be able to count upon fair treatment in a Court of justice, as well as the accused, the question would arise whether looking to the stage at which that accusation was made, the mode in which it was brought forward, and the flimsy materials on which the accusation rests, that accusation is not one which in common fairness may be safely disregarded in this case.

But it appears to me quite unnecessary to lengthen this judgment by discussing a number of side issues raised at the hearing, or to rest my conclusion upon the Police evidence in this case. For apart from the Police evidence as to the conduct of Jethalal there is material sufficient in my opinion to enable me

(1) (1904) 6 Bom. L. R. 361.

Digitized by Google

to some to a clear conclusion. Therefore in order to shorten my judgment I will confine attention to certain features in the case which in my opinion are established beyond room for question or doubt.

First of all it is known that in August 1903 there was a theft of property of considerable value—about Rs. 7,000—at the house of complainant who is a Magistrate.

Sahebdin, accused 1 in this case, stands convicted of having dishonestly received part of the stolen property from the thieves, and we know that out of the portion he received he passed on a part to accused 2 Jethalal including a silver anklet called Exhibit G early in September 1903. We have that date because Jethalal says he gave the acquittance of which Exhibit Z is a copy (dated 19th September 1903). Some days after he received the property with which he is concerned including Exhibit G from Sahebdin, and thus we have recent possession of stolen property traced to Jethalal. From such recent possession of stolen property a Court may presume that Jethalal received it knowing it to be stolen unless Jethalal can account for his possession satisfactorily—section 114, Evidence Act, Ill.(*a*)—the inference arising of course from the absence of satisfactory explanation and not from the mere recent possession of stolen property.

Now, is this possession of Jethalal of property recently stolen satisfactorily accounted for, or do the facts and circumstances proved in the case show beyond room for reasonable doubt that he received or retained this property, dishonestly knowing or having reason to believe it to be stolen property. Of course there is a difference between reason to suspect and reason to believe : but the sections 411 and 414 say nothing about reason to suspect, whilst they do draw a distinction between knowledge and reason to believe. It is not incumbent on the prosecution to prove knowledge or mental conviction, that is the actual state of mind of the accused if the prosecution can prove facts constituting a reason to believe, but when possession of recently stolen property is not satisfactorily accounted for even knowledge that the property was stolen and not mere reason to believe it was stolen may be presumed by the Court. That is the law as contained in section 114 of the Evidence Act.

The words " reason to believe " are quite plain and I will not attempt to paraphrase them.

[After reviewing the rest of the evidence the judgment continues :—]

The conclusion I have came to on consideration of all the evidence is that the respondent Jethalal has not satisfactorily accounted for his possession of property recently stolen when he obtained possession of it, and that on the contrary the facts and circumstances proved in the case show that his conduct throughout was that of a man who knew or had reason to believe that the articles in question including the anklet Exhibit G were stolen property when hereceived or retained them.

I would for the above reasons set aside the appellate acquittal and restore the conviction and sentence recorded by the First Class Magistrate.

Owing to the above difference in opinion, the case was referred to Batty, J., under the provisions of section 378 of the Criminal Procedure Code (Act V of 1898).

Rao Bahadur *Vasudeo J. Kirtikar*, Government Pleader, for the Crown.

Branson (with him *G. S. Rao*) for the accused.

BATTY, J.—In this case the accused, Jethalal Harlochand, was tried with two other persons, Sahebdin Jevdin and Kila Kanchhed, on charges of receiving

Digitized by Google

stolen property knowing it to be stolen, and was convicted by a First Class Magistrate. The Sessions Judge, however, reversed the conviction on appeal. And the Bombay Government have appealed against the order of acquittal recorded by the Sessions Judge. The Bench which heard the appeal having been divided in opinion, the case has now been referred to me under section 378 of the Code of Criminal Procedure.

The facts of the case for the Crown are fully stated in the judgment recorded by the Magistrate who convicted the accused, and are summarized in the judgments recorded by the Sessions Judge and by the Members of the Bench which heard the appeal made by Government in this Court. It will suffice therefore to note here such salient facts in the case as gave rise to the difference of opinion on which this reference was made.

These facts as stated by the Magistrate, who tried the case, are as follows :—

On 22nd August 1903 three Bhils committed a theft at Baroda. Sahebdin, the first accused, was one out of several receivers. He disposed of part of what he had received to two Banias, Chhotalal and Mansuk and to a barber Ishwar Purshotam.

On 8th September Sahebdin delivered to the present accused, Jethalal, a further portion of what he had received and the Magistrate states that there is not much doubt that Jethalal did receive the things for a debt of Rs. 1,185.

The third accused, Kila Ranchhod, produced a further portion, but a very small portion, of the property identified as stolen. There is nothing in the Magistrate's judgment to show when he received it or from whom. It is not suggested that he obtained it from Jethalal or from Sahebdin. His own statement that it was obtained from a Bata appears to have been accepted without dispute.

The objection has been raised in this appeal that in the circumstances above stated, the three offences against the three accused, Sahebdin, Jethalal and Kila Ranchhod were distinct offences which could not be regarded as offences committed in the same transaction within the meaning of section 239 of the Code of Criminal Procedure, and that the trial of the three accused together was thus in contravention of the provisions of section 233 of the Code, and therefore illegal.

Mr. Justice Russell accepted this objection as fatal to the validity of the proceedings.

Mr. Justice Aston, however, held the trial regular on the authority of *Emperror* v. *Keshav Krishna* (1). That case, however was one in which the accusation was that a stolen article criminally disposed of by one of the accused persons, had been at the same time and place dishonestly received by the other accused person, and it was, therefore, held that charges under section 414 and section 411, Indian Penal Code, formed part of the same transaction, and that the two accused could be jointly tried on those two charges.

The *ratio decidendi* in that case clearly was that the offences of which the two accused were convicted were committed at the same time and place. The commission of the second offence took place in the course of the commission of the first offence. The evidence related to the same time, place, persons and intention.

(1) (1904) 6 Bom. L. R. 861.

Digitized by Google

In the present case, however, the three accused were not tried for respectively assisting in disposing of and receiving the same stolen property or of committing offences at the same time and place. The charges under section 414 were withdrawn. And apparently they were properly withdrawn. For according to the rulings of the Madras High Court (1868, 4 M. H. C. R. Appendix xiii) as well as under the ruling of this Court in *Queen-Empress* v. *Alu Kala* (1) and *Empress* v. *Sakharam* (2): "Section 414, Indian Penal Code, applies only where there has been no actual receipt of the stolen property." The offence punishable under section 414 is that of voluntarily assisting in disposing of stolen property and therefore must necessarily form part of the same transaction as the receipt by the person to whom it is so disposed of. It necessarily involves manifest criminality in both persons at one and the same time when both offences are committed. But in the present instance, the offence charged against the accused Jethalal was a dishonest receipt on a totally different occasion from those on which the offences charged against Sahebdin and Kila Ranchhod are alleged to have been committed. Between Kila Ranchhod and Jethalal no connection of any kind suggested. The facts relating to all the three offences charged were different and apparently unconnected. The Government Pleader was asked to point out in what respect these distinct offences could be regarded as committed in the same transaction, but was unable to suggest any construction of the phrase "the same transaction," which would apply to the present case.

That phrase, as observed in *Queen-Empress Fakirapa*(3), is not defined in the Code. In the judgment of Jardine J. in that case, section 309 of Pitt Taylor on Evidence is referred to as showing that concurrence or proximity of time is the criterion. Birdwood J., however, referred to the Illustrations to sections 235 and 239 as showing that for the phrase "the same transaction" to apply, the offences must either (1) form part of one continuous series of acts or (2) must have been committed at the same time or (3) when an interval of time may have elapsed between the several offences, must have the same specific criminal intent common to them all or (4) when more persons than one are concerned, must be connected by the fact that one of such offences was committed in the course of the commission of the other (see illustration (*b*) to section 239).

In the present instance a considerable interval of time apparently elapsed between the receipt by Sahebdin and the receipt by Jethalal, and there is no allegation as to any continuity of action between the offences of Kila Ranchhod and Jethalal.

Ordinarily successive dealings by different persons with respect even to the same property would be described as distinct transactions. In this case the property dealt with was different in the offences imputed to Kila Ranchhod and Jethalal. And in the transactions alleged against Sahebdin and Jethalal, only a portion of that which the former received was transferred by him to Jethalal.

If a trader obtains goods from one person and sells a portion of them to a third, it would, I think, be a strain of language to describe his successive dealings as one and the same transaction, unless he were acting merely as an agent representing one or other of the parties. But here no agency is alleged. If it had been alleged the Sahebdin was an agent either for the thieves or for

(1) (1891) Cr. R. 28 of 1891. Ratanlal's Unrep. Cr. C 553.
(2) (1889) C. R. 8 of 1889, Ratanlal's Unrep. Cr. C. 449.
(3) (1890) 15 Bom. 491.

Digitized by Google

the present accused Jethalal, Sahebdin might have been charged under section 414 with assisting in the disposal of the goods and the case of *Emperor* v. *Keshav Krishna*(1) would have applied. But here no privity is alleged against Jethalal in respect of Sahebdin's receipt of the goods. Sahebdin received the goods on his own account and his offence was complete (so far as the case for the prosecution goes), before the offence or purpose imputed to Jethalal had begun. The only connecting link between those two offences therefore arose from the identity of the property with which the later offence was concerned, with a portion of that which formed the subject of the earlier offence. But in the offences of which Kila Ranchhod and Jethalal were respectively accused, not even this connecting link existed, and Jethalal had no connection whatever with the property received by Kila Ranchhod.

The words of section 239 are to say the least of it ambiguous if intended to include in the same transaction a series of acts one or more of which had been done at a time before the parties to the subsequent acts had anything to do with that transaction.

The illustrations to the section seem to suggest that the persons to be jointly tried must have been associated from the first in the series of acts which from the same transaction. And this appears to be the construction put on the section in the cases of *Queen-Empress* v. *Fakirapa*(2), *Queen Empress* v. *Daulata Dhondi*(3), *Queen-Empress* v. *Chandi Singh*(4). In *Bishnu Banwar* v. *The Empress*(5), indeed, it was definitely held that a thief and the receiver from him could not be jointly tried. And this decision was referred to without any expression of dissent or disapproval by the Calcutta High Court in *Karu Kalal* v. *Ram Charan Pal* (6). But in that case the Court held that the misjoinder was a mere irregularity which under section 537 was not fatal to the proceedings.

The case of *Bishnu Banwar*(5), however, has been considered by a Bench of this Court in *Emperor* v. *Balabhai Hargovind* (7). In that case, which was not cited in argument in the present case, the Court expressed its inability to concur in the view taken in *Bishnu Banwar* v. *Empress*(5). And though the case of *Bishnu Banwar* may show that section 239 is at least patient of the construction there put on it, the ruling in *Emperor* v. *Balabhai*(7) must be accepted in this Court as binding on us as a decision that a thief and the receiver from him may be tried together. It is true that in the present case Sahebdin and Jethalal were not respectively thief and receiver from the thief. In view of the forcible reasoning in *Emperor* v. *Balabhai*(7) and the weight due to the learned Judges who decided it, if not the long established practice to which it refers, I am unable to hold that the provisions of section 239 were necessarily inapplicable to the joint trial of Sahebdin and Jethalal. But I do not think that the case of *Balabhai* disposes of the question whether the joint trial of Kila Ranchhod and Jethalal was sustainable. The reasoning in *Emperor* v. *Balabhai*(7) does not appear to touch that question. For that reasoning merely connects the series of acts as forming the same transaction on the ground of the receiver's guilty knowledge or belief as to the offence which he knows or has reason to believe has been committed. But in the present instance no knowledge or belief as to any dishonest receipt by Kila Ranchhod (the third accused) is imputed by the prosecution to Jethalal. It is not suggested that either of them had the least cause for suspecting that the other had committed

(1) (1904) 6 Bom. L. R. 361.
(2) (1890) 15 Bom. 491.
(3) Cr. R. 20 of 1897; Ratanlal's Unrep. Cr. C. 925.
(4) (1887) 14 Cal. 395.
(5) (1896) 1 C. W. N. 95.
(6) (1900) 28 Cal. 10.
(7) (1904) 6 Bom. L. R. 517.

Digitized by Google

an offence, much less that there was preconcert or any associaton or connection of any kind between them. However reasonable it may be to connect the receipt by Jethalal with receipt by Sahebdin as one transaction, on the ground that the knowledge, or reason to believe, imputed to Jethalal, involved a Knowledge of, or reason to belive in, Sahebdin's guilt, it is impossible to apply that reasoning to connect Jethalal with Kila Ranchhod from whom Jethalal received nothing and with regard to whom it is not suggested that Jethalal had any knowledge, acquaintance or connection whatsoever. The Government Pleader has not suggested or urged that there is such connection. The only argument adduced on behalf of the Crown is that the accused Jethalal is not shown to have been prejudiced by the joint trial. This may or may not be the case. Mr. Justice Russell points out reasons for believing that the complexity of the trial by the introduction of disconnected incidents was prejudicial to the defence. The question is however one of principle and if the procedure in this case is to be accepted as correct, innumerable disconnected incidents might be imported into a case which would render it almost impossible for an innocent person to know when evidence adduced had any bearing on the case against himself.

But when once it appears that a joint trial is not warranted by section 239, and that consequently section 233 has been contravened, the question whether the joint trial is a mere irregularity not fatal unless accused be prejudiced, can now no longer be entertained. For that question has been answered in the negative by the highest judicial authority to which the Courts in India are subject. In the case of *Subrahmania Ayyar* v. *King Emperor* (1) the Privy Council declared that the disregard of the express provision of law in section 233 as to the mode of trial, was not a mere irregularity which could be remedied under section 537 and the cases of *In the matter of Abdur Rahman*(2) and *Karu Kalal* v. *Ram Charan* (3) to the contrary are overruled.

The inevitable result appears to be that the proceedings of the Magistrate were illegal and a nullity. It follows that there has been no trial within the meaning of the Code, and that the preceedings of the Sessions Judge in appeal ending in the acquittal of the accused, are also a nullity, as based on evidence not recorded in a legal trial. It is open to this Court under clause (*a*) to section 423 in an appeal from an order of acquittal to reverse such order and to order that the accused be retried. But in the present case no such order is necessary or as it seems to me even possible. There has been no legal trial. There has therefore been no legal acquittal and there is therefore neither appeal against acquittal nor acquittal to reverse, and the question whether the accused should now be legally tried is a question not for judicial decision but for the consideration of the authorities with whom it rests to proceed with a prosecution. I do not think it desirable therefore to offer any comments on the merits of a case which I concur with Mr. Justice Russell in holding has not been legally tried.

R. R.

---

(1) (1901) 25 Mad. 61, 3 Bom. L. R. 540. (2) (1900) 27 Cal. 839.
(3) (1900) 28 Cal. 10.

Digitized by Google

1904, *November* 28. I. L. R. 29 Bom. 575.

Before Mr. Justice Batty.

EMPEROR *v.* ROBERT COMLEY AND OTHERS. *

Aden Courts Act (II of 1864), sections 17, 20, 22, 23§—Criminal Procedure Code (Act V of 1898), sections 447, 449—Resident's Court at Aden—Sessions Court—Transfer of case to the High Court—Jurisdiction of the High Court to transfer a case to itself from the Court of the Resident at Aden—Letters Patent, clause 29.+

It is not competent to the Resident at Aden, to whose Court as a Court of Session a case is committed under section 447 of the Criminal Procedure Code, 1898, to transfer the case to the High Court, under the provisions of section 449 of the Code, on the ground that the offence cannot be adequately punished by him.

The powers of the Court of Session conferred upon the Resident at Aden by the Aden Courts Act (II of 1864) are not merely such as are defined in the Criminal Procedure Code, 1898; but such as are provided expressly in the Act itself. And section 449 of the Code of Criminal Procedure, 1898, cannot affect those provisions.

The High Court of Bombay can, under clause 29 of the Amended Letters Patent, trnsfer to itself a case pending in the Court of Session at Aden.

THE accused, thirteen in number, were charged under section 325 of the Indian Penal Code (Act XLV of 1860) with voluntarily causing grievous hurt to one Alulabint Jamoh, committed at steamer Point in the District of Aden.

They were placed for trial before the District Magistrate of Aden (Lieutenant Colonel J. Davies), who, after taking all the evidence in the case, committed the accused, under section 447 of the Criminal Procedure Code, 1898, for trial by the Court of Sessions at Aden.

Before the Court of Sessions at Aden (Major-General H. M. Masons, Resident at Aden), the accused pleaded not guilty and claimed to be tried. But the Sessions Judge on a perusal of the proceedings bafore the Committing Magistrate came to the conclusion that the offence charged could not be adequately punished by him: and he therefore, transferred the case to the High Court of Bombay under section 449 of the Criminal Procedure Code, 1898. The order run :—

"At this stage, I must record that having carefully gone through the proceedings of this case before the Committing Magistrate, I am of opinion that the offence of which the accused are charged and which appears to be proved, cannot be adequately punished by a sentnce of imprisonment for a time which may extend to one year or five both, which are the only sentences I can pass in this case under section 449 of the Criminal Procedure Code, the accused being

---

* Crown Side No. 1, 5th Sessions, 1904, High Court of Bombay.

§ The Aden Court's Act (II of 1864), sections 17, 20, 22 and 23 run as follows :—

17. The administration of criminal justice at Aden is hereby declared to be vested in the Court of the Resident, save as is herein otherwise provided.

20. The Resident shall, except as in this Act is otherwise provided, exercise all the powers of a Court of Session as defined in this Code of Criminal Procedure, 1882 and he may also, when it shall seem to him proper so to do, exercise the powers of a Magistrate as defined in the said Code, except in cases triable before himself as a Court of Session.

22. If any European British subject shall be charged in Aden with any offence (other than an offence punishable with death under the Indian Penal Code), which a Justice of the Peace shall not be competent to punish, and there shall be sufficient grounds for committing him for trial, such European British subject shall be committed to the Court of the Resident, and shall be tried by the Resident.

23. Save as in this Act otherwise provided, the proceedings in all Criminal cases of any description brought in any Court in Aden shall be regulated by the Code of Criminal Procedure, 1882.

+ Amended Letters Patent, clause 29 is as under :—

29. And we do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

Digitized by Google

European British subjects. If the accused are guilty they are guilty of a brutal assault which resulted in severe injuries to a Somali woman and ultimately in her death. I must consequently transfer this case to the High Court of Bombay under section 449 of the Criminal Procedure Code. The accused on being asked if they have any cause to show why the case should not be transferred to the High Court of Bombay, state that they have none."

The accused were accordingly placed for trial before Batty, J.

A preliminary objection was raised that the Resident at Aden as the Sessions Judge had no jurisdiction to transfer the case to the High Court of Bombay,

Young, for the Crown.

Kirkpatrick, for the accused.

BATTY, J.:—The Magisterial enquiry in this case was conducted by Lieutenant-Colonel Davies, purporting to be District Magistrate at Aden, who on the 13th August, 1904, under section 447 of the Criminal Procedure Code, committed the case to the Court of Session.

The Resident at Aden, after the accused persons had been placed at the Bar of his Court and claimed to be tried, and after perusal only of the proceedings before the Magistrate, passed an order in which he said that the offence with which the accused were charged and which appeared to be proved, could not be adequately punished by a sentence of imprisonment for a term which may extend to one year or fine or both, which were the only sentences he could pass in this case under section 449 of the Criminal Procedure Code, the accused being European British subjects, and that he therefore transferred this case to the High Court of Bombay under section 449 of the Criminal Procedure Code.

Now it has been urged on the part of the Crown that under section 20 of Act II of 1864 (being an Act for the administration of civil and criminal justice at Aden), the Resident at Aden is not a Court of Sessions but is a *persona designata* invested with specific powers described as all the powers of a Court of Session except as in that Act is otherwise provided. This contention appears to be correct,

[His Lordship read sections 22 & 23.]

The result of these sections is to except from regulation by the Code of Criminal Procedure, cases of European British subjects charged with offences which are not punishable with death and to render such cases triable by the Resident alone.

In these circumstances it appears that s. 449, sub-section 2 of the present Code of Criminal Procedure can have no application to the Court of the Resident at Aden, because that section contains provisions which are inconsistent with the provisions of s. 22 which declares imperatively that cases of the nature therein mentioned shall be tried by the Resident.

Section 17 declares that the administration of criminal justice in Aden is vested in the Court of the Resident except as in that Act is otherwise provided.

And the result appears to be that the powers of the Court of Session conferred upon the Resident are not merely such as are defined in the Criminal Procedure Code but such as are provided expressly in the Act itself. Section 449 cannot affect those provisions.

It is contended on the part of the accused that the power to transfer a case under s. 449 (sub-section 2) conferred upon a Court of Session is one of those powers which s. 20 directs that the Resident shall exercise.

Digitized by Google

In the first place the provisions of s. 449, sub-section 2, impose a duty and it is doubtful whether a direction imposing a duty can be said to confer a power.

In the second place if it be a power, it is one which would be in conflict with the provisions of s. 22 of Act II of 1864 and as such, would be excepted from the powers conferred by s. 20 of that Act.

It may be that sub-section 1 of s. 449 of the Criminal Procedure Code enters into and forms part of the definition of the powers of a Court of Session within the meaning of s. 20 of Act II of 1864.

If so, there might be a limitation of the power of the Resident to pronounce on European British subjects any sentence exceeding one year's imprisonment.

And the result in that case would be that though the Resident would be competent to try a case in which European British subjects are charged with culpable homicide or grievous hurt, he would not be competent to pass sentences in excess of one year's imprisonment.

I mention this because it is possible that it may require consideration for the purposes of amending the provisions of Act II of 1864 in order to remove what at present seems an anomaly. But the phrase in s. 22 is imperative and it seems to me that a case of the nature now in question must be tried by the Resident and could not be transferred to this Court by him under s. 449, sub-section 2, of the Code of Criminal Procedure.

Counsel for the Crown has, however, intimated that it would be desirable that in this case this Court should exercise the power of transfer, and it is urged on behalf of the defence that it would be a great hardship to the accused if after coming all the way from Aden, they were not tried here but were sent back to the Court at Aden which has already expressed an opinion on the merits of that case.

The case appears to be one which it is very desirable should be transferred to this Court if this Court possesses the power.

Under clause 29 of the Letters Patent this Court is empowered to direct the transfer of any criminal case to any Court of any Jurisdiction. There are no limitations in clause 29 such as are to be found in clause 13 of the Letters Patent relating to the power of transferring civil cases. And though it may be assumed that some limitation was implied in clause 29, there is no reason to suppose that the limits of this Court's power in this direction fall short of the utmost extent of its criminal jurisdiction.

[His Lordship read clause 27 of the Letters Patent.]

Assuming that Aden is a settlement administered by the Governor of Bombay in Council it would follow that the criminal Court of the Resident at Aden would be within the limits of the appellate jurisdiction of the High Court of Bombay

But it has also been judicially decided in the case of *Abdul Karim* v. *Municipal Officer, Aden*, (1) that this Court has power to remove a civil suit from the Court of the Resident and to try and determine the same, and that the civil Court at Aden is subject to the superintendence of the High Court of Bombay.

(1) (1903) 27 Bom. 575 : 5 Bom. L. R. 462.

Digitized by Google

That being so, as the provisions in clause 29 of the Letters Patent contain no words of limitation, it follows *a fortiori* that they cannot be more restricted in their operation than clause 13 of the Letters Patent, where the words of limitation expressly restrict the power of transfer to cases pending in Courts over which this High Court has superintendence.

The latter part of the preamble to Act II of 1864, which I now read, shows that it was the intention of the Legislature to confer on this Court powers of superintendence in respect of the Court of Aden.

For all these reasons I think this Court has the power to transfer the case in question.

That a single Judge has the power to make this transfer is decided by the case of *The Queen* v. *Ameer Khan*(1).

I, therefore, direct that the case of *Emperor* v. *Robert Comley and others* be transferred to this Court.

[The trial then proceeded.]

Attorney for the Crown:—*The Public Prosecutor.*

Attorneys for the accused:—Messrs. *Crawford, Brown and Co.*

R. R.

VOLUME XXX.

1905, *July* 19. I. L. R. 30 Bom. 49.

Before Mr. Justice Russell and Mr. Justice Batty.

EMPEROR *v.* DATTO HANMANT SHAHAPURKAR.*

Criminal Procedure Code (Act V of 1898), sections 222, 239—Successive breaches of trust—Joinder of charges—Joint trial—Same transaction—'Transaction' meaning of.

Where the accused persons were jointly in charge of trust funds, so that one could not act without the connivance of the other, and each of them misappropriated sums of money from the trust funds to his own use, thus evidently carrying through their object in concert, the fact that they carried out their scheme by successive acts done at intervals, alternately taking the benefits, did not prevent the unity of the project from constituting the series of acts one transaction, *i. e.*, the carrying through of the same object which both had from the first act to the last: and there was no objection to their being tried jointly at one trial.

Section 222 of the Criminal Procedure Code (Act V of 1898) clearly admits of the trial of any number of acts of breach of trust committed within the year as amounting only to one offence. The section does not require any particular formulation of the accusation, but only enacts that it is sufficient to show the aggregate offence without specifying the details. It dispenses with the necessity of amplification; it does not prohibit enumeration of the particular items in the charge.

Section 239 of the Criminal Procedure Code (Act V of 1898) admits of the joint trial when more persons than one are accused of different offences committed in the same transaction. It suffices for the purpose of justifying a joint trial that the accusation alleges offences committed by each accused to have been committed in the same transaction, within the meaning of section 239. It is not necessary that the charge should contain the statement as to the transaction being one and the same. It is the tenour of the accusation and not the wording of the charge that must be considered as the test.

In section 239 of the Code, a series of acts separated by intervals of time are not excluded, provided that those jointly tried have throughout been directed to one and the same objective. If the accused started together for the same goal, this suffices to justify the joint trial, even if incidentally, one of those jointly tried has done an act for which the other may not be responsible.

The foundation for the procedure in section 239 is the association of two persons concurring from start to finish to attain the same end. No doubt if it were attempted to associate in

---

* Criminal Application for Revision No. 77 of 1905. (1) (1871) 7 Beng L. R. 240.

Digitized by Google

the trial a person who had no connection whatever with the transaction at a time when one or more of the series of the acts alleged had been done then that would be outside the provisions of the section.

"Transaction" means "carrying through" and suggests not necessarily proximity in time—so much as continuity of action and purpose.

APPLICATION under section 435 of the Criminal Procedure Code (Act V of 1898), for revision of conviction and sentence passed on appeal by A. Lucas, Sessions Judge of Satara, confirming conviction and sentence recorded by J. E. Sahasrabudhe, First Class Magistrate of Satara.

The accused No. 1 (Datto Hanmant) was the Karbhari and the accused No. 2 (Ganesh Waman Bhagwat) was the *nagdi* karkun (cashier) of the complainant, Sardar Gangadhar Luxaman Swami of Chafal.

On the 18th April 1898, the complainant left Chafal to go to the Nizam's dominions on business in connection with the regrant of a village. Previous to his departure, the complainant counted his "khasgi" or private balance and handed it over to the two accused.

The complainant did not again verify his cash balance till the 9th June 1903, when he found, on examining the accounts, that Rs. 5,249 remained to be accounted for. He, therefore, charged the two accused with having embezzled that amount. As the alleged embezzlements might have extended over more than five years during which the accused had unchecked control over the Swami's cash, the accused were charged each with having embezzled three items within the period of one year beginning from the 18th April 1898.

Datto Hanmant (accused No. 1) was charged with having misappropriated Rs. 650 on the 11th December 1898, Rs. 1,500 on the 12th February 1899, and Rs. 700 at some date unspecified in 1899. And Ganesh Waman was said to have embezzled Rs. 400 on the 21st August 1898, Rs. 400 on the 22nd December 1898, and Rs. 200 on the 17th July 1899.

They were tried together at one trial by the First Class Magistrate of Satara, who convicted them of offences under section 408 of the Indian Penal Code and ordered that "each of the two accused should suffer rigorous imprisonment for four months for each head of the charge and should also pay a fine of Rs. 300. The sentences to run one after the other."

On appeal the Sessions Judge of Satara confirmed the convictions, with the exception that the accused No. 2 was not held answerable for Rs. 200, as the item could not be included in the charge, having "been embezzled more than a year after 18th April 1898." The sentences passed on the two accused were confirmed.

Datto Hanmant (accused No. 1) filed this application, contending *inter alia* that the joint trial of the two accused was illegal, that as each of the accused was charged with having committed three distinct acts of misappropriation in respect of three separate sums on three different occasions quite independent of each other, the trial was illegal and had prejudiced the defence; and that it was not alleged by the prosecution that either of the accused was any way concerned with the criminal breach of trust by the other in respect of three distinct sums respectively shown in the charges framed against them.

Robertson (with him *M. V. Bhat*), for the accused:—We submit that the various offences with which the accused is charged exceed three in number and they were not committed within one year. These offences cannot therefore be tried together. See section 234 of the Criminal Procedure Code (Act V of 1898). Secondly we say that the offences with which the accused (applicant) is charged are totally distinct offences from those with which Ganesh (accused

Digitized by Google

No. 2) has been charged; and that, therefore, the two accused persons cannot be tried together at one trial. See section 239 of the Criminal Procedure Code (Act V of 1898). A joint trial of two or more persons is permissible only if they are accused of the same offence or of different offences committed in the same transaction or of having abetted one another in committing an offence. The question in the present case is, were the different acts done by the accused so connected together as to form parts of the same transaction. We submit that there was no joint action on the part of the accused; each acted independently of the other. In framing the charges also each of the accused is charged with having committed three distinct acts of misappropriation in respect of three separate sums on three different occasions quite independent of each other. Neither was in any way privy to or connected with the acts committed by the other. The joint trial was, therefore, illegal. See *Emperror* v. *Jethalal Hurlockand* (1), where the remarks on which we rely are at page 465. In this case there is no evidence of preconcert between the two accused.

Binning (with him *D. A. Khare*), for the complainant:—As to the first point we submit that section 222 of the Criminal Procedure Code (Act V of 1898) admits of the trial of any number of acts of breach of trust committed within the year as amounting only to one offence. It enacts that it is sufficient to show the aggregate offence without specifying details. On the second point we submit that the case for the prosecution is that both the accused were acting in concert and had a common intention. In this case both the accused are found to be jointly in charge of the trust fund, so that one could not have acted without the connivance of the other.

Vasudeo J. Kirtikar, Government Pleader, for the Crown.

BATTY, J.—In this case the two accused Datto Hanmant and Ganesh Waman, having been entrusted with certain moneys belonging to the Swami of Chafal the first as Karbhari and the second as cashier, were accused of having committed breach of trust in respect of those moneys; Datto, the first accused, having, it is alleged, taken Rs. 650 on the 11th December 1898, Rs. 1,500 on the 12th February 1899, and Rs. 700 at some date unspecified in 1899; while Ganesh Waman is said to have committed breach of trust in respect of Rs. 400 on the 21st August 1898, Rs. 400 on the 21st December 1898 and Rs. 200 on the 17th July 1899

Both the accused were convicted: each of them in respect of each item which he was alleged to have taken: except that Ganesh was not convicted in respect of the last mentioned item of Rs. 200.

The present application is one for revision in favour of Datto on the ground of misjoinder of charges. Certain facts connected with the grounds assigned for conviction have been stated to us, but in revision we do not ordinarily interfere with findings of fact and in the present case see no reason for departing from the ordinary practice.

The objections taken are, first that the various offences exceed three in number and were not all committed within one year, and that therefore the offences could not be tried together; secondly that the offences with which Datto has been charged are totally distinct offences from those with which Ganesh has been charged and therefore the two accused persons could not be tried together under section 239 of the Criminal Procedure Code.

We think with reference to the first objection that section 222 clearly admits of the trial of any number of acts of breach of trust committed within

(1) (1905) 29 Bom. 449; 7 Bom. L. R. 527.

Digitized by Google

the year as amounting only to one offence. Section 222 does not require any particular formulation of the accusation, but only enacts that it is sufficient to show the aggregate offence without specifying the details. It dispenses with the necessity of amplification: it does not prohibit enumeration of the particular items in the charge. In this instance the objection to the charge is practically that it is more specific than it need have been, it gave more details than are required under that section. This objection amounts, at most to this that there has been—a merely formal error in the drafting of the charge—an error in the form of the charge which certainly could not have prejudiced the accused and is one which may be dealt with as coming within section 537. The introduction of greater detail than is legally necessary in no way affects the jurisdiction of the Court. Taken by themselves, the charges against Datto and Ganesh may, therefore, respectively be regarded as one offence against each.

The only objection to the trial that remains for consideration is, whether these offences according to the accusation were offences committed in the same transaction. Section 239 admits of the joint trial when more persons than one are accused of different offences committed in the same transaction. It suffices for the purpose of justifying a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction, within the meaning of section 239. It is not necessary that the charge should contain the statement as to the transaction being one and the same It is the tenour of the accusation and not the wording of the charge that must be considered as the test. And in this case, it is for the appellant to show that no such connection between the offences alleged against the two accused was set forth as would satisfy the condition required for a joint trial.

We think that the argument of the learned Counsel for the appellant would have been more convincing if no continuity of action and purpose, common to both the accused throughout, had been alleged in the case presented by the prosecution. The word "transaction" is unfortunately not defined in the Code and the meaning to be attached to it must be gathered from the context in which it occurs in various sections and illustrations.

According to its etymological and dictionary meaning the word "transaction" means "carrying through" and suggest, we think, not necessarily proximity in time—so much as continuity of action and purpose. The same metaphor implied by that word is continued in the illustrations where the phrase used is "in the course of the same transaction" In section 215, the phrase is used in a connection which implies that there may be a series of acts—illustration (*f*) to that suection indicates that the successive acts may be separated by an interval of time and that the essential is the progressive action, all pointing to the same object. In section 239, therefore, a series of acts separated by intervals of time are not, we think, excluded, provided that those jointly tried have throughout been directed to one and the same objective. If the accused started together for the same goal this suffices to justify the joint trial, even if incidentally, one of those jointly tried has done an act for which the other may not be responsible (*vide* section 239, illustration (*b*)).

We think the foundation for the procedure in that section is the association of two persons concurring from start to finish to attain the same end. No doubt if it were attempted to associate in the trial a person who had no connection whatever with the transaction at a time when one or more of the series of the acts alleged had been done, then it might be urged that would be outside the provisions of the section. But since in this case two persons have associated for the carrying out of one particular common object *viz* a breach of trust the

Digitized by Google

continuance of that object and the progressive execution of it by successive acts seem to satisfy the test and criterion implied in section 239. In this case it has apparently been found by the lower Court that the accused were jointly in chahge of the trust fund, one of the accused being the Karbhari and the other cashier. The one could not act without the connivance of the other: and they evidently carried through their object in concert. That they carried out their scheme by successive acts done at intervals, alternately taking the benefits, does not prevent the unity of the project from constituting the series of acts one transaction *i,e,* the carrying through of the same object which both had from the first act to the last. The objections raised are insufficient.

We accordingly reject the application.

R. R. *Application rejected.*

1905. *July* 9. **I. L. R. 30 Bom. 126.**

Before Mr. Justice Russell and Mr. Justice Aston.

EMPEROR *v.* BUDHOOBAI,*

City of Bombay Municipal Act (Bombay Act III of 1888), sections 410, 24, S. D. (4)§ Prohi-

---

* Criminal Appeal No. 75 of 1905.

§ The provisions of the City of Bombay Municipal Act (Bom. Act III of 1888) referred to run as under :—

410. (1) Except as hereinafter provided, no person shall, without a license from the Commissioner, sell or expose for sale any four-footed animal or any meat or fish intended for human food, in any place other than a municipal or private market.

(2) Provided that nothing in sub-section (1) shall apply to fresh fish sold from, or exposed for sale in a vessel in which it has been brought direct to the seashore after being caught at sea.

Section 24 (3). Unless and until they are so altered or re-apportioned, the number and respective boundaries of the wards and the number of councillors to be elected for each ward shall be as specified in Schedule B.

Consecutive Number.	Name of Ward.	Boundaries.				Number of members of the Corporation to be elected for each Ward.
		On the North.	On the South.	On the East.	On the West.	
4	Girgaon Ward.	A line starting from the north-west corner of Trimbak Parashram Street and extending along the south side of Grant Road as far as the B. B. & C. I. Railway, and again from the B. B.& C. I. Railway level crossing on Clerk Road along the south side of Clerk Road as far as the south end of Hornby Vellard	Back Bay from a point opposite to Thakurdwar Street to Malabar Point.	A line starting from Back Bay at a point opposite Thakurdwar Street, and extending along the north side of Thakurdwar Street; south-west side of part of Bhuleshwar Street as far as the southern end of Ardesir Dady Street; thence along the west side of the latter and Trimbak Parashram Street as far as Grant Road; again from the Grant Road Railway Bridge along the west side of the B. B .&, C. I. Railway Line as far as the Clerk Road level crossing.	The sea from Malabar Point to the south end of Hornby Vellard.	Five.

Digitized by Google

bition of sale of fish except in a market—Sale from a basket placed on the Chowpatti foreshore—Sale from a vessel—Private market—Onus of proof—City of Bombay, limits of—Bombay General Clauses Act (Bom. Act I of 1904, section 3 (10)).§

The accused, a fisherwoman, was charged under section 410 (1) of the Bombay City Municipal Act (Bom. Act III of 1888), with selling or exposing for sale, without a license from the Municipal Commissioner, fish intended for human food, on the Chowpatti foreshore, in the City of Bombay. The sale was from a basket, which the accused had placed on the sand, at some distance from the water, between the high and low water mark. The fish sold was fresh fish and was brought from one of the boats then in Back Bay. The Presidency Magistrate acquitted the accused on the grounds that (1) the Bombay City Municipal Act did not apply as the place of sale was outside the limits of the City of Bombay as laid down in the City of Bombay Municipal Act; (2) section 410 of the Act had no application because the place was a private market established from time immemorial; and (3) the sale fell within section 410 (2) of the Act, on appeal, against this order of acquittal, by the Government of Bombay:—

Held, reversing the order of acquittal and convicting the accused, that the accused was not protected by section 410 (2) of the Bombay City Municipal Act (Bom. Act III of 1888), since it was impossible in the present case to say that the fish had been sold from a vessel, when as a matter of fact it had been sold from the basket on the shore, it having been brought from the vessel which was in the water.

Held, also, that the onus of proving that the place in question was a "private market" lay upon the accused.

Held, further, that the Bombay City Municipal Act (Bom. Act III of 1888) applied to the spot in question, because it came within the expression "City of Bombay" as defined by the Bombay General Clauses Act (Bom. Act I of 1904).

APPEAL under section 417 of the Criminal Procedure Code (Act V of 1898), from an order of aquittal passed by Chunilal H. Setalvad, Acting Fourth Presidency Magistrate of Bombay.

The accused was charged under section 410 of the city of Bombay Municipal Act (Bombay Act III of 1888), with selling or exposing for sale without license from the Municipal Commissioner fish intended for human food, on the Chowpatti foreshore on the 5th October 1904 at 8 A. M.

On the morning in question, two Municipal officers accompanied by a Sub-Inspector Ramchandra went to the Chowpatti foreshore and there the Sub-Inspector purchased one pamplet for one anna from the accused. It was sold by the accused from a basket which she had placed on the sand at some distance from the water. At this time, there were at the place half a dozen persons similary selling fish and some customers buying them. The fish sold was fresh and was brought from a vessel which was lying in the Back Bay.

It was stated on behalf of the prosecution that the place where the fish was sold not being either a Municipal or a private market the accused could not sell it there without a license from the Municipal Commissioner, and that, inasmuch as the fish in question was sold from a basket and not from a vessel in which it had been brought direct to the seashore after having been caught at sea, the accused was not protected by clause 2 of section 410 of the City of Bombay Municipal Act (Bom. Act III of 1888).

The accused, in defence, contended that the provisions of the City of Bombay Municipal Act, 1888, did not apply to the place of sale, which was below the ordinary high water line of the sea; that the place in question was a market, the rights of which had been acquired by prescription; and that it was a private market (section 336 of the Act) to which the provisions of section 410 of the Act did not apply; and that the accused was protected by clause 2 of section 410, since the fish sold was transferred into the basket from the vessel which was lying in the Back Bay.

§ 3. (10) "City of Bombay" shall mean the area within the local limits for the time being of the ordinary Original Civil Jurisdiction of the Bombay High Court of Judicature.

Digitized by Google

The Magistrate held that the City of Bombay Municipal Act (Bom. Act III of 1888) did not apply as the place of sale was outside limits of the City of Bombay as laid down in the Act; that section 410 of the Act did not apply as the place was a private market established from time immemorial; and that the sale in question fell within clause (2) of section 410 of the Act. In the result, he acquitted the accused under section 245 of the Criminal Procedure Code (Act V of 1898).

Against this order of acquittal the Government of Bombay appealed to the High Court.

Raikes, acting Advocate General, (with him *E. F. Nicholson*, Public Prosecutor), for the Crown:—The prosecution was brought by the Bombay Municipality for breach of the provisions of section 410 of the City of Bombay Municipal Act (Bombay Act III of 1888). The accused was found selling fish on the Chaupati beach between high and low water mark. As to the exact distance of the place of sale from the sea-water there is some discrepancy in the evidence.

We submit that the provisions of the City of Bombay Municipal Act (Bombay Act III of 1888), apply to the place in question. The Act applies in so many words to the "City of Bombay" (section 1). The expression "City of Bombay" as defined by the Bombay General Clauses Act (Bombay Act I of 1904) means "the area within the local limits for the time being of the ordinary original civil jurisdiction of the Bombay High Court of Judicature." This signifies that "City of Bombay" bears this meaning, whenever it is used in the City of Bombay Municipal Act. unless there be anything repugnant in the latter Act. And there is nothing repugnant to it in the City of Bombay Municipal Act. Now, the place in question is indisputably within the limits of the ordinary original civil jurisdiction of the Bombay High Court.

[ASTON, J.—Do you refer us to any authority by which the local limits of the ordinary original civil jurisdiction of the Bombay High Court are defined?]

The local limits of the ordinary original civil jurisdiction of the Bombay High Court are defined in the Amended Letters Patent, section 11 (High Court Rule Book, p. 122). There is no law passed by the Governor General of India in Council as indicated in that section. So one has to go from that to the original Letters Patent of the Bombay High Court, section 11 (High Court Rule Book, p. 100). This again refers back to the Supreme Court Charter (High Court Rule Book, p. 23); which again refers to the Charter of the Mayor's Court, which mentions "Towns, Factories or places called Bombay."

Section 24 of the City of Bombay Municipal Act (Bombay Act III of 1888) enacts that for the purposes of election, the City shall be devided into wards: and the limits of these wards are defined in schedule B to the Act. This, however, cannot constitute a definition of "City of Bombay." The wards simply exist for the purposes of elections, and the Act does not say that every part of the City is included in the wards.

[RUSSELL, J.—The definition of "City of Bombay" enacted in the Bombay General Clauses Act (Bombay Act I of 1904), applies to all Acts passed by the Bombay Legislature, unless there be anything repugnant in an Act.]

The City of Bombay Municipal Act takes the City as defined by the General Clauses Act and divides it into wards temporarily for purposes of election. The fact that the wards and the city limits are not coincident appears from the fact that the corporation has power to alter the boundaries of the wards with the sanction of Government.

Digitized by Google

If schedule B of the Act be referred to, the place in question seems to lie within the boundaries of the City of Bombay, according to accepted principles of construction. The Magistrate says the beginning of Back Bay must be the high tide. The fallacy in the reasoning of the Magistrate is that you must include in the Back Bay every part of land uncovered by tide. I am not able to understand the reasons which led the Magistrate to that conclusion. He simply postulates. Again, in the same schedule, in No. 1 the whole of the harbour is included in Ward No. 1. If the reasoning of the Magistrate is carried further, the whole of the Colaba reclamation would be outside the ordinary original civil jurisdiction of the Bombay High Court. Refers also to sections 386, 387, 388 and 389 of the City of Bombay Municipal Act (Bombay Act III of 1888).

The next point is whether the place in question is a private market. Under the City of Bombay Municipal Act (Bombay Act III of 1888), a private market is a non-municipal market. But it remains to be seen whether it is a market at all; and then the question arises upon whom does the burden of proving it rest. If the accused protects herself from this prosecution on the ground that she sells fish in a market, then obviously she must prove it. Suppose the woman had been convicted of the offence, could the conviction be set aside by the fact that the Municipality had not proved that the sale was not in a market? The land as a rule is not a market. And the evidence in the case upon the point is all vague and is evidence of repute. The evidence is technically inadmissible; and apart from that, such evidence is absolutely worthless. See also, Ameer Ali and Woodroffe's Evidence Act, 3rd Edition, p. 352; *Patel Vandravan* v. *Patel Manilal*(1); and *Musammat Shafiq-un-Nisa* v. *Khan Bahadur Raja Shaban Ali Khan*(2).

The last point turns upon the construction of section 410, clause (2) of the City of Bombay Municipal Act (Bombay Act III of 1888). The term 'vessel' according to the Bombay General Clauses Act (Bombay Act I of 1904) means and includes any ship or boat or any other description of vessel used in navigation. The proviso, therefore, does not apply to this case. The fish was sold and exposed for sale in a basket on the shore. The sale in question was begun, continued and ended on the foreshore, and the person who purchased the fish did not know that they were brought from the vessel. The proviso to the section was only intended to protect the wholesale sale of a particular catch to a dealer.

Strangman (instructed by *Smetham Byrne and Noble*) for the accused:—Taking the last point urged by the learned Advocate General first, we submit that the proviso to section 410 of the City of Bombay Municipal Act (Bombay Act III of 1888) affords a complete protection to the accused. In this case the accused brought the fish from the vessel in a basket on the shore and there sold them. The basket is merely a means of carriage and the sale is really from the 'vessel.'

As to the second point, we contend that the area over which a Municipal Corporation has ordinary jurisdiction are the portions which are described in schedule B to the City of Bombay Municipal Act. There the Girgaon ward is described as bounded on the west by the sea from Malabar point to the south end of Hornby Vellard. The construction to be placed on 'sea' is the sea which forms the Back Bay: and the sea includes the portion of land covered by the high-water mark: see Hill on Seashore (2nd Edn.), P. 17.

(1) (1890) 15 Bom. 565. (2) (1904) 31 I. A. 217.

Digitized by Google

Section 24 of the City of Bombay Municipal Act shows the ordinary Municipal limits. And therefore we are not concerned with the limits of the "City of Bombay" as defined in any other Act.

Turning, then, to the only remaining point whether the place is a private market, we find, on referring to Stroud's Judicial Dictionary, Wharton's Law Lexicon and Webster's Dictionary of the English Language, that market ordinarily means a place of sale. According to Webster, the market must be by grant or by immemorial user; and there is ample evidence in this case to show that the fish are sold at the place in question from time immemorial. It is for the prosecution to show that the place is a private market. Market is either an appointed place of sale or at an appointed time and place of sale. Time is not of the essence in its meaning. The ordinary dictionary meaning of thes term is an appointed place for the purposes of sale.

[ASTON, J.— Is the market owned by any body ?]

The site belongs to the Collector of Bombay.

Raikes was heard in reply.

Cur. adv. vult.

RUSSELL J. :—The accused herein Budhoobai, widow of a fisherman Rama Kamla, was charged before Mr. Setalvad, Acting Presidency Magistrate with selling and exposing for sale, without license from the Municipal commissioner, fish intended for human food on the Chaupati foreshore on the 5th October 1904, at 8 A. M. contrary to the provisions of section 410 (1) of the Bombay Municipal Act III of 1888. It appears that on the morning in question two Municipal Officers, accompanied by a Sub-Inspector named Ramchandra Lagu, went to the Chaupati foreshore and there the said Sub-Inspector bought one pomfret for one anna from the accused. It was sold by the accused from a basket which she had placed on the sand at some distance from the water. The witnesses are not agreed as to the exact distance, but it may be taken that the fish was sold between the high and low water mark. At the time this fish was sold ther were several other fisher people selling fish and other people were buying from them. It is proved we think, that the fish sold was fresh fish and that it had been recently brought from one of the boats then in the Back Bay. The deceased husband of the accused was a fisherman owning two tonies a large and a small one, and she is now the owner of them It would appear, although it is not quite clear that the fish that was sold to the Sub- Inspector was taken out of one of her tonies.

The first question we shall discuss is, is the accused protected by the provisions of section 410 of the Municipal Act which runs as follows :—

"(1) Except as hereinafter provided, no person shall, without a license from the Commissioner, sell or expose for sale any four-footed animal or any meat or fish intended for human food, in any place other than a municipal or private market :

"(2) Provided that nothing in sub-section (1) shall apply to fresh fish sold from, or exposed for sale in, a vessel in which it has been brought direct to the sea-shore after being caught at sea."

The proviso is very ungrammatical and by no means easy to construe. The relative "which" refers to "vessel" whereas the words "caught at sea" refer to "fish" and the whole sentence from "in which" to "sea" is intended to be what in German grammar is known as a compound adjective. Treating this whole sentence in that way the proviso is, we think, worded so as not to

Digitized by Google

interfere with the exposing or selling of fish in and from vessels coming direct from the sea. The allocation of the prepositions "in" and "from" seems to show this. Three processes seem to be aimed at and the proviso should then run as follows :—Nothing in sub-section 1 shall apply to fresh fish (1) caught at sea; and (2) brought direct to the sea-shore and (3) sold from or exposed for sale in a vessel. The draftsman of the proviso, however, thought fit to put the processes in their reverse order and thereby has given occasion for this difficulty. Directly any fresh fish is brought on to the shore the prohibition of clause 1 attaches, but the prohibition is not intended to apply to anything which has not been actually brought on the shore. It would be impossible in the present case to say that this fresh fish had been sold from a vessel, when as a matter of fact it had been sold from the basket on the shore, it having been brought from the vessel which was in the water. We have been unable to find any direct authority on this point but the case of *Playford* v. *Mercer*(1) supports our conclusion. In that case a cargo of ice was consigned to the plaintiff, and before the ship came into the harbour the defendants bought the cargo with a condition that the ice was to be taken from the ship's deck by them. It was held that the contract "from the deck," meant that the vendor should pay all that was necessary to enable the purchaser to remove the cargo from the deck, and that harbour dues charged to be paid before the goods could be removed, were payable by the vendor. Applying that case to the present—suppose here Budhoobai had agreed to sell the pomfret "from the tony," and then had paid a charge for putting it into the basket and taking it to shore surely the purchaser would have had to pay that charge.

The next question to consider is whether it can be said that the place where this fish was sold is a "private market" and upon whom does the burden lie to prove it to be such. Now no attempt has been made to show that there are any limits to be placed upon the foreshore in question so as to constitute a fixed market. It was suggested that a space of some 100 yards in width and length might be considered as the limit, but there is really no evidence whatever to support that suggestion. Therefore the whole foreshore of Chaupati must, according to the argument of the accused, be taken to be "private market." "Private market" is defined by section 398 of the Act which says :—"All markets which belong to or are maintained by the Corporation shall be called 'Municipal markets.' All other markets shall be deemed to be private." It is difficult to see how a place like the whole of the foreshore of Chaupati could be held to be a 'private market" Even however if this were not so, we must next consider upon whom in this case lay the onus of proving that the place in question was a "private market." Now upon that point the Municipality started their case by showing that the place in question was the foreshore of Chaupati. That therefore was sufficient to throw the onus upon the defendants to prove that the foreshore of Chaupati was a "private market" within the meaning of the Act. Now upon this point a certain amount of evidence was given and a great deal was made of the admission by Mr. C. B. Shroff in cross-examination that the fishermen in general have been in the habit of using the Chaupati foreshore for fishing from time immemorial and also for selling fish there. Afterwards he said he could not say that the fishermen were selling fish there from time immemorial and his own knowledge had been only for 10 years. Certain other evidence was given by the witnesses for the accused but the conclusion we have come to upon that point is that the accused has not

(1) (1870) 22 L. T. N. S. 41.

Digitized by Google

discharged the burden which we find was laid upon her by the evidence that she has called. To legally prove immemorial custom for selling Chaupati foreshore would require very much better and further evidence than has been given in this case: *e. g*, *Mercer* v. *Denne*(1) shows what evidence was necessary to prove a valid and good custom for fishermen to dry their nets upon the shore of the land of a private owner. As we have said the evidence in this case falls far short of the evidence which was given in support of the custom in that case. Of course this judgment will not prevent the fishermen who are interested in this alleged custom from filing a civil suit to prove the custom and to protect their rights if any. Whether it is worth their while to do so is for them to consider, for in order to avoid any penalty hereafter all they need do is to haul their tonies a little higher on to the sea-shore and expose their fish in and sell them from them direct.

The last question is, whether the Municipal Act applies to the spot in question. We have no doubt whatever that it does. *Prima facie* the foreshore between high and low water marks belongs to the crown: see *Attorney-General* v. *Richards* (2) and *Attorney General* v. *Emerson* (3) The same law applies in India. *Doe d. Rajah Seebkristo* v, *The East India Co.*(4) The Municipal Act, sections 387—389, certainly contemplate parts of the sea-shore being vested in and parts not being vested in the Municipality. But there is nothing to show that the Chaupati foreshore is so vested. The Presidency Magistrate seems to have considered that the City of Bombay is defined in detail in the Municipal Act, because the boundaries of the wards are set out in schedule B into which the city is divided. But it is clear from section 24 that these boundaries are given for electoral purposes only, and further "City" in section 24 must be read subject to the qualification in section 3, at the beginning "unless there is something repugnant in the subject or context," wherefrom it appears that in section 24 "City" is not equivalent to the City of Bombay or the whole area to which the Municipal Act applies. The word "City of Bombay" under the General Clauses Act I of 1904 means the area within the local limits for the time being of the Ordinary Original Civil Jurisdiction of the Bombay High Court of Judicature: see clause 10; and by section 4 the word "City of Bombay" as defined in section 3 of that Act applies also, unless there is anything repugnant in the subject or context of Bombay Acts passed before the commencement of Act I of 1904. We do not find anything repugnant in the subject or context in the Bombay Municipal Act. There is no doubt therefore the foreshore in question is within the Ordinary Original Civil Jurisdiction of the Bombay High Court of Judicature, consequently this point also fails the accused.

The result is that in our opinion the order of the Acting Presidency Magistrate was wrong, the accused ought to have been convicted of the offence with which she was charged.

We accordingly reverse the order of acquittal and direct that she do pay a fine of two annas, or, as section 26 of the Bombay General Clauses Act I of 1904 applies, by which section 67 *inter alia* of the Indian Penal Code is rendered applicable in the case of fines imposed under any Bombay Act, we order the accused do suffer simple imprisonment for one day in default.

ASTON, J.—I concur in the order proposed. The evidence establishes that the accused exposed for sale and sold the fish in question after it had been

(1) [1904] 2 Ch. 534.
(2) (1795) 3 R. R. 682.
(3) [1891] A. C. 649.
(4) (1856) 6 Moo. I. A. 267.

Digitized by Google

removed, unsold, from a boat and had been taken to the shore and had been placed on the shore in the basket in which it was exposed for sale on the shore. This is prohibited by section 410 of the City of Bombay Municipal Act unless the place of sale or exposure is a market.

The spot where this exposure and sale took place is part of the Chaupati foreshore, between high and low water mark, which *prima facie* belongs to the Government and in which no proprietary rights are claimed by the accused for herself or any private individuals. It is *prima facie* not a market place and the evidence to which we were referred to show that this foreshore or any part of it is a market is too indefinite as to place, time and circumstance to show that the Chaupati foreshore is in whole or in part a market place.

I also concur in the view that in applying the provisions of section 410 of the City of Bombay Municipal Act, the decision whether the Chaupati foreshore between high and low watermark is within the City of Bombay is governed by the definition of "City of Bombay" contained in the Bombay General Clauses Act and not by certain provisions of Bombay Municipal Act which divide "the City" into wards for electoral purposes. On this view of the case the accused has committed an offence punishable under the section cited, but the prosecution being avowedly instituted merely as a test case, a nominal fine is sufficient.

R. R.

1905. *December* 5. **I. L. R. 30 Bom. 348.**

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Russell.

EMPEROR *v.* HUSSEIN NOOR MAHOMED AND OTHERS.*

Bombay Prevention of Gambling Act (Bom. Act IV of 1887), section 12(1)—Gambling in a railway carriage—Through special train—Public place—Railway track—Public having no right of access except passengers.

The accused were convicted under section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) as persons found playing for money in a railway carriage forming part of a through special train running between Poona and Bombay, while the train stopped for engine purposes only at the Reversing Station (on the Bore Ghauts between Karjat and Khandala Stations) of the Great Indian Peninsula Railway.

Held, reversing the conviction, that a railway carriage forming part of a through special train is not a public place under section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887).

---

* Criminal application for revision No 217 of 1905.

(1) Section 12 of the Bombay Prevention of Gambling Act (IV of 1887)

12. A Police officer may apprehend without warrant—

(*a*) any person found playing for money or other valuable thing with cards, dice, counters or other instruments of gaming used in playing any game, not being a game of mere skill, in any public street, place or thoroughfare;

(*b*) any person setting any birds or animals to fight in any public street, place or thoroughfare;

(*c*) any person there present aiding and abetting such public fighting of birds and animals.

And such person shall, on conviction, be punished with fine which may extend to fifty rupees, or with imprisonment which may extend to one month.

And such Police officer may seize all birds and animals and instruments of gaming found in such public street, place or thoroughfare or on the person of those whom he shall so arrest, and the Magistrate may, on conviction of the offender, order such instruments to be forthwith destroyed, and such birds and animals to be sold and the proceeds forfeited.

Digitized by Google

Per JENKINS, C. J. :—The word "*place*" [in section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887)] is, I think, qualified by the word "public" and having regard to its context and its position in that context, it must, in my opinion, mean a *place* of the same general character as a *road or thoroughfare*..... I am unable to regard the railway carriage, in which the accused were, as possessing such characteristics of, or bearing such a general resemblance to, a street or thoroughfare as to justify us in holding that it was a public place within the meaning of section 12 of the Act, with which alone we are concerned.

Per RUSSELL, J.—The adjective "public" [in section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887)] applies to all the three nouns—street, place or thoroughfare, and it is clear that the railway line certainly cannot be described as a "public street or thoroughfare" inasmuch as it is not and cannot be used by the public in the same way as they are in the habit of using "public streets" and thoroughfares".

CRIMINAL application for revision of convictions and sentences recorded by K. V. Joshi, First Class Magistrate of Maval at Vadgaon in the Poona District, in case No. 221 of 1905.

On the 2nd September 1905 the accused were travelling in a Second Class Railway carriage of a through special train running from Poona to Bombay. The train ran direct to Bombay and took no passengers at any intermediate stations between Poona and Bombay. During the season of the races at Poona, the Great Indian Peninsula Railway Company started such trains from Bombay to Poona if a sufficient number of passengers offered beforehand to travel by them. The train in which the accused were travelling stopped for the purposes of the engine only at the Reversing Station in the Bore Ghauts between Karjat and Khandala Stations, and while this train was standing the Police raided the carriage in which the accused were travelling and found them sitting round a piece of cloth bearing various devices thereon as heart, anchor, crown, &c., and engaged in what is known as the heart, anchor and crown game with dice and money. It was a game of chance and not a game of skill. The accused by the First Class Magistrate of Maval in the Poona District. The Magistrate found that the place where the accused were playing was a "public place" within the meaning of section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) and on the 5th October 1905 convicted and sentenced accused No. 8 to rigorous imprisonment for one month, because he was considered to be the ring-leader and accused Nos. 1—6 to pay a fine of Rs. 40 each. Accused No. 7 was acquitted. The following are the reasons given by the Magistrate for holding that the carriage in which the accused were travelling was a "public place" :—

The accused are said to have been found gambling in a railway carriage of the race special second class which ran * * from Poona to Bombay. The question for determination is therefore whether such a carriage comes within the meaning of the words "public street, place or thoroughfare." There are no definitions given in the Act of these expressions ; nor are there Indian rulings to guide this Court in determining the above question. Certainly a railway carriage will not be a public street or thoroughfare. But it is to be seen whether it can be a public place or not. The English case, *Langrish* v. *Archer* (10 Q. B. D. 44) is I think on all fours with this case though the latter has some special circumstances attending on it. In that case it was held that a railway carriage while travelling on its journey is within the definition of "an open and public place to which the public have or are permitted to have access" in the section (3 of the Vagrant Act Amendment Act, 1873—36 and 37 Vic c. 38). Though we have not got the same words in our section 12 of the Gambling Act, the expression "public street, place or thoroughfare" carries, I think, the same meaning. It is contended on behalf of the defence that the conviction in that case was secured because there were in that case the additional words "any open place to which the public have or are permitted to have access." But from the opinions given by some of the Judges in that case about the case of *Ex parte Freestone* which was decided before the additional words were inserted, I think that this contention does not hold good. Lord Coleridge, C. J., had said "in *Ex parte Freestone* where it was held that a conviction upon 5 Geo. IN, c. 83, s. 4, for playing cards in a railway carriage must be set aside because it was not shown affirmatively that the carriage was being used for the conveyance of passengers, there is a strong intimation of opinion that if this evidence had been forthcoming the conviction would have been sustained." Another Judge, Stephen J., gives his opinion in the

Digitized by Google

following words: "I am of the same opinion. Although it was not actually decided in *Ex parte Freestone* that a railway carriage while in the act of conveying passengers was an open and public place within 5 Geo. IV c. 83, it may be inferred that if the facts had raised the question, the Court would have decided it in the affirmative."

§ § § § § § §

It is further contended on behalf of the defence that the train in which the accused travelled was a race special, and that as passengers were not allowed to get in at intermediate stations between Bombay and Poona and between Poona and Bombay, the carriages of that train would not come within the meaning of the word "public place". Mr. Muirhead, the Traffic Manager of the G. I. P. Railway Company, was examined as to rules in connection with the running of Race specials. From the evidence and documents produced, it appears that the stoppages of these trains at Karjat, Reversing and Lonavla are for engine purposes only and that they are not to stop at any intermediate stations to pick up or set down passengers. Had it been possible to run these trains without stoppages for engine purposes they would have run between Bombay and Poona as ordinary trains run between two stopping stations where passengers are picked up and set down. Such being the case the argument for the defence that public had no access to these race specials has no significance. Like ordinary trains the public have access to these race specials both at Bombay and Poona. At the former for second class race specials sufficient passengers have to offer the day before the train is due to run. At the latter passengers were booked on payment of single journey fare provided there is room. It is nowhere ordered that a particular class of passengers are to travel by these trains. Any man can join it at Bombay if he offers the day before and any man can get into it at Poona if there is room available. The condition of offering oneself at Bombay the day before the train is due to run, is imposed only in order that the Railway authorities may know beforehand whether there are sufficient passengers to run a train. In these circumstances I do not think that the race specials differ in any way from the ordinary trains in point of access to the public.

Against the said convictions and sentences the accused applied to the High Court under its criminal revisional jurisdiction urging *inter alia* that section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) was not applicable, that the Magistrate erred in holding that the Railway carriage in which the accused were travelling was a "public place" within the meaning of the section notwithstanding the fact that the carriage was attached to the Poona race-express which admitted no passengers on its journey between Bombay and Poona and *vice versa* and that the Magistrate was wrong in holding that the said Act applied to the spot where the accused were arrested. The application was admitted and a notice was issued to the District Magistrate of Poona intimating that the High Court had decided to hear the application on the date mentioned in the notice or thereafter.

Branson (with *F. Oliveira* appeared for the applicants (accused):—The main question is whether the carriage in which the accused were travelling was a public place within the meaning of section 12 of the Bombay Prevention of Gambling Act. The expression in the section is "public street, place or thoroughfare." Taking into consideration the position of the term "street" in the expression and the adjective "public" preceding the three terms "street, place or thoroughfare", we contend that the term "place" means a public place such as a street or a thoroughfare, Maxwell on Statutes, 3rd edition, p. 461. The meaning put by the Magistrate on term "place" cannot be sustained. The Magistrate has expressed his opinion that a railway carriage is not a public street or a thoroughfare. If so, how can a railway carriage to which the public in general have no access be a public place within section 12 of the Act? Further the Act being penal its sections must be very strictly construed. The Magistrate failed to do so and has given to the section a wider scope by drawing upon section 3 of the Vagrant Amendment Act, 36 and 37 Vic. c. 3. The words of that section are wider than those of section 12 of the Bombay Prevention of Gambling Act. The Magistrate was not justified in importing the words of the English statute in the Gambling Act.

If a railway carriage attached to an ordinary train is not a public place

Digitized by Google

within the meaning of section 12, much less will be so a carriage attached to a race special which took only a limited number of passengers and did stop at any intermediate station between Poona and Bombay. Such a train having once started the public can have no access to it.

Rao Bahadur V. J. Kirtikar, Government Pleader, appeared for the Crown :—The expression "public street, place or thoroughfare" in section 12 of the Bombay Prevention of Gambling Act is wide enough to include a railway carriage on the line. The railway line is, according to the scope of section 12 of the Act, a thoroughfare. The Act makes gambling in a public place or thoroughfare penal. Therefore the conclusion arrived at by the Magistrate was correct. The carriage in which the accused travelled was not reserved for the party of players. There were other persons in the carriage who did not take any part in the play.

JENKINS, C. J. The accused in this case have been convicted as being persons found playing for money against the provisions of section 12 of the Bombay Prevention of Gambling Act, 1887, in a railway carriage forming part of a through special train running between Poona and Bombay.

The only question is whether it was in a public place that the accused were so playing. This depends on the meaning the word "*place*" has in section 12 of the Act. The word "*place*" is, I think, qualified by the word "*public*" and having regard to its context and its position in that context, it must, in my opinion, mean a *place* of the same general character as a *road* or *thoroughfare*, else it was pointless to use the words *street* or *thoroughfare* as they are there used. To the Railway track as such the public have no right of access except as passengers in the Company's train. Therefore I need not seriously consider the suggestion that the accused were found playing in a public place, because the carriage in which they were playing was on the railway track. To support the conviction it must be shown that the railway carriage was a public place of the same general character as a public street or thoroughfare. I would be slow to place on the section an interpretation that would curtail its legitimate scope, but I am unable to regard the railway carriage, in which the accused were, as possessing such characteristics of, or bearing such a general resemblance to, a street or thoroughfare as to justify us in holding that it was a public place within the meaning of section 12 of the Act, with which alone we are concerned.

The conviction and sentence must therefore be set aside and the fine, if paid, refunded.

RUSSELL, J.—In this case the accused were charged and convicted of the offence of gambling in a Special Race Train on the way from Poona to Bombay on the 2nd day of September 1905. The train was a second class one and the Police made their raid on it at what is well known as the "Reversing Station" between Khandala and Karjat. The game they were playing was one known as Heart Crown and Anchor and it was not disputed before us that they were gambling.

The only question is were the accused gambling in "a public street, place or thoroughfare" within the meaning of section 12 of the Bombay Gambling Act.

In the Court below and before us the case was argued as if the only point was whether the carriage, in which the accused were, comes within those words in the section. But it appears to me that there are two questions involved.

1. Was that part of the railway line on which the train was where the accused were arrested, "a public street, &c."

Digitized by Google

2. Was the carriage in which the accused were playing "a public street, place or thoroughfare."

I propose to deal with these two points in their order.

If either of these questions is answered in the negative the conviction is bad and must be set aside.

1. In my opinion Mr. Branson was correct in saying that the adjective "public" applies to all the three nouns—street, place or thoroughfare and it is clear that the railway line certainly cannot be described as a "public street or thoroughfare" inasmuch as it is not and cannot be used by the public in the same way as they are in the habit of using "public streets" and "thoroughfares."

Railway Act IX of 1890, section 122, provides *inter alia* "if a person unlawfully enters upon a railway, he shall be punished with fine which may extend to 20 Rs." and "unlawfully" seems to mean without the leave of the railway administration: see the second clause of this section. Section 125 provides a penalty when the owner or person in charge of any cattle permits them to stray on a railway provided with fences suitable for exclusion of cattle. Section 13 provides for the railway administration putting up (*a*) boundary marks or fence, (*b*) works in the nature of a screen near to or adjoining the side of any public road for the purpose of preventing danger to passengers on the road by reason of horses or other animals being frightened by the sight or noise of the rolling-stock moving on the railway; (*c*) provides for the erection of suitable gates, chains, bars, stiles or handrails where a railway crosses a public road or the level and (*d*) provides for employment of persons to open or shut such gates, chains or bars. These provisions, in my opinion, clearly show that the Legislature did not intend the premises of a railway to be public and therefore it is impossible to describe the railway line and the ground adjoining it between the places as either a public street, place or thoroughfare. This view is borne out by the case of *Imperatrix* v. *Vanmali and others*(1), where a company which owned a mill on the one side of the B. B. & C. I. Railway and a ginning factory on the other, and whose servants had entered on the Railway premises without permission of the Railway Company to repair a pipe (which had been laid beneath the railway line) and reservoirs (built on each side to preserve the proper level of water), and it was held by this Court that as the pipes and reservoirs belonged to the mill company and were kept in repair by them, they as owners of the dominant tenement had a right to enter on the premises of the railway company, the owners of the servient tenement and effect any necessary repairs, and that the entry in question being in the exercise of that right, could not be called unlawful. The Magistrate in this case had convicted the accused under section 122 of the Railway Act (IX of 1890) and sentenced them to a fine of four annas each. Parsons, J., in delivering his judgment observed: "But it appears to us that as the pipe and reservoirs belong to the (mill) company, and are kept in repair by them, they, as the dominant owners, would have a right to enter on the premises of the Railway Company, the servient owners, to effect any repairs that might be necessary. See the Indian Easement Act, section 24 and Illustration (*a*) and *Colebeck* v. *Girdlers Company* (2). The evidence shows there was such necessity at this time, the flow of the water through the pipe being stopped. An entry in exercise of a right cannot be called unlawful". From this case it follows that an entry upon railway premises not in exercise of a right or by permission of the railway administration would be unlawful: compare *Foulger* v. *Steadman*, (3) where a cab driver was held not justified in refusing

(1) (1896) 22 Bom. 525. (2) (1876) 1 Q. B. D. 234. (3) (1872) L. R. 8. Q. B. 65.

Digitized by Google

to leave the Railway Company's premises when requested on behalf of the company to do so although he believed himself entitled to remain thereon because other drivers did so on payment of certain sums to the Railway Company.

It would be impossible for the Railway Company to work its lines were we to hold that the public should have access to them inside the fences without the permission of the company. The place at which the accused were caught gambling, *viz.*, the Reversing Station (at which from the evidence it is clear the train stopped for engine purposes only) was not a place generally accessible to the public, who would not have any right without the permission of the Railway Company to be on the line at all.

2. The next point to consider is whether the Race Train in which the accused were caught at the Reversing Station was a "public place".

Looking at all the circumstances under which the train was being run and the evidence of Mr. Muirhead I am of opinion that it was not. It was a *Special* train—not bound to run unless a sufficient number of passengers applied, it took no passengers in between Poona and Bombay, and I cannot think that it would be described as a train for the "public" carriage of passengers. At the same time a good deal of the evidence that was given was irrelevant, the point to be decided being whether the train at that place, *i, e,* the Reversing Station could be called a "public place." What it might be at other places between Poona and Bombay seems to my mind irrelevant.

Several cases were referred to in course of the argument. The first was *Langrish* v. *Archer* (1) where it was held that the railway carriage while travelling on its journey was an "open and public place" or "an open and public place to which the public have or are permitted to have access.".

Now if the words in the statute before us were the same as in that, of course the accused would have been rightly convicted, but in the statute there referred to (36 & 37 Vic, c. 38), the words used are "open place to which the public have or are permitted to have access." The judgment of Lord Coleridge shows that if these words had not been used the decision would have been the other way.

In *Ex Parte Freestone* (2) the prohibition (St. 5 Geo. IV, c. 83, s. 4) was from playing or betting "in any street, road, highway or in any other open or public place" and the conviction alleged that the defendants played in an open and public place, to wit, a third class carriage used on the L. B. and S. C. Railway. It was held that the conviction could not be supported as it did not appear that the carriage was then used for the conveying of passengers. There Alderson B. says "these convictions ought to be framed strictly within the words of the Act, the object of which was to prevent nuisances and gambling in the public highways." It was also held that it was consistent with the conviction that the offence might have taken place in the third class carriage which although occasionally used on the Railway was then shunted away in the yard. There however the words used "other open and public place," appear to me to distinguish that case from the present one.

In *Emperor* v *Jusab Ally* (3) Mr. Justice Batty who delivered the judgment says at page 389, referring to 36 & 37 Vic c, 38 and s. 12 of the Bombay Gambling Act; "In these two enactments, however, the offence is, not that the individual members are making a profit at all, but simply that they are carr-

(1) (1882) 10 Q. B. D. 44. (2) (1856) 25. L. J. M. C. 121
(3) [1905] I. L. R. 29 Bom. 386 : 7 Bom. L. R. 383.

Digitized by Google

ying on their gambling with such publicity that the ordinary passer-by cannot well avoid seeing it and being enticed—if his inclinations lie that way-to join in or follow the bad example openly placed in his way. In the one case comparative privacy for profit in the other bad public example and accessibility to the public, would seem to constitute the gravamen of the offence. Thus, the very fact that special accommodation and privacy had been furnished, which would be essential in a case under section 4 of the Bombay Gambling Act, would be a ground for excluding the case from the purview of section 12. If people *gratuitously* allow gambling on their private premises, the law does not interfere with them, presumably because in that case they have no special inducement to tempt outsiders to join them. The law does interfere, however, if, whether for private gain or not, they expose temptation where the general public have a right to come."

In *Khudi Sheikh and others* v. *The King Emperor*(1) it was held that the word "place" as used in section 11 of the Gambling Act, (Bengal Code. 2 of 1867) must be a public place and was *ejusdem generis* with the other words in the section, public market, fair, street or thoroughfare. Consequently a *thakurbari* surrounded by a high compound wall is not a public place as contemplated by that section. In that case the learned Judge says :—"The place must be of the same character as public market, fair, street or thoroughfare. Now the gambling in this case took place within a *thakurbari* surrounded by a high compound wall. It is not a place where any member of the public is entitled to go. The Sub-Divisional Magistrate, who convicted the accused, has held that it is a public place because 'anybody and everybody was allowed to go in and come out'. The ground, as stated by the Magistrate, cannot be supported. Though in a *thakurbari* belonging to a Hindu anybody and everybody would be allowed to go in, yet the owner of the *thakurbari* is entitled to prevent any particular individual going in if he so chooses and as a matter of fact men who are not Hindus are not allowed to go into a *thakurbari*." See also *Durga Prosad* v. *The Emperor* (2). I am therefore of opinion, taking the object of the section before us to be what Mr. Justice Batty says it is the mischief aimed at by that section cannot possibly be said to have risen in the present case. The second class carriage in a Special train in which the accused were playing cannot in my opinion be considered to be a 'public place" within the meaning of the Act. To get to that carriage it would be necessary to trespass upon the line unless the person so doing had permission from the Railway Company to cross the line. It is well-known that persons standing on the line could not possibly see into the carriages in which these people were gambling.

Under these circumstances I am of opinion that to call or describe either the railway line at the spot in question or the carriage in which the accused were playing as coming within any of the terms, "public street, place or thoroughfare" would be to place a wrong interpretation upon those words.

For these reasons I am of opinion that the conviction recorded and sentence passed upon the accused must be set aside. Fine, if paid, to be refunded.

Conviction and sentence reversed.

G. B. R.

---

(1) (1901) 6 Cal. W. N. 33.

(2) (1904) 8 Cal. W. N. 592.

Digitized by Google

1906, *January* 17. I. L. R. 30 Bom. 392.

Before Mr. Justice Russell and Mr. Justice Aston.

EMPEROR *v.* DWARKADAS DHARAMSEY.*

City of Bombay Municipal Act (Bom. Act III of 1888), section 249§—Place of public resort—Theatre.

A theatre is a place of public resort and as such falls within the purview of section 249 of the City of Bombay Municipal Act (Bom. Act III of 1888).

THIS case came before the High Court on a reference made by Karsondas Chhabildas, Esquire, Acting Second Presidency Magistrate, which runs as follows:—

"I have the honour to refer under section 432, Criminal Procedure Code, the following question of law which has arisen in the hearing of a complaint by the Municipal Commissioner for the City of Bombay against defendant Dwarkadas Dharamsey of an offence punishable under section 471 of the Bombay Municipal Act III of 1888, in failing to comply with the requisition of Notice No. 4 of 1905 issued under section 249 of the Bombay Municipal Act III of 1888. The question of law is whether a theatre falls within the purview of section 249 of the Municipal Act, which runs as follows":—

(The learned Magistrate here set out the section and continued:—)

"The defendant Dwarkadas Dharamsey is called upon as owner of the Elphinstone theatre to provide privy accommodation on the said theatre and it is urged on his behalf that under section 249 of the Municipal Act, the Municipal Commissioner is not empowered to call upon the owner or occupier of a theatre to provide privy accommodation and that the issue of such a notice is illegal. It is further urged that the definition of 'other place of public resort' in the said section must be construed *ejusdem generis* with the words preceding. Counsel for the defendant has also quoted Maxwell on the Interpretation of Statutes, page 461, 3rd edition, which says when two or more words susceptible of analogous meaning are coupled together, *noscuntur a sociis*, they are understood to be used in their cognate sense. They take as it were their colour from each other; that is, the more general is restricted to a sense analogous to the less general. The Honourable Mr. Crawford on behalf of the Municipality has on the other hand drawn the attention of the Court to page 475 of the same book which says: Of course the restricted meaning which primarily attaches to the general word in such circumstances is rejected when there are adequate grounds to show that it was not used in the limited order of ideas to which its predecessors belong. If it can be seen from a wider inspection of the scope of the legislature that the general words, notwith-standing that they follow particular words, are nevertheless to be construed generally, effect must be given to the intention of the legislature as gathered from the larger survey.' Under these circumstances the question for consideration is whether 'other places of public resort' should be construed as meaning a place of public resort of any kind or a place of the same kind, as a market, railway station, dock or wharf. In my opinion the words 'other place of public resort' must be construed generally, *i. e.*, as meaning a place of public resort of any kind and not as *ejusdem generis* with the words market, railway station, dock or wharf. In the first place, the words market, railway station, dock or wharf are not *ejusdem generis* and I fail to conceive any place analogous to market, railway station, dock or wharf. In my opinion, therefore, the principles laid down by Maxwell on Interpretation of Statutes on page 461, *viz.*, when two or more words susceptible of analogous meaning are coupled together *noscuntur a sociis* they are understood to be used in their cognate sense, do not apply in this case. If 'other place of public resort' in section 249 is to be construed as a place of public resort *ejusdem generis* with market, railway station, dock or wharf, then those words should be rejected altogether as it is difficult to suggest any places of public resort analogous to market, railway station, dock or wharf. The words 'other place of public resort' being present in that section, the legislature must have intended to have some meaning attached to them. The only reasonable construction that could be placed on those words after taking into consideration the intention of the legislature is that 'other place of public resort' means other place of public resort of any kind. A theatre being a place of public resort falls in my opinion within the provisions of section 249 of the Municipal Act."

---

* Criminal Reference No. 82 of 1905.

§ Section 249 of Bombay Act III of 1888 runs as follows:

"Where it appears to the commissioner that any premises are, or are intended to be used, as a market, railway station, dock, wharf or other place of public resort, or as a place in which persons exceeding twenty in number are employed in any manufacture, trade or business or as workmen or labourers, the Commissioner may, by written notice, require the owner or occupier of the said premises to construct a sufficient number of water-closets or latrines or privies and urinals for the separate use of each sex."

Digitized by Google

The reference was heard by a Bench composed of Russell and Aston. JJ,

Weldon for the Municipality.

H. B. Coyaji for Dwarkadas ;—The expression " other place of public resort " in section 249 of the City of Bomby Municipal Act (Bom. Act III of 1888) does not include a theatre. This is apparent from the wording of the section itself. The places specified therein are (1) market ; (2) railway sta tion , (3) dock , (4) wharf ; (5) a place in which persons exceeding twenty in number are employed in any manufacture, trade or business or as workmen or abourers. These are all places where we expect to find tradesmen or labourers or workmen at work for the greater part of the day, and where, therefore, the necessity contemplated by the section is most likely to arise. We do not find in the section any mention of a place where people meet for two or three hours amusement or entertainment, *e g* , a music hall or a theatre. This contention is borne out by the marginal note to the section, which mentions " factories, &c." ; and we are entitled to have recourse to it, since " the headings prefixed to sections or set of sections in some modern statutes are regarded to sections or set of sections in some modern statutes are regarded as preambles to those sections." (Maxwell on the Interpretation of Statutes, 2nd edition. page 65) The word " theatre " is not used in the section. The omission is significant and shows it must have been a designed omisson. See also *Regina* v *Cleworth*(1).

RUSSELL, J.—In this case the point is whether a theatre comes within section 249, Bombay Municipal Act (Bom. Act III of 1888), as premises used or intended to be used as a market, railway station, dock, wharf or other place of public resort or as a place in which persons exceeding twenty in number are employed, etc The section gives, in such cases, power to the Municipal Commissioner to require the construction of a sufficient number of latrines or water closets or privies and urinals for the separate use of each sex.

Now the construction of the words " place of public resort " or " public place " where they occur in an Act of Parliament must depend on the context and scope and object of the Statute. (*Vide* Encyclopædia of English Law, Vol. 10, p. 97, title " place. ")

What is then the scope and object of section 249 ? It is to provide proper and decent accommodation for persons of both sexes in the way of latrines, urinals. &c., in regard to the places specified in the section. It is, we think, clear that the words " other places of public resort " cover the case of a theatre which is *ejusdem generis* with a railway station : it is impossible to say, and it has not been argued, that the public do not resort to the theatre. Why then should not persons resorting to the theatre be provided with the same accommodation as persons resorting to a railway station. No evidence as to the number of persons employed at the theatre was given, so no point arises as to the second branch of the section.

For these reasons we answer the question sent to us in the " affirmative."

With regard to *Regina* v. *Cleworth*(2) relied on by Mr. Coyaji, the object of that Statute was to prevent certain classes of workmen from working on Sunday.

ASTON, J.—I concur that the answer must be in the affirmative. The places of public resort specified in the sentence preceding the words " or other place of public resort " do not differ *inter se* less than a theatre differs from them. There is nothing therefore in the " *ejusdem generis* " argument. It is

(1) (1861) 4 B. & S. 927. (2) (1861) 4 B. &. S. 927.

Digitized by Google

therefore unnecessary for the purpose of answering this reference to ascertain whether the theatre in question comes under any other category in section 249.

Attorneys for the Municipality :—*Messrs. Crawford, Brown and Co.*

R. R.

1906 *February* 12. **I. L. R. 30 Bom. 421.**

Before Mr. Justice Batty.

EMPEROR *v.* BHASKAR BALWANT BHOPATKAR*.

Criminal Procedure Code (Act V of 1898), section 292—Act X of 1882, sections 289, 292—Adducing evidence—Documents put in during cross examination by the accused of witnesses for the Crown—Right of reply.

During the cross-examination of a witness for the Crown certain documents were put in evidence by Counsel for the accused which were not part of the record sent up to the Court by the Committing Magistrate. No witnesses were called for the defence. The Crown claimed the right of reply.

Held, that as the documents put in during the cross-examination of a witness for the Crown were tendered and relied upon by the defence as distinct from the evidence actually tendered by the prosecution and submitted for cross-examination, they must be regarded as evidence adduced by the accused, and that therefore the Crown had the right of reply.

CASE tried before Batty, J., and a Special jury. The accused who was the editor and publisher of a Marathi newspaper called the "Bhala," was charged under section 124-A of the Indian Penal Code, in connection with the publication in his newspaper of an article entitled "A Durbar in Hell," with attempting to bring the Government into hatred or contempt, and with attempting to excite feelings of disaffection against the Government established by law in British India. During the cross-examination of a witness for the Crown Counsel on behalf of the accused put in certain articles from the "Bhala" as evidence in the case. The articles in question had not been previously tendered by the prosecution, nor did they form part of the record sent up to the High Court by the Committing Magistrate. The case for the prosecution having been closed, Counsel for the accused stated he did not intend to call any witnesses. Counsel for the Crown thereupon claimed the right of reply.

Raikes, Acting Advocate-General, with him *Lowndes* and *Weldon*, for the prosecution.

We claim a right of reply under section 292 of the Code of Criminal Procedure (Act V of 1898). The former Code (Act X of 1882) provided that if the accused stated that he meant to adduce evidence, the prosecution should be entitled to reply, and the different High Courts took different views of the effect of sections 289 and 292 of the former Code: *Queen-Empress* v. *Krishnaji*(1) dissented from in *Queen-Empress* v. *G. W. Hayfield*(2), *Queen-Empress* v. *Moss*(3), *Queen-Empress* v. *Venkatapathi*(4). The only reported case under the new Criminal Procedure Code is *Emperor* v. *Stewart*(5). From this case it appears that the view we are contending for is now adopted by the Calcutta High Court: see Mr. Justice Geidt's judgment. The right of reply is frequently waived by the Crown where the evidence adduced by the accused does not

---

* Case No. 5, First Criminal Sessions, 1906.

(1) (1890) 14 Bom. 436. (2) (1892) 14 All. 212.
(3) (1893) 16 All. 68. (4) (1888) 11 Mad. 339. (5) (1904) 31 Cal. 1050.

Digitized by Google

seriously affect the question and where the Crown is not at a disadvantage in summing up the case. Here the case at the close of the evidence stands where it stood when we opened our case. We have very little more idea of the line of defence to be adopted by Counsel for the accused than we had at the commencement, and as the defence rely on the articles put in during the cross-examination of our witness, we submit we are entitled to hear what the other side have to say with regard to them before we put our case to the jury.

Davar with *Gadgil* for the accused.

The accused has not lost the right of reply. In spite of repeated attempts to snatch that privilege from the accused the Bombay Court has constantly ruled against such attempts. We are not aware of a single case before the High Court Sessions in which the accused person, having put in documentary evidence in the course of the cross-examination of the Crown's witnesses, has forfeited his right of reply.

The authorities are conclusive as far as Bombay and Calcutta are concerned. Section 292 in the amended Code makes the law and procedure more favourable to the accused than the corresponding section in the Code of 1882. Section 289 does not differ in the two Codes.

As to section 292 there is a difference. In the former Code the Court calls upon the accused to say whether he wishes to call any evidence, and if he said he intended to adduce evidence the prosecution got the right of reply. Under the present Code the prosecution does not get that right unless the accused does as a matter of fact adduce evidence.

The meaning of the word "adduce" here is "Are you going to call any witnesses?" or "Are you going to put in any documentary evidence which you have not been able to put in during the case for the prosecution?" It seems to take it for granted that what has taken place before is not adducing evidence: *Hurry Churn Chuckerbutty* v. *The Empress*(1).

[BATTY, J.—Everything turns on the word "Adduce".]

Davar:—Mere formally putting on the record an exhibit in cross-examination is not adducing evidence. It is a distinction which has been the matter of judicial consideration.

Adducing evidence means leading evidence. We could lead evidence independently of the prosecution. The present is not evidence which we adduce.

We are not taking the prosecution by surprise. We put these articles in for the purpose of showing that the accused is no disloyal or disaffected subject of the Crown, but that he has been an impartial critic of Government. *Queen-Empress* v. *Krishnaji*(2) is in our favour, and that ruling has been followed in every case as far as we know in these Courts.

As far as reported cases are concerned we can remember no case in the Bombay High Court where the prosecution have been given the right to reply when documents only have been put in by the defence.

It has been laid down that when during the cross-examination of witnesses for the prosecution certain documents were put in on behalf of the accused, this did not entitle the prosecution to the right of reply. That procedure has been followed in this case. The legislature does not intend by the word "Adduce" to include documents merely put in. It is not substantial evidence and the Crown is not entitled to a reply unless we give substantial evidence.

(1) (1883) 10 Cal. 140. (2) (1890) 14 Bom. 436.

Digitized by Google

The section means that evidence has to be adduced on behalf of the accused with a view to shatter the evidence given by the prosecution witnesses.

Raikes in reply.

In this matter one must be guided by the Code and we submit that by the Code we have the right to reply. Compare the new with the old section. Under the old section the test was whether the accused when asked said that he was going to adduce evidence. Under the new section it says: "If the accused adduces any evidence." That very significant word "any" has been introduced into the new Code. Can it be said that putting in documents is not adducing "any" evidence? The legislature has done its best to make the matter clear by putting in that word. If merely a formal document were put in that would not take from the accused the right of reply. When a substantial mass of documents is put in which have not been read to the jury, it amounts, we submit, to adducing evidence. The only reported case bears out our contention.

BATTY, J.:—The original provision of the legislature was to make the right of reply dependent, not upon the actual adducing of evidence, but upon the accused's statement that he intended to adduce evidence. The ruling in *Hurry Churn Chuckerbutty* v. *The Empress*(1) with reference, to that provision laid down the principle, that both sides should have the opportunity of commenting upon the evidence of the other, so that no additional advantage should be given to either. I think that unless the phrase "adduces any evidence" applies to and includes the production and recording of documentary evidence which the defence places before the Court, it has no definite meaning at all. And evidence, therefore, which has been put in or is tendered and relied upon by the defence as distinct from the evidence actually tendered by the prosecution and submitted for cross-examination, must be regarded as evidence adduced by the accused. I think therefore that the amended section is intended to give a right of reply whenever at any stage, evidence is recorded for the defence which is not part of that adduced for the prosecution. The section makes the right of reply dependent upon the fact of evidence having been adduced. Earlier decisions relate only to a state of law which made the right of reply dependent on accused's statement as to his intention to adduce evidence, and those decisions have now no application. To adduce evidence is to lead evidence, and while the legislature recognized it as a hardship that the accused should be deprived of a right of reply by merely stating that it was intended to adduce evidence which eventually was not adduced at all, it clearly expressed its intention to give the prosecution the right of reply whenever evidence has actually been put in for the defence, which was not led by the prosecution. The words of the present section suggest that the legislature approved and adopted the principle laid down in I. L. R. 10 Calcutta (1), that each side should have an opportunity of commenting upon the evidence of the other side. I therefore hold that the Crown has in this case the right of reply.

W. L. W.

---

(1) (1883) 10 Cal. 140

Digitized by Google

1906. *April* 21. I. L. R. 30 Bom. 558.

Before Mr. Justice Russell and Mr. Justice Batty.

THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY *v.* MATHURABAI.*

The City of Bombay Municipal Act (Bom. Act III of 1888), section 3, clauses (w), (x) and (y),§ section 461—Building Byelaws Nos. 40, 42 *—Street —Construction.

The owner of a large plot of ground abutting on a highway divided the plot into 19 small plots and sold them to different purchasers. These plots were mapped out as abutting on the sides of two parallel roads which were marked out as proposed roads. Each of the purchasers of the plots entered into a covenant with the owner to keep open that portion of the proposed road which stood in front of his plot and to prepare so much of the road. The question arose whether the proposed road was a street within the meaning of the City of Bombay Municipal Act (Bombay Act III of 1888):—

Held, that the proposed road would constitute a street within the meaning of the City of Bombay Municipal Act (Bombay Act III of 1888).

THIS was a reference made by Chunilal H. Setalwad, Acting Fourth Presidency Magistrate of Bombay, under section 432 of the Criminal Procedure Code (Act V of 1898).

The reference was in these terms :

" One Tribhovandas Mangaldas was the owner of a large plot of land opening or abutting on its south side on the Girgaon Back Road. About two years ago he divided this large plot of land into 19 small plots in three rows and sold them to different purchasers. He expressly covenanted with each of the purchasers that in front of each plot and open space should be left unbuilt upon or unblocked in any way in order to enable the owners of the other plots and their

---

* Criminal Reference No. 7 of 1906.

§ The City of Bombay Municipal Act (Bombay Act III of 1888), section 3, clauses [w], (x) and (y) run as follows :—

(*w*) " Street " includes any highway and any causeway, bridge, viaduct, arch, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not, over which the public have a right of passage or access or have passed and had access uninterruptedly for a period of twenty years ; and, when there is a footway as well as a carriageway in any street, the said term includes both ;

(*x*) " public street " means any street heretofore levelled, paved, metalled, channelled, sewered or repaired by the Corporation and any street which becomes a public street under any of the provisions of this Act.

(*y*) " private street " means a street which is not a public street.

* *Building Bye-laws Nos. 40 and 42* are as follows :—

40. In every case—

Where a person who shall erect a building, shall at any reasonable time during the progress or after the completion of the erection of such building, receive from the Engineer notice in writing specifying any matters in respect of which the erection of such building may be in contravention of any bye-law relating to new buildings and requiring such person, within a reasonable time which shall be specified in such notice, to cause anything done contrary to any such bye-law to be amended, or to do anything which by such bye-law may be required to be done, but which has been omitted to be done.

Such person shall, within the time specified in such notice, comply with the several requirements thereof, so far as such requirements relate to matters in respect of which the erection of such building may be in contravention of any such bye-law.

Such person, within a reasonable time after the completion of any work which may have been executed in accordance with such requirement, shall deliver or send or cause to be delivered or sent to the Engineer, at his office, notice in writing of the completion of such work.

42. Every person who shall commit any breach of any of the foregoing bye-laws shall be, punishable with fine which may extend to twenty rupees, and in the case of a continuing breach with fine which may extend to ten rupees for every day after conviction for the first breach or after receipt of written notice from the Commissioner to discontinue the breach, during which the breach continues.

Digitized by Google

tenants to have access to their property. Exhibit I is the conveyance and exactly similar conveyances are made with the purchasers of other plots. A reference to the plan attached with Exhibit No. 1 will show that a road of 16 feet width (marked proposed road on the plan) was left between two rows of plots. The defendant's plot is No. 15 on this plan and the place in front of it is marked red. Most of these plots, including the defendant's plot, have been built upon. Thus there is a road of 16 feet width having rows of buildings on either side and which are occupied by the owners of these buildings and their tenants who make use of this road. There is a road nearly parallel to this road of the same nature and similarly made and there are cross roads between these two. The length of the road in question is about 260 feet. At the south end it joins the Girgaon Back Road. At the north end of it there is a wall and there is no passage on that side. It is an admitted fact that on the original large plot the public had no right of access and now these new roads that are made are meant only for the use of the owners of the building on either side of them and their tenants; the public at large have no right of access to them.

"The said Mathurabai on being desirous of building a house on her plot submitted plans and specifications to the Municipal Commissioner on the 6th April 1905 as required by section 337 of the Bombay Municipal Act. The Municipal Commissioner while disposing of the plans and specification took among others the following objection, 'the building will be more than one and a half times the width of the street it abuts on.'

"Notwithstanding this intimation of disapproval the defendant continued the erection of her building and erected the same to a height of 32 feet, 9 inches. So a requisition under Bye-law 40, dated 16th October 1905, was served upon the defendant calling upon her to amend the work done by her. This requisition being ignored the present prosecution was commenced.

"The point of law that arises under the above circumstances is :—

"Whether the road like the 16 feet wide road marked 'proposed road' on the plan attached to Exhibit No. 1 and also on the block plan on which the defendant's building abuts, which has buildings on either side of it but over which the public have or had no right of passage or access is a 'street' within the meaning of the Bombay Municipal Act.

"A number of authorities have been cited on both sides which appear in the notes of proceedings. It is contended on behalf of the prosecution that section 3 (*w*) of the Bombay Municipal Act III of 1888, is not an exhaustive definition of the word 'street' but it is an extension of its ordinary, popular and natural meaning, and that the ordinary, popular and naturale maning implies a way or space having houses more or less contiguous on both sides, and that therefore the road in question is within the meaning of the section. It is contended on behalf of the defence that 'street' conveys an idea that the public ought to have a right of access and which right can be acquired either by dedication or prescription; which is not the case here. It is also contended that the words 'over' which the public have a right of passage, &c,' show that the legislature intended to refer to streets over which the public had a right of way inasmuch as even the extended meaning of the word is qualified by such a proviso.

"I submit that the road in question is a 'street' within the meaning of the Bombay Municipal Act. The word 'street' is to be taken in its ordinary, popular and natural sense as denoting a roadway having or intended to have buildings on either side, at all events on one side.

Digitized by Google

"The fact that under section 3 (*w*), which is an interpretation clause, street *includes* highway, &c, which would not ordinarily be described as streets does not prevent the word from having its ordinary, popular and natural sense. (*Pound* v. *Plumstead Board of Works*, L. R. 7 Q. B. pages 192—195.) The language of the definition in section 3, clause (*w*) is made to include certain other things but it does not exclude that which independently of such enactment would be a street. Then the question practically resolves itself into what the ordinary, popular and natural meaning of the word 'street' is. I submit that it is not confined to streets over which the public have acquired a right to pass or repass either by dedication or prescription. (*Vestry of St. Mary, Islington* v. *Barrett*, L. R. 9 Q. B. 283, 284; and *Midland Railway Company* v. *Watton*, L. R. 17 Q. B. D., pages 39, 40 and 42.)

"In this case there is a large block of land in the middle of the town. It is laid out in rows of houses with "ways" between them opening direct into a public street at one end. The owners and occupiers of these houses are taking advantage of the public roads and facilities afforded by Municipal Government. I submit that the 'ways' which provide access to these houses to and from the public road are private streets. They are certainly 'way' in a city bounded on each side by houses and as such come within the definition of 'street' in the Imperial Dictionary, quoted with approval by Jessel M. R. in *Taylor* v. *Corporation of Oldham*, L. R. 4 Ch D, page 408. This view is also supported by a reference to Stroud's Judicial Dictionary. In *George Robinson* v. *The Local Board for the District of Barton Eccles*, L. R. 7 App. Cas. at page 801, Earl of Selborne, L. C., said: 'In the natural and popular sense of the word street I should certainly understand a roadway with buildings on each side (it is not necessary to say how far they must or may be continuous or discontinuous)'. Obvious mischief, I submit, would be occasioned if such 'ways' were not held to be streets.

"*Kalidas* v. *The Municipality of Dhandhuka*, I. L. R. 6 Bom. p. 686, and *Re Gulabdas Bhaidas*, I. L. R. 20 Bom., which have been decided upon the definition of street in the District Municipal Act VI of 1873, and which have been cited by the defence seem to create some doubt and difficulty, but at the same time I submit that they are distinguishable."

At the commencement of arguments, Mr. Justice Russell suggested that the question was not clearly framed by the Magistrate. His Lordship therefore formulated the question as follows:—

"Whether the vacant space in front of Mathurabai's house when and if laid out as a means of passage with houses on both or either side of it and if used as such by the occupiers of such houses and not by the public generally will constitute a 'street' within the meaning of the City of Bombay Municipal Act, 1888."

Raikes (acting Advocate General) instructed by *Unwalla and Phirozshah*, for the defendant:—We contend that the road marked "proposed road" is not a "street' within the meaning of the City of Bombay Municipal Act (Bombay Act III of 1888). The earliest meaning of the word "street" refers to the surface of the ground being prepared in a particular manner and the word has not lost that meaning. Speaking from a historical point of view the word "street" in the very first instance means a made road. Here the "proposed road" will not be a street unless it is made into a road. The mere fact that there are houses and there is a space between them will not make it a street.

The next point and the real point to consider is whether 'street' in the

Digitized by Google

ordinary sense of the term does not connote the place to which the public have access. The "road" in this case does not come within the definition of the word "street" as given in section 3 (*w*) of the City of Bombay Municipal Act (Bombay Act III of 1888). Everything which is included in the definition of "street" is a place "over which the public have a right of passage or access or have passed and had access uninterruptedly for a period of twenty years."

Counsel cited *Pound v. Plumstead Board of Works*(1); *Vestry of St. Mary, Islington* v. *Barrett*(2); *Taylor* v. *Corporation of Oldham*(3): *Midland Railway Company* v. *Watton* (4); *Robinson* v. *Local Board of Barton-Eccles*(5) *Arter* v. *Vestry of Hammersmith* (6); *Queen* v. *Fullford* (7); *Hall* v *Corporation of Bootle*(8), *Galloway* v. *Mayor and Commonalty of London* (9). *Bourke* v, *Davis* (10).

It comes down to this. What is a street? According to the ordinary connotation of the term, one of the things which the street connotes is the place to which the public have access, and this ingredient is absent in the present case.

Lowndes (instructed by *Crawford, Brown and Co.*) for the Municipal Commissioner;—The definition of the term "street" in the City of Bombay Municipal Act (Bombay Act III of 1888) is not exhaustive. It runs:—street "includes," etc. The fact that the term "includes" some things does not at all touch the ordinary meaning which the term bears. It is made to 'include' in Acts of Legislature only for convenience of expression. The Act defines "street," "public street" and "private street" side by side. In the first the term "includes" is used: whereas in the two latter terms the word "means" is used.

What is the ordinary meaning that is assigned to the word "street"? It is a road public or private having houses continuous or discontinuous on one or both sides. In the common use 'street' means a little bit of ground in front of one's house. It does not necessarily imply publicity: and it is immaterial whether it is public or private. Ordinarily, it means a roadway within town limits having houses at least on one side and it is immaterial whether it is public or private. Is there, then, anything in the City of Bombay Municipal Act 1888, which says that the ordinary meaning should not be attached to the term "street?

Raikes was heard in reply.

RUSSELL, J.:—This is a special case stated by the Acting Fourth Presidency Magistrate, Bombay, but inasmuch as the question as put by him did not exactly meet the case, the following question was formulated by the Court with the consent of the parties, *viz.*—

"Whether the vacant space in front of Mathoorabai's house when, and if, laid out as a means of passage with houses on both sides and when, and if, used as such by the occupiers of such house, and not by the public generally, will constitute a street within the meaning of the Bombay Municipal Act." (Bombay Act III of 1888).

The facts stated shortly are as follows:—

The Municipal Commissioner for Bombay laid a complaint against defendant Mathoorabai for an offence punishable under the Building bye-law No.

(1) (1871) L. R. 7 Q. B. 183, 192. (2) (1874) L. R. 9 Q. B. 278. (3) (1876) 4 Ch. D. 395, 408. (4) (1886) 17 Q. B. D. 30. (5) (1883) 8 App. Cas. 798. (6) [1897] 1 Q. B. 646. (7) (1864) 33 L. J. M. C. 122. (8) (1881) 44 L. T. (N. S.) 873. (9) (1865) L. R. 1 H. L. 34, 55. (10) (1889) 44 Ch. D. 110.

Digitized by Google

42, she being the purchaser of a plot No. 15, from one Tribhovandas Mangaldas It appears that this Tribhovandas owned a large plot of ground abutting on the south side of the Girgaum Back Road and about two years ago he divided this plot into 19 small plots and sold them to different purchasers. Each purchaser entered into a covenant in similar terms, *mutatis mutandis*, as Mathoorabai. She was the purchaser of plot No. 15, and covenanted with the vendor as follows :—

"And the purchaser doth hereby for the benefit of the owners and occupiers of all the other plots specified on the said plan hereto annexed, covenant with the said vendor that she, the purchaser, shall not build upon or block in any way whatever and leave open to the sky such portion of the said piece of land as is marked as the "proposed road" on the said plan hereto annexed, and which contains by admeasurement 54 square yards and 66 hundredths of a square yard but shall use the same as a road only and shall at her own expense prepare and pave and metal and otherwise keep the same in proper repair and order and shall allow the owners and occupiers for the time being of the other plots specified on the said plan and their agents and servants and all and every other persons or person for the benefit and advantage of such owners and occupiers full and free right and liberty from time to time and at all times hereafter at his and their will and pleasure by night and by day and for all purposes to go, return, pass and repass with or without horses, carts, wagons and other carriages laden or unladen and also to drive cattle and other beasts in, through, and over the said road to and from the said plot No. 15." The words above set out "and all and every other persons or person for the benefit and advantage of such owners and occupiers" give at all events a limited right of access to the public over the road marked, although we are told that the "proposed road" is to be, it appears, *a cul de sac*.

Mathoorabai being desirous of building a house on her plot No. 15, submitted plans and specifications to the Municipal Commissioner in April 1905. The Municipal Commissioner while disposing of the plans and specifications took amongst others the following objection : —

"That the building will be more than one and a half times the width of the street it abuts on".

The proposed street or road was to run in front of Mathoorabai's house and was to have houses on either side of it. But the public were to have no right of access over the said street or road. Notwithstanding the intimation of disapproval by the Municipal Commissioner, Mathoorabai continued her house and erected it to the height of 32 feet 9 inches, the width of the proposed road being 16 feet, this height was obviously more than one and half times the width of the street.

Section 3 [clauses (*w*), (*x*) and (*y*)] of Bombay Act III of 1888 provides as follows :—

"(*w*) 'Street' includes any highway and any causeway, bridge, viaduct, arch, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not, over which the public have a right of passage or access or have passed and had access uninterruptedly for a period of twenty years; and when there is a footway as well as carriage-way in any street, the said term includes both."

(*x*) 'Public street' means any street heretofore levelled, paved, metalled, channelled, sewered or repaired by the Corporation, and any street which becomes a public street under any of the provisions of this Act."

Digitized by Google

"(y) 'Private street' means a street which is not a public street."

The main question argued by Mr. Raikes was that inasmuch as the public had and were to have no right of access over the "proposed road or street", it did not fall within the definition of "street" as above set forth.

Mr. Lowndes for the Municipality contended on the other hand that the word "street" was not defined by clause (w) but "included (as was shown by the use of the word 'includes') any high-way and any cause-way," etc., etc. The Act moreover had defined "public street" and "private street" in clauses (x) and (y) by using the word "means," for these clauses say "public street" means § § § § and "private street" means. § § §

Now, firstly it is to be observed that "includes" is a phrase of extension, and not of restrictive definition. It is not equivalent to "means," *The Queen* v. *Kershaw* [1]; *The Queen* v. *Hermann* (2). But as said by Lord Watson:—"'include' is very generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. Bot the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expression defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of Act must invariably be attached to these words or expressions." *Dilworth* v. *Commissioners of stamps*(3). The draftsman of the Bombay Municipal Act was fully aware of the difference between "include" and "mean", and we are of opinion that he used the word "include" in the above clause (w) in order to enlarge the meaning of the word "street" which, having before him the example of various Judges in England, he was careful not to define. From this it follows that the word "street" must receive the ordinary common sense interpretation which (if we may use a colloquial expression) would be put upon it by "the man in the street".

Before however dealing with the numerous cases which were cited to us as to the meaning to be put on the word, we would point out that if the argument of the Advocate General were to prevail, the definition of "private street" would appear to be a contradiction in terms. For if "street" must in this Act always be associated with "publicity" then no street could be private.

That this is the right construction to be put upon the word "street" by itself, appears from the following cases:—In *Robinson* v. *Local Board of Barton-Eccles*,(4) the Earl of Selborne L. C., at page 801 in dealing with the words in the statute "includes" and "shall apply to and include", says as follows:—"An interpretation clause of this kind is not meant to prevent the word receiving its ordinary, popular, and natural sense whenever that would be properly applicable: but to enable the word as used in the Act, when there is nothing in the context or the subject matter to the contrary, to be applied to some things to which it would not ordinarily be applicable." Again he says (page 801) "In the natural and popular sense of the word 'street' . . . . . I should certainly understand a road-way with buildings on each side (it is

[1] [1856] 6 E. & B. 999 at p. 1007. [2] (1879) 48 L. J. M. C. 106; 4. Q. B. D. 284.
(3) [1899] A. C. 99 at pp. 105—106. (4) (1883) 8 App. Cas. 798.

Digitized by Google

not necessary to say how far they must, or may be continuous or discontinuous)". Again Jessel M. R. in *Taylor* v. *Corporation of Oldham*,(1) says:—"The definition of a 'street' is thus laid down in the Imperial Dictionary: 'A street is properly a paved way or road; but in usage, any way or road in a city, having houses on one or both sides.' Now, tried by that test, this is a street: it has houses on both sides of it, and therefore, in common parlance, it is a street. It is really a street. Supposing that were wrong, I find 'street' is to include 'road and this certainly is a road". Again in *Robinson* v. *Local Board Barton-Eccles* cited *supra*, Lord Blackburn says, page 809, that "street" in the ordinary and popular sense of the word, was a high-way with houses on each side. But in the case of *Corporation of Portsmouth* v. *Smith*(2) it was held by Brett M. R. that the word "street" when popularly used meant a thoroughfare bounded on one or both sides by houses. That case was affirmed in the *Mayor etc., of Portsmouth* v. *Smith* (3), in which Lord Blackburn delivered the first opinion. He did not take objection to the definition above given by Brett M. R. With regard to the remark of Brett M. R. above quoted it may be said that "roadway ought th have been the word he should have used instead of "thoroughfare" for a *cul-de-sac* is a "street" and may be a "public street". See *Souch* v. *East London Railway Company*(4) and *Davis* v. *Board of Works for Greenwich District* (5).

With regard to the Bombay cases which were cited, *viz*, *Kalidas* v. *The Municipality of Dhandhuka* (6) it need only be remarked (1) that the court there in question was not used as a thoroughfare but only as a means of access to the houses which surrounded it by persons who had business with the householders, (2) no reference was made to the definition of "street" in the Bombay District Municipal Act VI of 1873 which "shall include . . . . any court, . . . whether a thoroughfare or not". Similar remarks apply to *In re Gulabdas Bhaidas*,(7) while in the case of *The Ahmedabad Municipality* v. *Manilal Udenath*,(8) in the issue sent down involved the question what constitutes a "public street" within the contemplation of Bombay Act VI of 1873; and "public street" had not been defined in that Act as it has been in the Bombay Municipal Act 1888.

That being so, we have come to the conclusion ahat the question we have to decide as formulated by us, must be answered in the affirmative. We would moreover wish to cite the very apposite passage in *Taylor v, Corporation of Oldham*,(1) at page 408. Jessel M. R. says as follows:—"The owners of these private Courts and alleys are, of all people in the world, the most averse to laying out money in sanitary works. It is in these places that the poor live, the very people who suffer most from the want of sewerage and drainage, which are so requisite for public health. It is to be imagined that the Legislature intended to except such places as these from the operation of the Act? I should say if the Act were passed for anybody, it must have been meant to include these owners, who, for the sake of gain and aquiring high rents in proportion to the anual value of the wretched tenements they allow the poor to occupy, neglet ordinary and necessary sanitary precautions. If I were to interpret it by what I might think to be the mind of the Legislature, I should suppose that the first people to be included would be the owners of these crowded courts and alleys, over which the public have no strict rights whatever, but which are intended to be used for the dwellings of the poor, and are unprovided

(1) (1876) 4 Ch. D. 395 at p. 408. (2) (1883) 13 Q. B. D. 184. (3) (1885) 10 App. Cas. 364.
(4) (1873) L. R. 16 Eq. 108. (5) [1895] 2 Q. B. 242. (6) (1882) 6 Bom. 686.
(7) (1894) 20 Bom. 83. (8) (1894) 20 Bom. 146.

Digitized by Google

with what, according to modern science, is known to be absolutely necessary for their well-being."

We have no evidence before us of the class of persons who are to occupy Mathoorabai's house, but whether they be poor or well-to-do, they are equally entitled to what in Bombay is "absolutely necessary for their well-being," namely, light and air, as for many purposes the Bombay City Municipal Act is a Public Health Act.

The case accordingly will be remanded to the Magistrate to be dealt with by him according to the law in the light of the above judgment.

BATTY, J.—I have nothing to add.

R. R.

1906. *August* 30. I. L. R. 30 Bom. 611.

Before Mr. Justice Aston and Mr. Justice Beaman.

EMPEROR *v.* KOTHIA VALAD NAVALYA BHIL.*

Criminal Procedure Code (Act V of 1898), sections 337, 338—Accomplice—Pardon—Grant of conditional pardon—The pardoned accomplice giving full and true story of the crime, but retracting it in cross-examination before the Sessions Court—Order of Sessions Court to Committing Magistrate to withdraw the pardon—Forfeiture of pardon—Trial of accused for the offence—Commitment—Conviction on his plea of guilty—Irregularity—Illegality—Practice. and Procedure.

The accused was one of several persons accused of murder. He accepted a tender of pardon made to him by the Committing Magistrate on the conditions set out in section 337 of the Criminal Procedure Code. He was examined as a witness for the Crown before the Committing Magistrate, and he made a full and true disclosure of the whole of the circumstances within his knowledge relating to such offence. He repeated them in his examination-in-chief before the Sessions Judge, but resiled from his statements in cross-examination. At the conclusion of the trial, in which the accomplices were convicted of murder, the Sessions Judge sent the pardoned accomplice in custody to the Committing Magistrate with an order directing that he should be committed for trial for the same murder. The Magistrate accordingly withdrew the pardon and committed the accused to the Sessions Court to take his trial for the murder aforesaid. The Sessions Judge convicted the accused of murder on what was discribed as his plea of guilty and was sentenced to transportation for life. On appeal,

Held, by Aston, J., that the Sessions Judge had no authority under the Code of Criminal Procedure to order the accused to be committed for trial for the murder in respect of which a pardon had been tendered; and further, that the accused's trial was conducted with material irregularity which seriously prejudiced the accused and occasioned a failure of justice.

Held, by Beaman, J., that the Sessions Judge, who presided at the first trial, had no power to make the order purporting to have been under section 339 of the Criminal Procedure Code, directing the commitment of the accused on the ground that he had forfeited his pardon; and that the procedure adopted was both wrong and illegal.

Per Aston J.—It is open to a pardoned accomplice, if placed on trial as an accomplice who has *forfeited* the pardon already accepted by him, to plead in bar of trial that he did comply with the condition on which the tender of pardon was made, and such plea in bar of trial would have to be gone into and decided before the accused is called on to enter his plea in defence to the charge of having committed the offence in respect of which the pardon was tendered.

Section 339 of the Criminal Procedure Code does not enact that a person who has accepted a tender of pardon, renders himself liable to be tried for the offence in respect of which pardon was tendered, if he gives false evidence; what the section says is that he renders himself so liable (or forfeits the pardon) if by giving false evidence he has not complied with the condition on which the tender was made.

Per Beaman J.:—At the termination of the trial in which the pardon was given, the accomplice must be discharged by the court. Then if so advised, the Crown may re-arrest and proceed against him for the offence in respect of which he was given a conditional pardon. When put upon his trial for that offence, he may plead to a competent Court his pardon, in bar. And

* Criminal Appeal No. 268 of 1906.

Digitized by Google

that is a plea that the Court would be bound to hear and decide upon before going further and putting him on his defence. In deciding it the Court would have to raise the issues whether he had or had not complied with the conditions of the pardon, whether he had or had not made a full and true disclosure of the whole facts. And where after having admittedly done that he had at a later stage recanted, that recantation amounted to giving false evidence within the meaning of section 339 of the Criminal Procedure Code, and worked a forfeiture of the pardon.

APPEAL from conviction and sentence recorded by R. S. Tipnis, Sessions Judge of Khandesh.

The facts of the case were briefly as follows:

One Amiruddin was formerly Karbhari to the Chieftain of Gangtha (Chikli) Estate, but had left his service and was living at Bhaver near Talvada. He was murdered on the night of the 4th December 1904 and for a long time the Police were without a satisfactory clue. At last Kothia (the present accused) was induced by the promise of pardon to confess that he in company with one Godia Vanji and five others had murdered the deceased.

Kothia was accordingly offered under section 337 of the Code of Criminal Procedure (Act V of 1898) a full pardon by the Commiting Magistrate, on condition of his giving a full and true account of the circumstances within his knowledge relating to the offence.

The pardoned man (Kothia) then gave what appeared to have been a true account before the Magistrate and before the Sessions Judge but when cross-examined in the Sessions Court he stated that the account he had given was false and he had been told by the Police to give it.

The Sessions Judge at the end of the trial, which resulted in the conviction of all the accused, passed an order under section 339 of the Code of Criminal Procedure (Act V of 1898) ordering Kothia to be tied for the murder, and sent him to the Committing Magistrate.

The Committing Magistrate revoked the pardon tendered to the accused and held proceedings for his commitment.

The accused admitted before the Committing Magistrate that he first gave a true statement and then declared it was false; but stated that he was told to do so by the pleader for the defence.

The Magistrate then charged the accused Kothia with committing an offence under section 302 of the Indian Penal Code (Act XLV of 1860) and committed him for trial to the Sessions Court.

In the Sessions Court the accused pleaded guilty of the offence of murder. The learned Sessions Judge convicted the accused on his own plea of guilty and sentenced him to suffer transportation for life. His reasons for accepting the plea of guilty were as follows:—

"The cancellation of the pardon once granted to the accused was within the authority of the Sessions Court. It cannot now be questioned, nor can the accused escape from the consequences of his crime by pleading that he forfeited that pardon in consequence of bad advice. In any case it is not an extenuation of the offence.

"Perhaps his trial for giving false evidence might have sufficed the ends of justice, more especially as I find that the record discloses that the present accused took a subordinate part in the muder, and it was through utter foolishness more than anything else that he forfeited his pard ‹

The accused appealed to the High Court against this conviction and sentence.

M. M. Karbhari (*amicus curiæ*) for the accused:—The procedure adopted by the Sessions Judge was illegal. He had no power to send the accused in custody to the Committing Magistrate or to detain him in custody after the termination of the trial. Section 337 clause 3, Criminal Procedure

Digitized by Google

Code, provides that the accused who has been tendered a pardon should be detained in custody until the termination of the trial. Section 476 of the Code does not apply, because powers under that section are only to be exercised in cases of those offences enumerated in section 195 of the Code.

There is no provision in the Code which indicates what Court is competent to forfeit the pardon, under section 339. Generally the sanction of the High Court should first have been obtained under section 339, clause (3), to show that the approver has given false evidence and that the pardon should therefore stand forfeited. There are no doubt decided cases showing that the Court granting the pardon can revoke it, but the words used in section 339 are "by giving false evidence," and not, "by giving evidence which in the opinion of the Court tendering the pardon is false."

Now a pardon can only be forfeited if the approver has not complied with the conditions on which the tender of pardon was made. Mere giving false evidence is not enough. Here the accused has no doubt admitted giving false evidence in his cross-examination, but this is not enough for the purposes of sections 337 and 339. Take the case of an apurover deliberately making a statement implicating himself as well as the orher accused persons; and it is subsequently found that he gave false evidence in order to screen himself or some other person or persons, against the accused, then that case is covered by sections 337 and 339, Reading sections 339 and 337 together we see that if the approver by wilfully concealing anything essential or by giving false evidence does not make a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence, &c, he forfeits his pardon and is liable for being tried for the principal offence. In this case the disclosure made by the accused before the committing Magistrate and in his examination-in-chief is relied upon in the principal case and is there held to be full and true, and all that the accused is charged with doing is that he withdrew his statement in his cross-examination before the Court of Sessions. Now apart from the fact of his being guilty of giving false evidence, if the disclosure is believed to be full and true then I submit the accused does not forfeit pardon. He may be liable to be tried for giving false evidence, but he cannot on that account be said to have forfeited his pardon and rendered himself liable to be tried for the principal offence.

The Government Pleader for the Crown :—The withdrawal of the pardon should be made under section 339, Criminal Procedure Code, by the Court that granted it : *Queen-Empress* v. *Manick*(1) and *Queen-Empress* v *Ramasami*(2). After the termination of the trial in which the present accused was an approver, the accused was sent to the Committing Magistrate who had tendered the pardon. The pardon was withdrawn by the proper authority, *viz.*, the Magistrate who tendered it, and hence there was no bar to the trial of the present appellant.

The appellant has no doubt made a full and true disclosure, but at the same time he has given evidence in his cross-examination which he admitted to be false and hence he forfeits the pardon under section 339 of the Criminal Procedure Code.

ASTON, J. :—The appellant, a Bhil named Kothia valad Navalya, was one of the persons accused of murder in the case of *King-Emperor* v. *Godia and 5 others*. He accepted a tender of pardon made to him by the Committing Magistrate on the conditions set out in section 337 of the Criminal Proc-

(1) (1897) 24 Cal. 492. (2) (1900) 24 Mad. 321.

Digitized by Google

edure Code (Act V of 1898), and was examined as a witness for the Crown at the trial of his accomplices in the Sessions Court of Khandesh, for an offence of murder.

At the trial he according to the case presented by the learned Government Pleader for the Crown in the appeal now before us, made "a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence, and to every other person concerned, whether as principal or abettor, in the commission thereof" and so far had fully complied with the condition on which pardon was tendered and accepted.

The Sessions Judge nevertheless, at the conclusion of the trial of the abovementioned case in which the accomplices were convicted, sent the pardoned accomplice Kothia (present appellant) in custody to the Committing Magistrate with an order directing that he should be committed for trial for the same murder.

This order, which purports to have been made under section 339 of the Code of Criminal Procedure, was made because this pardoned accomplice after fulfilling the statutory conditions on which the tender of pardon was made and accepted, had on a later date, and in cross-examination resiled from his statement made in examination-in-chief having, as this Bhil approver alleged, been meanwhile suborned by a Nandurbar Pleader.

The result of this order is that after the further step was taken of getting the pardon "withdrawn" by the Magistrate who had tendered it, this approver was committed to the Sessions Court to take his trial for the murder aforesaid and was convicted of murder on what is described as his plea of guilty and has been sentenced to transportation for life.

Against this conviction and sentence he appeals to this Court and his main ground of appeal is that faith has not been kept with him, because although it is true that he did under evil influence give false evidence when cross-examined, he had in fact already fulfilled the conditions on which he had accepted the tender of pardon.

Under section 337, Criminal Procedure Code, a conditionally pardoned accomplice if not on bail be detained in custody until the termination of the trial, and in the present appeal the authority of the Sessions Judge to order at the close of the trial such approver to be discharged from custody, has not been questioned. It is, I think, open to argument whether if a Sessions Judge is of opinion that the pardon has become forfeited, he has not also authority to order a conditionally pardoned accomplice to be remanded in custody until the proper authority has had reasonable time to decide whether further proceedings are to be taken against him from the stage where his prosecution was interrupted by the tender of pardon. But the learned Government Pleader has not attempted to justify the Sessions Judge Mr. Giduimal's order directing the prosecution of the present appellant, an order purporting to be made under section 339 but for which that section gives no authority.

It has however been contended that as the pardon was "withdrawn" by the proper authority, namely, the Magistrate who tendered it, there was no bar to the trial of the present appellant and the cases *Queen-Empress* v. *Manick Chandra Sarkar*(1) and *Queen-Empress* v. *Ramasami*(2) were cited in support of this contention.

But there is no provision in any of the sections of the Code for cancelling,

(1) (1897) 24 Cal. 492. (2) [1900] 24 Mad. 321.

Digitized by Google

or revoking, or withdrawing a pardon, Section 339 of the earlier Code Act X of 1882 as amended by Act V of 1898 no longer contains the word *withdrawn*. It contemplates a pardon being *forfeited* under that section, but neither in this section nor in any other part of the Code is it enacted that the forfeiture of a pardon depends upon the opinion of the Judge or Magistrate trying a case in which the conditionally pardoned accomplice has agreed to make a full and true disclosure.

It is therefore open to a pardoned accomplice, if placed on trial as an accomplice, who has *forfeited* the pardon already accepted by him, to plead in bar of trial that he did comply with the condition on which the tender of pardon was made, and such plea in bar of trial would have to be gone into and decided before the accused is called on to enter his plea in defence to the charge of having committed the offence in respect of which the pardon was tendered.

The Sessions Judge (Mr. Tipnis), who convicted the appellant, was therefore doubly wrong in ruling (1) that " the cancellation of the pardon once granted to the accused was within the authority of the Sessions Court " and (2) that " it cannot now be questioned ".

The record shows that the position of the appellant was not explained to him as to this, before he was called upon to make his plea in defence and was convicted of the murder in respect of which a pardon had been tendered conditionally.

The first paragraph of section 339, Criminal Procedure Code, runs as follows :—" Where a pardon has been tendered under section 337 or section 338, and any person who has accepted such tender, has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, he be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter,"

It will be seen that this section does not enact, that a person who has accepted a tender of pardon renders himself liable to be tried for the offence in respect of which pardon was tendered, if he gives false evidence. What the section says is that he renders himself so liable (or forfeits the pardon) if by giving false evidence he has not complied with the condition on which the tender was made.

That condition is the condition set out in section 337 and the learned Government Pleader has very fairly conceded that this condition had been complied with before the appellant gave the evidence which he admitted was false.

The appellant is a Bhil and the Sessions Judge before recording his plea as a plea of guilty should in a case like the present one have been careful to ascertain whether he meant to admit that he had not complied with the condition on which the tender of pardon was made.

It was not disputed at the hearing that the appellant did comply fully with the statutory condition before he gave false evidence and it appears to me that the appellant in his plea at trial did not intend to admit anything to the contrary.

It appears for the reasons already stated that the Sessions Judge had no authority under the Code to order the present appellant to be committed for trial for the murder in respect of which a pardon had been tendered, and

Digitized by Google

further this appellant's trial was conducted with material irregularity which seriously prejudiced the accused and has occasioned a failure of justice.

It is not necessary to decide in this appeal whether the pardon was in the above circumstances forfeited, it is sufficient to say that the question whether the pardon was in fact forfeited should have been inquired into and decided at the trial of appellant before he was called upon to plead to the charge of murder.

We set aside the conviction and sentence and direct that appellant be discharged.

Our acknowledgments are due to Mr. Karbhari who argued the case as *amicus curiæ* for the appellant.

There is no indication in the record whether investigation has been made into the charge made by the appellant against a Nandurbar pleader of suborning evidence.

BEAMAN, J.:—We are much indebted to Mr. Karbhari who argued this appeal as *amicus curiæ*. The questions arising upon sections 337, 339, Criminal Procedure Code, as to the proper mode of procedure when an accomplice to whom pardon has been tendered has in the opinion of the authorities forfeited the pardon, are, in the present state of the law, of some complexity and importance. The reported decisions, to which reference is commonly made in cases of the kind, do not tend to throw much light on the subject. Doubtless what is discussed and has been the occasion of some differences of opinion in most of them, is due to the wording of the law as it stood before it was amended by the present Act. Thus the proposition for which there is plenty of authority in the case law that the proper person to withdraw a pardon is the person who tendered it—a proposition which is, I think, answerable for a good deal of confusion of thought, might have once been appropriate for controversy, but hardly is so now. Apart from the fact that the existing law makes no mention of withdrawing or cancelling a pardon at all, the proposition is in itself disputable. For to take a simple case, can it be seriously contended that were a Magistrate of the first class has tendered a pardon, and where the accomplice has given evidence in the Sessions Court which the presiding Judge believes to be full and true, it is open, notwithstanding that belief, to the Magistrate who did not hear the evidence given to form his own opinion and thereupon to withdraw the pardon and put the accomplice on his trial for the principal offence? One difference between the Madras and the Bombay High Courts pivots upon a point with which I am not now directly concerned. And a great deal of judicial interpretation has been stripped of authority and rendered obsolete by the change of language in the Statute. We have not now to consider what the law was but what it is. And the law contains no provision whatever for any one withdrawing, revoking or cancelling a pardon. It does not go beyond defining the manner in which a pardon once tendered and accepted may be forfeited. Sections 337-338 lay down the conditions upon which and the officers by whom a pardon may be tendered. Then if the accomplice accepts the conditions and the pardon is given, the law goes on to say that his evidence shall be taken and that he shall be kept in custody until the termination of the case. If the case ends in the Sessions Court, the Sessions Judge will be bound to detain him till it is finished; no longer: and so if the case ends in the High Court, that Court will have to detain him till it is finished. But no authority is given to any one to detain him an hour longer. It is not for the Judges of the

Digitized by Google

Sessions or the High Court to exercise a discretion in the matter, and to say that they will detain him in order that further proceedings may be taken against him, much less, of course, to direct that such proceedings be instituted. Last, the law states how the pardon may be forfeited. Comparing these provisions, we shall see that a pardon is offered upon two main conditions, first that the accomplice shall make full, second true disclosure of all he knows about the crime. And the pardon is forfeited by his failure to comply with these two conditions in two corresponding ways, first by concealing some material fact, that is to say, by not making a full or by giving false evidence, that is, by not making a true disclosure. And I think that the words "false evidence" must be read subject to the limitations of their context, as defining one of the modes of non-compliance with the conditions of the pardon, and not in their fullest literal sense. It is plain that the latter could not have been meant. For no one would maintain that a man who had been pardoned for making a full and true disclosure of a murder, and had done so, and a month afterwards had given false evidence in an assault case, had thereby forfeited his pardon and rendered himself liable to be tried for the murder. Looking at the section in that way it appears to me open to very real doubt whether the appellant had forfeited his pardon. Most assuredly it was a question to be enquired into in a proper way and not to have been disposed of as it was in the Sessions Court which tried and sentenced him. This being the law, what is to be done where a person to whom pardon has been given, has in the opinion of the Crown forfeited it? Brushing aside all the confusion arising from the decisions of Courts on this and allied subjects, and keeping a single eye upon what the law says, the answer seems to be plain. At the termination of the trial in which the pardon was given, the accomplice must be discharged by the Court. Then if so advised, the Crown may re-arrest and proceed against him for the offence in respect of which he was given a conditional pardon. When put upon his trial for that offence, he may plead to a competent Court his pardon, in bar. And that is a plea that the Court would be bound to hear and decide upon before going further and putting him on his defence. In deciding it the Court would have to raise the issues whether he had or had not complied with the conditions of the pardon; whether he had or had not made a full and a true disclosure of the whole facts. And where, as in the present case, after having admittedly done that, he had at a later stage recanted, whether that recantation amounted to giving false evidence within the meaning of section 339 and worked a forfeiture of the pardon? Such questions, it seems to me plain, would have to be enquired into and answered at the trial and in the presence of the of the prisoner; they are not to be settled by an *ex parte* opinion of this or that officer, in the form of a sanction or a direction to the police or to any other subordinate Court to proceed as though no pardon had been given and accepted. Had this procedure been followed it may very well be doubted whether the appellant would ever have been put on his trial for the murder at all: or whether if he had, the Sessions Court would have held that his pardon had been forfeited. But the procedure that was adopted has shut him out of all possibility of these advantages. The Sessions Judge who presided over the first trial, made an order purporting to have been under section 339 directing the commitment of the appellant on the ground that he had forfeited his pardon. Now it is perfectly plain that the Judge had no power to make any such order. In form it is an order under section 476; but that section limits the Judge's power to offences of a special kind, among which it is hardly necessary to say murder is not included. By making such an order professedly under section 339 the Sessions Judge prejudged the

Digitized by Google

question whether the appellant had really forfeited his pardon. And this could after all be only, as far as he was concerned, a matter of opinion. He believed that the accomplice had given false evidence within the meaning of section 339; but the Court which had to try him for the murder might have thought otherwise. If the Sessions Judge had formed that opinion not upon a mere contradiction, but, as is often the case, on the general nature of the testimony given, it is clear that when the pardon was pleaded in bar, he would have been liable to be called as a witness to state the grounds of his opinion and if necessary to be cross-examined upon them. But the Court which tried the prisoner when he was re-arrested and sent up on the strength of this order, held that it was concluded by the order from going into any question of the kind. This shows how seriously the appellant was prejudiced by the procedure (a procedure which in my opinion was wrong and illegal) that was adopted. The appellant did admittedly make a full and true disclosure of the whole facts, and it was only at a later stage that he was suborned, as he says, in a weak moment to recant. Considering that his evidence was used and relied upon, and seems to have been the main ground upon which the prisoners in the first trial were convicted, it may well be doubted whether the Crown would have regarded the late and superfluous retractation of that evidence, as constituting a forfeiture of the pardon, but for the unauthorized command of the Judge. As to that however we do not feel called upon to express any opinion now, nor upon the further question whether should the Crown be advised to proceed further against the appellant a competent Court would hold upon all the facts that the pardon had been forfeited. It is sufficient to say that we think that the prisoner has been so seriously prejudiced by the procedure followed, that we ought to set aside the conviction and sentence, leaving it to the Crown, if so advised, to institute a prosecution in proper form against the accused appellant.

R. R.

(End)

Digitized by Google

INDEX.

I. L. R. Madras vols. 23 to 29 1900 to 1906 Criminal Cases.

(The references are to the pages of this book Madras series.)

Abkari Act Madras—I of 1886. s. 34—Power of officer in one Circle to arrest offenders in another.

An officer of the Salt and Abkari Department belonging to Circle A, received certain information and entered Circle B, and under section 34 of the Madras Abkari Act, arrested an offender in the latter circle. The Magistrate who, in due course, tried the offender, held that the officer's powers of arrest restricted to his own circle, and acquitted the accused, though he believed the prosecution evidence as to an offence having been committed. Upon an appeal being preferred against the acquittal.

Held, that the order of acquittal was wrong and must be set aside : also that the question whether the officer who effected the arrest was acting within or beyond his powers in making the arrest did not affect the question whether the accused was or was not guilty of the offence with which he was charged. Emperor v. Ravalu Kesigadu 26 Mad 124. 218

Abkari Act (Madras) Act I of 1886 s. 55 (g)—" Wash "—"Materials."

A liquid mixture known as " wash, " consisting of jaggery and babool bark and proved to be fit for distillation, constitutes "materials" for the purpose of manufacturing liquor within the meaning of section 55 (g) of the Abkari Act. Queen—Empress v. Gangayya 24 Mad 417. 77

Abkari Act (Madras)—Act I of 1886, s. 56 (b)—Omission not constituting an act.

By section 56 (b) of the Abkari Act (Madras), 1886, whoever, being the holder of a license or permit granted under the Act, " does any act in breach of any of the conditions of his license or permit not otherwise provided for in this Act " may be punished with fine or imprisonment or with both. The holder of a license to keep a shop for the sale of toddy having been convicted for failing to keep his shop open, in breach of one of the conditions of the license.

Held, that even if the licensee was under an obligation to keep open his shop (which did not appear to be the case), an omission to do so did not amount to an act in breach of the conditions of the license ; and that the conviction must in consequence be set aside. Queen-Empress v. Venkatasami Naidu 23 Mad. 220 19

Abetment—See Criminal Pro C. ss. 285, 537 79

Accomplice—See Criminal Pro C. ss. 423 (2) 537 187

Accomplice—See Evidence Act S. 114 (b) 317

Accomplice—See Evidence Act. ss. 114, 138 138

Accused—Examination of See Criminal Pro. C. S. 342 315

Appeal—See Criminal Pro C. ss. 195 (7), 407 (2) 300

Appeal—See Letters patent art 15 330

Appeal on Facts—See Criminal Pro C. ss. 418, 539 232

Assault—See Penal Code s. 353. 304

Assessors—See Criminal Pro. C. ss. 260 (3), 309 283

Assessors—absence of See Criminal P. C. ss. 285, 537 79

Bail—Jurisdiction of High Court pending appeal to P. C.

A person was, at Criminal Sessions held in Madras, convicted of certain offences and sentenced to imprisonment and fine. Upon a certificate being granted by the Advocate General under section 26 of the Letters Patent, the High court reviewed the conviction and reduced the sentence. The accused obtained from the Judicial Committee of the Privy Council special leave to appeal, and also applied to be released on bail ; but the Judicial Committee expressed the

Digitized by Google

opinion that the latter application should be decided by the Madras High Court. Upon application being made accordingly to the Madras High Court.

Held, that the High Court had jurisdiction to make an order releasing the accused on bail pending the decision of the Privy Council; and that having regard to the rule laid down by the Judicial Committee in *Ex Parte Carew* ([1897] A. C. 719) as to the circumstances under which an appeal in a criminal matter will be admitted by the Privy Council, the accused ought to be released on bail in the present case, Queen-Empress *v.* Subrahmania Ayyar 24 Mad 161 49.

Cattle Trespass Act ss. 20, 22—see Criminal P. C. s. 4 (0). 418

Cattle Trespass Act—Act I of 1871, s. 24—

Certain persons had been fined for rescuing cattle after seizure under section 24 of the Cattle Trespass Act, 1871. The judgment contained no finding to the effect that the land on which the cattle had been seized was public property in charge of the Public Works department:

Held, that the conviction must be set aside, and the case remanded. Queen-Empress *v* Lakshmanna 24 Mad. 318 69

Charges joinder of—see Criminal P. C. ss. 222, 234. 419

Charges misjoinder of—see Criminal Pro. C. ss. 233, 235. 219

Charges, splitting up of, see Criminal Pro. ss. 195, 233 to 239. 281

Charter Act sec. 15 see Criminal P. C. S. 147. 412

Cheating—see Penal Code ss. 417. 511, 465 188

Held, that the commitment that was made under the District Magistrate's order was invalid and must be set aside. Under clause 4 of section 435 it was not competent to the District Magistrate to entertain an application for the commitment being ordered when the Sessions Judge had refused such an order. Nor could he act *suo motu*. The reason for the prohibition in the section was to avoid a conflict between the orders of two District authorities having co-ordinate powers, and that reason applied equally to cases in which the the authorities acted *suo motu*. Kalimuithu *v.* Emperor 26 Mad. 477. 254

Criminal Pro. C. s. 4 see—Extradition Act XXI of 1879 ss. 4, 6. 283

Criminal Pro. C. s 4 (0)—see Breach of Contract Act ss. 1, 2. 98

Criminal Procedure Code s. 4 *(o)*, and the cattle Trespass Act I of 1871, ss. 20, 22—Appeal.

By section 4 [o] of the Code of Criminal Procedure, the word 'offence' includes an act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act; and a person against whom an order under section 22 of the Cattle Trespass Act is made is a "person convicted on a trial" and is entitled to appeal under section 407 of the Code of Criminal Procedure. Ponnusami In the matter of 29 Mad. 517. 418

Criminal Pro. C. s. 106 (1)—see Penal Code s. 187. 244

Criminal Procedure Code—s. 106—Appellate Court power of.

An accused person cannot be bound over to keep the peace under section 106 of the Code of Criminal Procedure unless he is convicted of an offence of which a breach of the peace is a necessary ingredient and unless it is found that a breach of the peace has actually occurred.

An appeal Court cannot exercise the power under the section when the accused has not been convicted by a Court such as is referred to in the section. Muthia Chetti *v.* Emperor 29 Mad. 190 409

Criminal Procedure Code—Act V of 1898, s. 106

Certain accused were convicted of theft, of mischief and of being members of an unlawful assembly. They were sentenced to imprisonment and were further required to give security to keep the peace. There was no finding that a breach of the peace had been committed by them.

Held, on revision, that the order requiring them to give security for keeping the peace

Digitized by Google

must be set aside, as none of the offences for which they had been convicted necessarily involved a breach of the peace.

Whether such an order might be made in a case in which a person is not accused of an offence involving a breach of the peace, but there is nevertheless an express finding that a breach has been committed.—*Quære.* Kannoo Kuran Kunhamad *v.* Emperor 26 Mad 469 251

Criminal Pro. C s. 107 see Criminal Pro. C. ss. 112, 118, 144, 145 253

Criminal Procedure Code—Act V of 1898, ss. 112, 118, 144, 145—Discretion to proceed under s. 107 or ss. 144 and 145.

Where a notice is issued under section 112 of the Code of Criminal Procedure to a defendant to show cause why he should not give security to be of good behaviour for three months, the Magistrate has no power to order security to be given for a longer period.

Where a defendant is found by the Magistrate to be in possession of land about which a dispute occurs, the Magistrate is not bound to Act under sections 144 and 145, but has a discretion to proceed either under section 107 or under sections 144 and 145 of the Code. Belagal Ramacharlu *v.* Emperor 26 Mad. 471 253

Criminal Procedure Code—Act V of 1898, s. 123—"Sentence of imprisonment."

When a person is committed to prison under section 123 of the Code of Criminal Procedure for failure to give security to be of good behaviour, he is not undergoing a "sentence of imprisonment" within the meaning of section 397 of the Code. Emperor *v.* Muthukomaran 27 Mad. 525 332

Criminal Procedure Code—Act V of 1898, s. 144.

An order passed under section 144 of the Code of Criminal Procedure directed a person (1) not to interfere with the management of a certain temple, (2) until another person should be duly evicted from the management by due course of law:

Held, that the first portion of the order was a direction to "abstain from a certain act" within the meaning of those words as used in section 144 of the Code of Criminal Procedure; but that the latter portion contravened the provisions of sub-section (5) of that section and that to that extent the order was made without jurisdiction. Ramanadhan Chetti *v.* Murugappa Chetti 24 Mad. 45. 33

Criminal Procedure Code—Act V of 1898, ss. 144, 437—

On petition being filed in the Court of a Sub-Divisional First-class Magistrate setting out that a breach of the peace was likely to arise from the simultaneous use of a certain mosque by members of the Hanifi and Shafi sects, the Magistrate passed an order addressed to ten members, who were named, and several others of the Hanifi sect, and to three members, who were named, and several others of the Shafi sect. The order concluded as follows:—"I do order hereby that the following order should be observed in regard to the entry of the said mosque by any of you or any other Mussalmans of the Hanifi and Shafi sects for a period of two months from this date unless in the meanwhile you establish your right in a Court of competent civil jurisdiction." It set out five periods of half an hour each during which each sect, respectively, might enter the mosque on ordinary days, and two periods of one hour each in which each sect might enter the mosque on other days:

Compensation: see Criminal Pro. C. sec. 250 181

Compensation: see Criminal Pro. C. s. 250 308

Compensation see Criminal Pro. C. ss. 250, 388(2) 220

Compensation—Notice to accused—Criminal Pro. C. s. 250.

An order by a Magistrate directing payment of compensation to the accused ought not to be set aside on appeal without notice to the accused. It will also be safer to give notice to the officer appointed by the Local Government referred to in section 422 of the Code of Criminal Procedure. Emperor *v.* Palaniappavelan 29 Mad. 187 407

Complaint dismissal of: see Criminal Pro. C. s. 203 74

Confession of a co-accused: see Evidence Act s. 30 1

Digitized by Google

Confession : see Evidence Act s. 24 199

Contradictory statements : see Penal Code s. 193 206

Councils Act 1861, 24 & 25 Vict ch. 67 s. 42 : see Municipal Act (Madras Act I of 1884) s. 341 142

Court fees Act s. 31 : see Criminal Pro. C. s. 545 67

Court fees Act VII of 1870 (as amended by Act XII of 1891) sec. 24 : see stamp Act II of 1899 s. 69 70

Criminal Breach of Contract Act —Act XIII of 1859, ss. 1, 2—Criminal Procedure Code.—s 4 (o)—" Offence."

The offence created by the Workman's Breach of contract Act (XIII of 1859) is not the neglect or refusal of the workman to perform his contract, but the failure on his part to comply with an order made by the Magistrate directing the workman to repay the money advanced or perform the contract. King-Emperor *v.* Takasi Nukayya. 24 Mad 660. 98

Criminal Breach of Contract Act —XIII of 1859, s. 2

An employer applied for an order under section 2 of Act XIII of 1859, alleging that a workman had received an advance on account of the work and had failed to perform his part of the contract. Prior to lodging the complaint, the employer had completed the work, and he claimed an order for the repayment of the advance.

Held, that no order could be made. The section only applies when the work is uncompleted when the complaint is made. If the work has been completed when the complaint is made, the Magistrate has no jurisdiction under the section, though the employer has a remedy against the workman in the Civil Courts.

The offence created by the act is not the neglect or refusal of the workman to perform his contract but the failure of the workman to comply with an order made by the Magistrate that the workman should repay the money advanced or perform the contract. Anugoori Sanyasi In the matter of 28 Mad 37 353

Criminal Breach of Contract Act —Act XIII of 1859, s 2

A workman agreed in writing to work for the proprietors of an estate for four years and one month, from 1st March 1899 to 31st March 1903, for an initial advance of one Rupee, which was not to be repaid till after the expiration of the agreement. The same person subsequently obtained an advance of Rs. 10, to be re-imbursed by a monthly deduction of one rupee from his wages He worked from 1st March 1899 till 18th September 1899 when he ceased to work, leaving in all a sum of Rs. 5 to be accounted for in the adjustment of the total advance. He was subsequently charged and convicted under section 2 of the Criminal Breach of Contract Act XIII of 1859 :

Held, that the initial advance of one rupee was not money advanced on account of work to be performed, but rather a loan made without interest on the condition that the workman would enter into a contract of service for the duration of the loan ; and that the Criminal Breach of Contract Act, 1859, was inapplicable to this case ;

that, with reference to the ten rupees to be repaid out of wages, the Act applied, and an order should be made directing the workman to work until the expiration of the term of the contract on account of which this sum had been advanced. Tangi Joghi *v.* Hall 23 Mad 203 18

Criminal Procedure Code—Act V of 1898 (4)—Refusal by Sessions Judge to commit Subsequent commitment by District Magistrate—Legality.

A Second-class Magistrate, after enquiring into a charge of murder, discharged the accused. A revision petition was then presented to the Sessions Judge, requesting that the accused might be committed for trial at the Sessions. The Sessions Judge dismissed the petition, holding that the Magistrate's reasons for discharging the accused were good. At a subsequent date, the District Magistrate took up the case *suo motu* and directed the commitment of the accused for trial at the Sessions Court on a charge of murder. On reference being made to the High Court for orders.

Digitized by Google

Held, that the order was within the powers conferred by section 144 of the Criminal Procedure Code.

Certain members of the Hanifi sect having entered the mosque in disobedience to the order hereinbefore referred to, they were charged under section 188 of the Indian Penal Code with disobedience to an order by a public servant The case was tried by the Magistrate who had passed the order :

Held: that the Magistrate was not competent to try the case, inasmuch as he had made the order under section 144. Queen Empress *v.* Abdulla Saheb 24 Mad. 262 **56**

Criminal Procedure Code Act V of 1898, s. 145.

In order that a Magistrate may have jurisdiction to act under section 145 of the Code of Criminal Procedure, he must be satisfied from a Police report, or other information, that a dispute likely to cause a breach of the peace exists concerning any land, etc. Where there is no Police report the statement of interested parties ought to be received with great caution and ought not to be acted upon unless they are corroborated by the testimony of less interested persons. The opposite party also, ought to be given an opportunity of cross-examining the party making such statements before the Magistrate takes any action on them.

Under section 145 of the Code of Criminal Precedure, a party who is required by a preliminary order to attend at the Magistrate's Court is entitled to show that no dispute likely to cause a breach of the peace exists or had existed, and it is not open to such Magistrate to refuse to receive such evidence when tendered. Where the Magistrate refuses to receive such evidence, his order will be set aside as having been passed without jurisdiction.

Per DAVIES, J.—A Magistrate acts *ultra vires* in clubbing together disputes relating to a large number of villages and treating them as one. Each village must stand on its own footing and the Magistrate should satisfy himself that a dispute existed in respect of all the villages. He should ascertain, as regards each village, which party was in possession at the date of the order and confirm that possession.

The object of Chapter XIV of the Code of Criminal Procedure being to procure prompt action to avert breaches of the peace, the Legislature could not have contemplated under that chapter wholesale proceedings in regard to a large number of villages which, if the procedure above stated be adopted, would entail a prolonged enquiry. Sreeman Kumara Tirumaraja Bahadur Rajah of Karvetnagar *v.* Sowcar Lodd Govind Doss 29 Mad. 561 **421**

Criminal Procedure Code—Act V of 1898, ss. 145, 526—Transfer.

A case under section 145 of Criminal Procedure is a "criminal case," and the High Court has jurisdiction to transfer it, both under section 526 of the Code of Criminal Procedure and article 29 of the Letters Patent. Arunuga Tegundan 26 Mad. 188 **227**

Criminal Procedure Code—Act V of 1898, s. 147.

The enclosing by a tenant of cultivable lands by a wall instead of a hedge is not *prima facie* an interference with the landlord's rights and ought not to be interfered with under section 147 of the Code of Criminal Procedure by a Magistrate, being a matter to be settled by a Civil Court. In such cases, if a breach of the peace is anticipated, security must be taken from the party from whom such breach of the peace is apprehended.

The words "concerning the use of land" in section 147 of the Code of Criminal Procedure cannot be qualified and the section construed as if it contained words that the user to which the dispute relates is a user by a party other than the party in possession. Arunachellam Chettiar *v.* Chidambaram Chetti 29 Mad. 97 **386**

Criminal Procedure Code—Act V of 1898, s. 147—Charter Act, s. 15.

An order under section 147 of the Code of Criminal Procedure, declaring possession to be with a certain person is illegal when there has been no enquiry as to the party in possession and will be set aside under section 15 of the Charter Act.

A dispute as to the right to use a mosque between persons claiming to be entitled to officiate as Kazi therein is a dispute coming within section 147 of the Code of Criminal Procedure;

Digitized by Google

Kader Batcha v. Kader Batcha Rowthan 29 Mad. 237 412

Criminal Procedure Code—Act V of 1898, s. 148 [3]

An award of costs under section 148 [3] of the Code of Criminal Procedure should, in the usual course, be contemporaneous with the decision of the main question. Where however, circumstances require the postponement of the award of costs, it should be made within a reasonable time after the disposal of the principal subject of the proceeding, in the presence of both parties. Vythianada Tambiran v. Mayandi Chetty 29 Mad. 373. 415

Criminal Pro. C.— ss. 164 162. see Penal Code s. 182 380

Criminal Procedure Code—Act V of 1898, s. 161—ss. 176, 179, and 187 of the Penal Code.

A refusal to answer questions asked by a Police officer under section 161 of the Code of Criminal Procedure is not punishable under section 176, 179, and 187 of the Indian Penal Code.—Queen-Empress v. Sankaralinga Kone 23 Mad. 544 25

Criminal Pro.—C. S. 164. see Penal Code S. 198 381

Criminal Procedure—Act V of 1898, s 195—Sanction for prosecution.

A Sessions Court when granting sanction to prosecute under section 195 of the Code of Criminal Procedure should so frame the proceedings before it as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not. Although notice is not invariably necessary in cases under the section referred to, the grant of an order sanctioning prosecution is a judicial act, and there may be circumstances—(such as in those cases in which there has been a difference of opinion as to the desirability for granting sanction)—in which a proper discretion cannot be said to have been exercised unless the persons sought to be prosecuted have been given an opportunity to be heard.

An order of a Sessions Judge, sanctioning a prosecution, containing nothing from which the High Court could conclude that he had directed his mind to the real question in such cases, namely, whether there was a *prima facie* case on which a prosecution could be instituted with a fair chance of success, the High Court revoked the sanction. Pampapati Sastri v. Subba Sastri 23 Mad. 210 14

Criminal Procedure Code—Act V of 1898 s. 195—Penal Code s. 188—Epidemic Diseases Act—Act III of 1897.

Certain persons were charged with having disobeyed an order promulgated by Government under the Epidemic Diseases Act (III of 1897), and were acquitted on the ground that the prosecution required, under section 195 of the Code of Criminal Procedure, the previous sanction of the public servant who had promulgated the order. Sanction had, in fact, been granted by the Chairman of the Municipality in which the order was disobeyed, but the Magistrate held that such Chairman was not the public servant who had promulgated the order, and that it was not shown that he had been specially empowered to grant the sanction:

Held, that the order of acquittal was wrong. Inasmuch as the order in question had been promulgated by Government and not any public servant, no sanction was required. Queen-Empress v Smith 24 Mad 70 34

Criminal Procedure Code—Act V of 1898, s 195—sanction to prosecute

A Tahsildar, when holding an enquiry as to whether a transfer of names in a land register should be made or not, is a Revenue Court; and before a party to any proceeding in such a Court can be prosecuted for an offence referred to in section 195 (c) of the Code of Criminal Procedure, sanction should be obtained. Queen Empress v. Munda Shetti 24 Mad. 121. 37

Criminal Procedure Code—Act V of 1898, s 195—Sanction.

A person whose prosecution had been sanctioned by a Sub-Magistrate petitioned the Special Assistant Magistrate for its revocation. The Special Assistant Magistrate declined to interfere on the ground that as the Sub-Magistrate had had judicial evidence before him and had also held the necessary enquiry before granting sanction, the necessary conditions had been fulfilled and it was not for him at that stage, to

Digitized by Google

usurp the functions of a court trying the petitioner for the offence:

Held, that it is the duty of the authority giving sanction or upholding it, under section 195, to go into the merits of the application for sanction, with reference to the evidence before it, which is relied on as justifying the according of sanction. Unless there is sufficient *prima facie* evidence and a reasonable probability of conviction, the Court giving the sanction or upholding it will not be properly exercising the discretion vested in it by law.—In re Partee Kunhammed 26 Mad 116 **215**

Criminal Procedure Code—Act V of 1898, s. 195—sanction propriety of.

Where sanction has been accorded under section 195 of the Criminal Procedure Code by a competent Court and a prosecution is instituted in pursuance thereof, it is not competent to the Court which is trying the case to question the propriety or legality of the sanction in respect of an offence of the kind mentioned in section 195, which is alleged to have been committed in any proceeding in the Court by which the sanction was granted.—Pachai Ammal. 2 Mad 184 **228**

Criminal Procedure Code—Act V of 1898, s 195—Sanction—Computation of the period of six months.

The period of six months during which sanction to prosecute remains in force under section 195 (6) of the Code of Criminal Procedure is to be computed from the date of the original order granting sanction and not from that of a final order of an Appellate Court declining to revoke it.—In re MuthuKudam Pillai 26 Mad. 190 **229**

Criminal Procedure Code—Act V of 1898 s. 195—Legality of sanction.

Application was made to a Second-class Magistrate for sanction to prosecute a person on a charge of abetment of giving false evidence in a judicial proceeding. The Magistrate held an enquiry and examined three witnesses, and then refused to accord sanction. Application was then made to the Sub-Divisional Magistrate, who granted sanction. In doing so, he did not hold that a prima facie case had been made out, or that there was a probability of securing a conviction. He expressed the view that it was essential that the truth of the matter should be threshed out and, for that reason, sanctioned the prosecution as that appeared to be the only course by which it could be decided whether or no the very serious offence charged had been committed.

Held, that this was no ground for granting sanction, or for setting aside the order of the Second-class Magistrate refusing sanction. Venkatesa Ayyangar 26 Mad.193...231

Criminal Procedure Code—Act V of 1898, s. 195 (b)—Sanction Application for extension of time—"Good cause.

Sanction was accorded for a prosecution, and an appeal was preferred against the order, which was not disposed of until after the expiration of six months from the date of the order. Upon an application being made for an extension of time for the prosecution of the accused.

Held, that good cause had been shown for the extension. *Karuppana* Servagaran *v.* Sinna Gounden 26 Mad 480 **257**

Criminal Procedure Code—Act V of 1898, s. 195 (b)—Power of superior Court to revoke sanction after complaint lodged.

P obtained sanction from a Stationary Sub-Magistrate to prosecute 8 persons for offences under sections 211 and 193, Indian Penal Code, alleged to have been committed before that Magistrate. P did not prefer any complaint in pursuance of the sanction, but the police, relying on it, preferred a charge sheet to the Joint Magistrate against the accused in respect of the alleged offence under section 211. The Joint Magistrate struck the case off his file, giving as his reason for so doing that he *suo motu* quashed the Sub-Magistrate's sanction under section 195 (b) of the Code of Criminal Procedure:

Held, that the Joint Magistrate's action in striking the case off his file was legal and proper, though the reason given by him for so doing was erroneous and his act in quashing the sanction *ultra vires*. A Joint Magistrate though authorized under section 407 (2) to entertain appeals preferred by persons convicted on a trial by the Stationary Magistrate is not the Court to which appeals from the Court of the Stationary Magistrate ordinarily lie, within the meaning of section 195 (7). The Court to which the Court of the Stationary Magistrate is,

Digitized by Google

within the meaning of section 195 (6) and (7), subordinate is that of the District Magistrate. The Joint Magistrate could not, therefore, revoke the sanction given by the Stationary Sub-Magistrate, the District Magistrate alone having the power to revoke or grant a sanction given or refused by the Stationary Sub-Magistrate. Nor was it competent to a District Magistrate, under section 407, to direct that applications for revoking or granting a sanction given or refused by a Sub-Magistrate may be presented to the Joint Magistrate.

Whether the Court authorized to exercise such a power under sub-section (6) can exercise it *suo motu*, as if it were a Court of revision, where no application has been made to it either to give a sanction which has been refused or to revoke a sanction which has been given—*Quære.*

The course pursued by the police in sending a police report in respect of the offence was contrary to law; but whether, on the strength of the sanction accorded to P, a police officer or other stranger might have preferred a complaint against S.—Quære.

The mere fact that a complaint has been made, in pursuance of sanction, will be no bar to a Court competent under sub-section [6] to deal with an application for revoking such sanction, entertaining such application and disposing of it according to law, even if the complaint in pursuance of the sanction has been preferred to itself. In the matter of Subbamma 27 Mad. 124 310

Criminal Procedure Code—Act V of 1898, s 195 (4)—Sanction.

Clause (4) of section 195 of the Code of Criminal Procedure applies only to cases in which, at the time of granting sanction to prosecute, the offender is uncertain or unknown. Where there is no doubt as to whom the prosecution is to be directed against, the offender should be named. John Martin Sequeira v. Luja Bai 25 Mad. 671 183

Criminal Procedure Code—Act V of 1898, ss. 195 [7], 407 [2]—Appeal.

A Magistrate who has been directed and empowered to hear appeals under the provisions of section 407 (2) of the Code of Criminal Procedure is not the Court to which appeals ordinarily lie within the meaning and for the purposes of section 195 (7) of the Code. (BENSON, J., dissenting). Eronna Variar v Emperor 26 Mad. 656 3 0

Criminal Procedure Code—Act V of 1898, ss. 195, 196, 197, 215, 436—Sanction—Notice to accused—Reference to High Court—Revisional powers.

Section 215 of the Code of Criminal Procedure is not applicable to a case in which a commitment in question has not been made under any one of the four sections therein specified, but has been made under the directions of the High Court under section 436 (1) IV. An order of a Sessions Judge or District Magistrate passed under section 436, directing commitment, may be quashed by the High Court in the exercise of its revisional powers, though not under section 215. But an order passed by the High Court itself under section 526 cannot be so revised.

Sanction accorded by Government under section 197 is not null and void for the reason that no notice was given to the accused to show cause why it should not be given. It is a matter left to the discretion of Government whether such opportunity should be given to the person concerned before sanctioning his prosecution.

There is a marked distinction between the classes of offences dealt with in section 195, clauses (*b*) and (*c*), and those dealt with in section 197. A Court granting sanction under section 195 (*b*) and (*c*) does so in connection with offences committed in or in relation to any proceeding in such Court, and the Court therefore Acts in its judicial capacity in granting the sanction on legal evidence. But the Government, in according or withholding sanction, under section 197 (for the prosecution of a public servant in respect of an offence alleged to have been committed by him as such public servant), acts purely in its executive capacity and the sanction need not be based on legal evidence.

The Criminal Procedure Code does not prescribe any particular form for the sanction required by section 197, as it does in the case of a sanction accorded under section 195. In the matter of Kalagava Bapiah 27 Mad. 54 305

Criminal Procedure Code—Act V of 1898, ss. 195, 233 to 239—accused Power of Sessions Court to try offenders seperately where jointly committed for trial.

Digitized by Google

The sections of the Code of Criminal Procedure which relate to joinder of charges (including section 239) refer to the trial of the accused. The ruling in *Subrahmania Ayyar* v. *Emperor*. (I. L. R. 25 Mad., 61) cannot be extended to a preliminary enquiry held by the Magistrate committing a case to a Sessions Court, so as to render the commitment itself illegal because there was misjoinder of offences or of offenders. In such a case, the Sessions Judge, if he considers it necessary. can frame charges against and try the accused separately.

There is no hard and fast rule that notice must be given in all cases to an accused person before sanction is accorded for his prosecution. In the matter of Govindu 26 Mad. 592 281

Criminal Procedure Code—Act V of 1898, ss. 195, 435—Order by Sessions Judge staying proceedings in Court outside jurisdiction.

Sanction was accorded by a Second-class Magistrate in the Sessions' Division of South Arcot, for the prosecution of A on various charges. A then applied to the Deputy Magistrate of Cuddalore (in the same Sessions Division) who confirmed the sanction. A charge was laid against A in the Court of a Second-class Magistrate in the Sessions Division of Chingleput. A, however, petitioned the Sessions Judge of South Arcot to revise the sanction and stay proceedings until his petition should be disposed of, and the Sessions Judge passed an order staying proceedings pending the disposal of the petition. On a criminal revision petition being presented to the High Court.

Held, that the order was *ultra vires*.

V. Shanmugam Chetty v. Pennappa Mudaly 26 Mad. 137 224

Criminal Procedure Code—Act V of 1898, ss. 195, 476—Deputy Magistrate sanctioning prosecution—Jurisdiction of Sessions Court to interfere.

A Deputy Magistrate having decided that certain witnesses, [who had given evidence before himself and before two other Magistrates on different occasions relating to charges of rioting and causing hurt] had wilfully committed perjury on one occasion or another, ordered them to be prosecuted for perjury and bound them over to take their trial. The Sessions Judge set aside the said order, deeming it undesirable that sanction to prosecute should be given under the circumstances :

Held, that whether the Deputy Magistrate had intended to pass an order under section 476 or to make a complaint under section 195 [1] (b) of the Code of Criminal Procedure, the Sessions Judge had no power to interfere : also that the power of revoking given under section 195 (b) is only in respect of sanction, and not of complaints. Queen Empress v. Ankanna 23 Mad 205 13

Criminal Procedure Code—Act V of 1898, ss. 195, 476—Penal Code s. 193.

At a preliminary enquiry held by a Subdivisional Magistrate, at the direction of the District Magistrate, into the circumstances of a complaint against the police, a witness made a false statement on oath. Notice was subsequently issued calling upon the said witness to show cause why sanction should not be granted for his prosecution. The Magistrate having held that the witness was bound to tell the truth at the said enquiry and having granted sanction for his prosecution under section 193 of the Indian Penal Code.

Held that the enquiry before the Magistrate in the course of which the alleged offence was committed was not a judicial proceeding within the meaning of section 193 of the Indian Penal Code, and the witness could not be convicted under that section—Queen-Empress v. Venkataramanna 23 Mad 223 20

Criminal Procedure Code—Act V of 1898. ss. 195, 537—Sanction, want of,

The general provisions of section 195 of the Code of Criminal Procedure ought not to be so construed as to nullify the special provisions of section 537 (b).

The want of sanction required by section 195 of the Code of Criminal Procedure is not fatal to a prosecution unless the accused is prejudiced thereby. Ismal Rowther v. Shunmugavelu Nadan 29 Mad 149 405

Criminal Procedure Code—Act V of 1898, s. 197—Charges against village magistrate for alleged offence while acting not in a judicial capacity—Sanction.

Digitized by Google

A village magistrate having been apprised of a disturbance in his village forcibly separated the combatants, one of whom thereupon preferred a charge against him of causing hurt. The complaint was taken by the sub-Magistrate upon his file without any previous sanction of the Government or other authority mentioned in section 197 of the Code of Criminal Procedure. The village magistrate raised the objection that the prosecution could not leg proceeded with until such sanction had been first obtained. The Sub-Magistrate held that such sanction was unnecessary and kept the case on his file and commenced to enquire into it. The village magistrate presented a petition to the District Magistrate raising the same ground of objection, whereupon the District Magistrate quashed the whole of the proceedings holding that the Sub-Magistrate had no jurisdiction to try the case against a village officer without sanction having been first obtained:

Held, that sanction was not necessary under section 197 of the Code of Criminal Procedure. The village magistrate, while preventing an offence, was not acting in the capacity of a Judge or a public servant not removable from office without the sanction of Government, and therefore the section referred to had no application.

Held also, that the order of the District Magistrate quashing the proceedings of the Sub-Magistrate was passed without jurisdiction.

Semble, that a village magistrate exercising jurisdiction, and trying an offender under Regulation XI of 1816 is a Judge within the meaning of section 197 of the Code of Criminal Procedure and section 19 of the Indian Penal Code. Kandasmi Chetti *v.* Soli Goundan 23 Mad. 540 23

Criminal Procedure Code—Act V of 1898, s. 197—Necessity for sanction to prosecute public servant—City of Madras Municipal Act—Act 1 of 1884, s. 341.

Under section 341 of the City of Madras Municipal Act, any person bringing or causing to be brought timber within the City of Madras without a license, obtained on payment of a fee, is liable to a fine. The Superintendent of the Gun Carriage Factory in Madras, who is an officer holding a commission in the Royal Artiery, brought or caused to be brought timber within the aforesaid limits without license. On a complaint being lodged against him under the section, it was cont nded that he was a public servant within the meaning of section 197 of the Code of Criminal Procedure and that the Court could not take cognizance of the offence inasmuch as the sanction referred to in section 197 had not been obtained:

Held, that sanction was not necessary, as the offence charged was not one which could be committed only by a public servant, nor did it involve as one of its elements that it had been committed by a public servant. The Municipal Commissioners for the city of Madras *v.* Major Bell 25 Mad. 15 106

Criminal Procedure Code—Act V of 1898, ss. 199, 238—Charge of kidnapping and conviction for enticing married woman—No complaint by husband—Legality.

The provision in section 199 of the Code of Criminal Procedure that no court shall take cognizance of an offence under section 498 of the Indian Penal Code except upon a complaint made by the husband of the woman, means a complaint by the husband of an offence under section 498, not any complaint made by the husband.

An accused was charged with kidnapping or abducting a woman under section 366 Indian Penal Code, but the Sessions Judge, holding that the prosecution had failed to prove either kidnapping or abduction, convicted the accused, on the evidence, of an offence under section 498. In doing so he purported to act under section 238 of the Code of Criminal Procedure. The complaint before the court had been made by the husband, but was only general in terms:

Held, that the conviction was bad. Bangaru Asari *v.* Emperor. 27 Mad 61 309

Criminal Procedure Code—Act V of 1898, s. 202—Failure to "record rersons" for postponing issue of process.

By section 202 of the Criminal Procedure Code, if a Magistrate is not satisfied as to the truth of an offence he may, when the complainant has been examined, "record his reasons, and may then postpone the issue of process" and inquire into the case:

Held, that the failure on the part of a Magistrate to record his reasons is at most an ir-

Digitized by Google

regularity, and unless it in fact occasions a failure of justice is not a ground for setting aside his order. King Emperor v. Alagarisami Pathan 25 Mad. 546 174

Criminal Procedure Code—Act V of 1898, s. 203 –Dismissal of complaint—Refusal by Magistrate to take cognizance of case.

A complaint was laid in the Court of a Town Magistrate, charging certain persons with having committed offences under the Registration Act. The Town Magistrate dismissed the complaint on the ground that sanction, which he deemed to be necessary, had not been obtained. The complainant obtained sanction and thereupon the Town Magistrate proceeded with the case and convicted the accused On appeal, the Deputy Magistrate, while agreeing that the accused were guilty, reversed the conviction on the ground that inasmuch as the Town Magistrate had once thrown out the complaint under section 203 of the Code of Criminal Procedure, he could not subsequently entertain it. On the case being referred to the High Court for orders:

Held, that though, in form, the Town Magistrates, order purported to dismiss the complaint under section 203, in substance it refused to take cognizance of the offence on the ground that sanction was necessary and had not been obtained; and that the acquittal must be set aside.—Queen Empress v. Kuniyil Ram 24 Mad. 337 74

Criminal Procedure Code—(Act V of 1898) s. 203 –Dismissal of complaint under, no bar to magistrate rehearing complaint.

On a reference by the Sessions Judge as to whether it was competent to a Magistrate, after dismissing a complaint under section 203 of the Code of Criminal Procedure, to rehear the complaint, when such order of dismissal had not been set aside by a higher Court:

Held, (SUBRAHMANIA AYYAR and DAVIES, JJ., dissenting) that the dismissal of a complaint under section 203 of the Code of Criminal Procedure does not operate as a bar to the rehearing of the complaint by the same Magistrate, even when such order of dismissal has not been set aside by a competent authority.

Per Sir ARNOLD WHITE, C. J.—The power to enquire into an offence must be held to exist in a Magistrate until something has occurred to divest the Magistrate of this jurisdiction. An order under section 203 of the Code of Criminal Procedure is not a judgment to which the provisions of section 369 will apply. The principle of *autrefois acquit* will not apply as there is no trial when the complaint is dismissed under section 203 of the Code of Criminal Procedure.

The provisions of sections 157, 400, 215 and 210 of the Code of Criminal Procedure of 1872 compared with the corresponding sections 203, 403, 253 and 242 of the present Code.

The alterations in the present Code in regard to the sections under consideration were merely drafting alterations and were not intended to effect and did not effect any alteration in the law as laid down by the old Code.

Per BENSON, J.—The decisions in Queen-Empress v. Adam Khan [I.L.R., 22 All., 106], Nilratan v. Jogesh Chundra Bhuttacharjee [I.L.R., 23 Calc., 983], and Mahomed Abdul Mennan v. Panduranga Row [I.L.R., 23 Mad., 255], do not apply, as in those cases it was not the *same* but a *different* Magistrate who proceeded to rehear the complaint.

There is no bar under the Code to the complaint being reheard unless the proceedings have reached such a stage of finality that an acquittal or an order operating as such under the Code is recorded.

Per MOORE, J.—The maxim *nemo bis vexari* has no application to an order under section 203 of the Code of Criminal Procedure, though it may be a good argument, were an accused has been discharged under sections 259 and 259 of the Code.

Per SUBRAHMANIA AYYAR, J.—Although the technical doctrine of *autrefois acquit* will apply only to acquittals, the principle underlying such doctrine, that a person should not, in respect of an offence, be in jeopardy of prosecution more than once, applies to cases where the prosecution failed to reach the stage of acquittal without any fault on the part of the accused, unless its application is precluded by the provisions of the Code.

Acquittal in common law means an acquittal after verdict or sentence. The Legislature having by sections 333, 494 and 248 of the Code of Criminal Procedure given the term a wider significance, the explanation to section 403 was intended to guard against the term being applied to cases where the plea of *autrefois acquit*

Digitized by Google

was not technically applicable and not to bar the application of the aforesaid analogous principle where justice required it. There being thus no legal provision to the contrary, an order dismissing a complaint or discharging the accused must, on the above principle, operate as a bar to further enquiry into the same matter as long as such order remains in force. Orders under sections 203, 259 and 259 of the Code of Criminal Procedure stand on the same footing as regards the application of this doctrine.

There is no inherent power in a Magistrate to revise his own order of dismissal or discharge. Emperor v. Chinna Kaliappa Gounden 29 Mad. 126 390

Criminal Procedure Code—Act V of 1898, ss. 203, 435, 439 Complaint dismissal of—Revival of Proceedings—Illegality.

When an original complaint is dismissed under section 203 of the Code of Criminal Procedure no fresh complaint on the same facts can be entertained so long as the order of dismissal is not set aside by a competent authority.—Mahomed Abdul Mennan v. Panduranga Row 28 Mad. 255 372

Criminal Procedure Code—Act V of 1898. s. 209—Examination of accused

It is the duty of a Magistrate, before committing accused persons for trial, to examine them for the purpose of enabling them to explain any circumstances appearing in the evidence against them. The effect of section 209 of the Code of Criminal Procedure is that it is not left to the discretion of the Magistrate who intends to commit to examine the accused. He is bound to examine them, and if he makes an order of commitment without such examination the order is irregular.—Queen-Empress v. Pandara Tevrin 23 Mad. 636 30

Criminal Procedure Code Act V of 1898, ss. 209, 436—Refusal by Magistrate to charge accused with offence triable exclusively by Court of Session—"Discharge"—Charge of offence triable by Magistrate—Acquittal—Order by Sessions Court for further enquiry and committal—Legality of such order.

Certain persons were charged before a Magistrate of the first class under section 379 of the Indian Penal Code with the theft of a promissory note. The prosecution applied for a further charge to be framed under section 477 of the Indian Penal Code, but this the Magistrate declined to do, as, in his opinion, there was no direct evidence that the accused had destroyed or secreted the note. After hearing the evidence for the defence the Magistrate acquitted the accused under section 258 of the Code of Criminal Procedure. Application was then made to the Sessions Court to call for the records and direct the committal of the accused for trial for an offence under section 477 of the Indian Penal Code. The Sessions Court ordered that a further enquiry be made and that the accused be committed for trial. On its being contended, on revision, that the order of the Sessions Court was illegal on the ground that the accused had been acquitted and not discharged:

Held, that the order of the Magistrate was, in substance, an order discharging the accused in respect of an alleged offence under section 477, Indian Penal Code, and that the Sessions Judge had jurisdiction to make the order sought to be revised. Krishna Reddi v. Subbamma 24 Mad. 136 42

Criminal Procedure Code—Act V of 1898, ss. 222, 234-Criminal breach of trust-Joinder in one trial of charges for two distinct items with another for a gross sum is not illegal-Construction of statute.

Under section 222 of the Code of Criminal Procedure a charge of criminal breach of trust in respect of a gross sum, without specifying the items, is a charge for one offence within the meaning of section 234.

Section 222 of the Code of Criminal Procedure does not apply only to cases where there is a general deficiency and the prosecution is unable to specify the particular items of the deficiency, but also to cases where the items may be. but are not. specified.

The joinder in one trial of charges of criminal breach of trust in respect of two distinct items with a charge in respect of a gross sum [the items constituting which may be but are not specified] is a joinder of only three charges. and is not bad as contravening the provisions of section 234 of the Code of Criminal Procedure,

Digitized by Google

"The essence of a Code is to be exhaustive on the matter in respect of which it declares the law and it is not the province of Judge to disregard or go outside the enactment according to its true construction." Thomas v. Emperor 29 Mad 558 419

Criminal Procedure Code—Act V of 1898, ss. 233, 235—Misjoinder of charges—Objection first taken on appeal—Same transaction.

A person was convicted on three charges, namely ;—(1) of abetting the falsification of a document (an account book), (2) of fraudulently destroying and secreting documents, and [3] abetting criminal breach of trust, no objection on the ground of misjoinder being taken before the Sessions Judge. The only manner in which the alleged falsification and destruction were connected was that the account book and the document were both in the custody of the accused, who thus had opportunity to falsify the one and to destroy the other. It was not suggested that the account book was falsified in order to conceal the fact that documents had been destroyed, or that documents had been destroyed in order to prevent the particular falsification from being detected.

Held, that the offences charged did not constitute one series of acts so connected together as to form the same transaction within the meaning of section 235 of the Code of Criminal Procedure. Also that the misjoinder could not be treated as an irregularity curable under section 537, and that the conviction must be set aside. Krishnasami Pillai v. Emperor 26 Mad. 125 219

Criminal Procedure Code—Act V of 1898, ss. 233, 234, 235 (1)—Misjoinder of charges—Trial by jury on indictment in which charges have been wrongly joined—irregularity in criminal proceedings—Penal Code—ss. 109, 161 and 384—Evidence Act—Act I of 1872, s. 167.

The appellant was tried at the Criminal Sessions of the High Court, and convicted, on an indictment the first count of which contravened the provisions of sections 233 and 234 of the Code of Criminal Procedure [which provide that every separate offence shall he charged and tried separately, except that three offences of the same kind may be tried together in one charge if committed within the period of oneyear], and did not fall within the provisions of section 235 [1] [which provides that if in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence]. On a case certified under article 26 of the Letters Patent and heard by the Full Court, it was held by the majority of the Court that the union of the first count with the others made the whole indi-ctment bad for misjoinder but that it was open to them to strike out the first count, rejecting the evidence with regard to it, and deal with the evidence as to the remaining counts of the indictment. This was done with the result that the conviction was upheld on one count only, the sentence being reduced.

Held, by the Judicial Committee that the disregard of an express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by section 537 of the Criminal Procedure Code. Such a phrase as "irregularity" is not appropriate to the illegity of trying an accused person for more different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one indictment.

Nor could such illegal procedure be amended by arranging afterwards what might or might not have been properly submitted to the jury. To allow this would leave to the Court the functions of the jury, and the accused would never have been really tried at all upon the charge afterwards arranged by the Court. The trial having been conducted in a manner prohibited by law was held to be altogether illegal and the conviction was set aside. Subrahmania Ayyar v. King-Emperor 25 Mad 61 112

Criminal Procedure Code—Act V of 1898, s. 235—"Same transaction".

An accused was charged and tried at one trial with the offences of kidnapping, wrongful confinement and assault, and convicted. The case for the prosecuton was that the accused had kidnapped and wrongfully confined a boy, and that when the boy's mother, a day or two afterwards

Digitized by Google

went to the house of the accused and asked that the boy might be allowed to return to her, the accused assaulted the mother. The conviction was upheld by the Sessions Court. On a revision petition being preferred in the High Court.

Held, that the charge of assault ought to have been brought separately and tried separately. The kidnapping and the assault were not committed in one series of acts so connected together as to form one transaction. The offence of kidnapping is complete when the minor is actually taken form lawful guardianship, and it is not an offence continuing as long as the minor is kept out of such guardianship. Even assuming that on the facts of this case the process of "taking" or "enticing" was going on at the time of the alleged assault of the mother, it was doubtful whether the assault was one of a series of acts so connected together as to form the same transaction, and the charge of assault should have been brought and tried separately.

Chekutty *v.* Emperor 26 Mad. 454 246

Criminal Procedure Code—Act V of 1898, ss. 243, 252, 529—Trial of a warant case as a summons case not a mere irregularity.

Where a Magistrate in trying a warrant case does not adopt the course prescribed by section 252 of the Code of Criminal Procedure, but convicts the accused on his own admission without taking evidence and without framing a formal charge, such procedure is not a mere irregularity and the conviction will be set aside.

Emperor *v.* Chinnapayan 29 Mad 372 414

Criminal Procedure Code—Act V of 1898, s 248—Withdrawal of complaint.

A complaint having been made to the police, the latter caused charges to be preferred under sections 143 and 504 of the Indian Penal Code against certain accused. The person who had complained to the police subsequently filed a petition praying the Second-class Magistrate to withdraw the charges under section 248 of the Code of Criminal Procedure. The Magistrate permitted the withdrawal and directed the accused to be set at liberty :

Held, that the order was bad, there being no " complainant " in the case and that consequently the Magistrate in purporting to act under section 248 had exceeded his powers.

Queen-Empress *v.* Chenchayya 23 Mad. 626 27

Criminal Procedure Code—Act V of 1898 s. 250—Frivolous accusations.

A Village Magistrate is not a Magistrate within the meaning of section 250 of the Code of Criminal Procedure ; and where a case has been instituted in consequence of a complaint made to a village Magistrate, who sent a report to the police, who submitted a charge sheet, the person who complained to the village Magistrate cannot be ordered, under section 250, to pay compensation to the accused if the latter are discharged.—King-Emperor *v.* Thammana Reddi 25 Mad. 667 181

Criminal Procedure Code—Act V of 1898, s. 250—Order for compensation.

The question whether the direction given by section 250 of the Code of Criminal Procedure has been rightly exercised, must always depend upon the facts of the particular case. If the false charge is of such a nature that a prosecution is necessary on grounds of public policy, it may well be, that a magistrate would exercise his discretion wrongly if, instead of sanctioning a prosecution, he awarded compensation. If the false charge is one which does not render it necessary on grounds of public policy that a prosecution should be sanctioned, a magistrate who makes an order for compensation cannot be said to exercise his discretion wrongly. In the matter of Tammi Reddi 27 Mad. 59 308

Criminal Pro. C.—s. 250. See Compensation. 407

Criminal Procedure Code—Act V of 1898, ss. 250, 388 (2)—Compensation.

A Deputy Magistrate, having held that a complaint was vexatious, ordered the complainant to pay compensation under section 250 of the Code of Criminal Procedure. He recorded the following order :—" The complainant is unable to produce any sureties and pleads inability to pay the compensation. He is awarded 30 days' simple imprisonment. " No attempt was made to levy the amount of the compensation.

Digitized by Google

Held, that the order was invalid whether it were passed under section 250 [2] or section 388 [2] of the Code of Criminal Procedure. Where an order to pay compensation has been made under section 250, the Magistrate cannot make an order for imprisonment on the mere intimation by the person who is directed to pay the compensation that he is unable to do so. Under section 388 [2], the issue of a warrant for the levy by distress of the amount awarded as compensation is a condition precedent to the carrying out of the sentence of imprisoment. In the matter of Byravalu Naidu 26 Mad. 127 220

Criminal Procedure Code—Act V of 1898. s. 259—Discharge of accused—Revival of proceedings.

Where an order of discharge under section 259 of the Code of Criminal Procedure has been passed by a Magistrate, such order will not preclude him from proceeding with the case on a fresh complaint.

An order of discharge under section 259 of the Code of Criminal Procedure is not an acquittal nor has it the effect of an acquittal under section 403—Chinnathambi Mudali *v.* Salla Gurusamy Chetty 28 Mad 310...377

Criminal Procedure Code Act V of 1898, ss 269 (1), 536 (2)—Jury case tried by assessors—Omission to take objection before finding recorded.

By section 269 of the Code of Criminal Procedure the local Government may, with the previous sanction of the Governor-General in Council, by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any District and may, with the like sanction, revoke or alter such order.

In the "Fort St. George Gazette," dated 30th August 1899, it was notified that, whereas by orders previously made the trial of persons charged with certain offences should, in certain districts of the Presidency, including that of Tinnevelly, be by jury; and whereas disturbances known as the anti-Shanar disturbances had taken place in the districts of Tinnevelly and Madura, and certain persons stood committed for trial and others might thereafter be similarly committed in connection therewith, the Governor in Council, with the previous sanction of the Governor-General in Council, directed, under section 269 of the Code of Criminal Procedure, that the said previous orders be revoked as regards the persons referred to, and that such persons should be tried with the aid of assessors and not by jury.

Certain persons having been so tried for offences under sections 148, 454, 395 and 323 of the Indian Penal Code, one assessor gave it as his opinion that none of shem were guilty: the other assessor finding some of them not guilty. The Additional Sessions Judge convicted and sentenced all the accused, whereupon the objection was taken, on appeal, in the High Court, that the trial should have been by jury and not with the aid of assessors and that the conviction should therefore be set aside. The objection was not taken at the trial:

Held, that the omission to take objection to the trial before the Court had recorded its findings was fatal to the contention now urged that the trial was invalid.

Held further, that even assuming that objection had been duly taken, the offences connected with the outbreak had been rightly treated as a "class of offences," and that it was competent to the Government, with the consent of the Governor-General in council to revoke the previous notification so far as it related to that class. Queen-Empress *v.* Ganapathi Vannianar 23 Mad 632. 28

Criminal Procedure Code—Act V of 1898, ss 285, 537—Absence of one assessor-Resumption of his seat Legality of trial- Conspiracy—Penal Code s. 109

A trial for murder, conspiracy to murder, and abetment of murder, duly commenced before a Sessions Judge and two assessors, and continued for about seven weeks. During that period one of the assessors was permitted to absent himself during two whole days, and five half days respectively: at first, so that he might visit his mother on her death-bed and subsequently, to perform the daily obsequies rendered necessary by her decease. He then returned his seat as an assessor and continued so to act until the termination of the trial, all the depositions recorded in his absence having been read by him on his return. At the conclusion of the trial the Sessions Judge invited the opinion of

Digitized by Google

each was that all accused were guilty and the Judge, concurring in that opinion convicted the accused. The prisoners appealed to the High Court where it was contended that the Judge had acted contrary to law in allowing the assessor who had been absent to resume his seat as an assessor and in inviting and taking into consideration his opinion deciding the case; and that the conviction ought to be quashed

Held, (DAVIES, J. dissenting) that the finding and sentence appealed against had been passed by a Court of competent jurisdiction within the meaning of section 537 of the Code of Criminal Procedure and that the defect in the trial did not affect its validity and was cured by that section if the irregularity had "had not in fact occasioned a failure of justice" and that no such failure of justice had been shown:

Per BHASHYAM AYYANGAR. J.—Under the Indian Penal Code conspiracy except in cases provided for by sections 311, 400, 401, 402, and 121A of the Code is a mere species of abetment where an act or an illegal omission takes place in pursuance of that conspiracy, and amounts to a distinct offence for each distinct offence abetted by conspiracy. King-Emperor *v.* Tirumal Reddi and King-Emperor *v.* Subbi Reddi 24 Mad. 523 76

Criminal Procedure Code—Act V of 1898, ss. 269, (3), 309—Opinion of only two jurors taken at assessors—Validity.

At the trial of an accused, before a Sessions Judge and a jury, for theft in a building [an offence triable by a jury] and for administering a noxious substance [an offence triable by assessors], the Judge took the verdict of the jury on the former charge, and took the opinion of only two of them [as assessors] on the latter.

Held, that, under sections 269 [3] and 309 of the Code of Criminal Procedure, the Judge should have taken the opinion of all the jury as assessors, on the latter charge, and that his failure to do so was not an "omission" or "irregularity" to which section 537 applied. Ramakrishna Reddi *v.* Emperor 26 Mad. 598 283

Criminal P. C. s. 271—See Evidence Act s. 30 1

Criminal Procedure Code—Act V of 1898, s. 288—

Under section 288 of the Code of Criminal Procedure the Court is not restricted to admitting the evidence of a witness duly taken before the committing Magistrate merely for the purpose of contradicting that witness when he is called as a witness at the Sessions Court. The section is intended to enable the Court to read the previous evidence as substantive evidence in the case, at the trial, where, for the purposes of justice, the adoption of such a course is found necessary by the Judge. Queen-Empress *v.* Dorasami Ayyar 24 Mad. 414 76

Criminal Procedure Code—Act V of 1898, s. 307—Procedure of High Court on reference under—'Opinion' of jury, what is.

Where the Sessions Judge disagreeing with the jury, refers a case to the High Court under section 307 of the Code of Criminal Procedure, the High Court is to form its own opinion on the evidence. The 'opinion' of the jury in section 307 of the Code of Criminal Procedure is the conclusion of the jury, and not the reasons on which that conclusion is based.

Per Sir SUBRAHMANIA AYYAR, Officiating Chief Justice, and BODDAM. J.—In references under section 307 of the Code of Criminal Procedure, although it may be expedient to have before the Court the reasons of the jury for the view taken by them, when any have been given, the circumstance that no such reasons have been ascertained does not warrant this Court to decline to go into the evidence and to arrive at its own judgment, after giving due weight to the views taken by the Judge and the jury as to the guilt or innocence of the accused. Emperor *v.* Chellan 29 Mad 91. 382

Criminal Procedure Code—Act V of 1898, ss 337, 339—Withdrawal of pardon and commitment for trial.

R was charged with having committed the offence of dacoity, with others. In consequence of a confessional statement made by R. pardon was tendered to him by the Stationary Sub-Magistrate, under the District Magistrate's order. R was subsequently examined as a witness for the prosecution at a preliminary enquiry into the dacoity held by the Magistrate under chapter XVIII of the Code of Criminal Procedure, but he retracted his former statement, each assessor, and recorded it. The opinion of

Digitized by Google

(which he said, had been made in consequence of police torture), and asserted that he knew nothing about the dacoity. The dacoity case came on for trial in the Sessions Court, but R was not called as a witness, and, in the end, the persons charged were acquitted. Upon the subsequent application of the police, the District Magistrate withdrew the pardon which had been tendered to R, on the ground that the latter had withdrawn and contradicted his first statement. R was in due course charged before the same Sub-Magistrate with having been one of the dacoits, and was committed for trial :

Held, that the commitment was illegal. The words "in the case," which occur in section 337 (2) of the Code of Criminal Procedure, include a preliminary enquiry, and do not refer to the trial alone. If there is reason to believe that a person to whom pardon has been tendered will give false evidence, there is no duty on the prosecution to put him forward as a witness. Pardon conditionally granted may be at once withdrawn as soon as good faith has been broken, and good faith is broken if the witness does not diclose the truth to the Magistrate. The proper authority to withdraw a pardon is the authority which granted it.

Semble, that when pardon is revoked, no steps should be taken against the person who so forfeits it until after the trial of the other accused is over; and that his trial should then proceed *de* novo Queen-Empress *v.* Ramasami 24 Mad. 321 71

Criminal Procedure Code—Act V. of 1898, s. 342—Examination of accused defamation—Failure to prove publication.

Eight persons were charged with defamation by making and publishing a certain petition regarding the conduct of the complaintant. Though other evidence was adduced by the prosecution, it was not proved that the accused made and published the matter which was alleged to be defamatory. The Magistrate, however, asked the accused if they had signed the petition and accepted their answers as proving that they had and as relieving the prosecution from proving the making and publication of the alleged defamatory matter by the accused. He convicted the accused.

Held, that the convictions must be set aside. A gap in the evidence for the prosecution cannot be filled up by any statement made by the accused in his examination under section 342 of the Code of Criminal Procedure. The omission to prove the making and publication of defamatory matter is more than an irregularity, it is a defect which vitiates the conviction.—Mohideen Abdul Kadir *v.* Emperor 27 Mad 238 315

Criminal Procedure Code—ss. 366, 397—Judgment after conviction.

Where a judgment, in a criminal trial, was written and delivered some days after the prisoners were convicted and sentenced ;

Held, that this was a violation of sections 366 and 367 of the Code of Criminal Procedure and was more than an irregularity. It was a defect which vitiated the convictions and sentences. Bandanu Atchayya *v.* Emperor 27 Mad. 237. 315

Criminal Pro. C.—ss. 391, 407—Postponement.

When a Second-class Magistrate passes a sentence of whipping only, without imprisonment he has no power to postpone the execution of the sentence pending an appeal by the accused. It is only when whipping is added to imprisonment in an appealable case that the whipping may, and ought to, be postponed under section 391 of the Criminal Procedure Code. Meyyan *v.* Emperor 26 Mad 465. 249

Criminal Pro. C—s. 403 [4].

Five persons were charged before a Sessions Judge, sitting with assessors, with having committed dacoity with murder under section 396, Indian Penal Code, and a sixth, with abetting them. The abettor was acquitted. He was, however, subsequently charged before the Sessions Judge, sitting with a jury, with receiving stolen property knowing that it had been obtained by dacoity, under section 412 of the Indian Penal Code. The jury returned a verdict of guilty, and the accused was convicted and sentenced. The facts on which the accused was convicted of receiving stolen property were the same as those upon which he had been acquitted of abetment of dacoity with murder, the dacoity by which the stolen property was alleged to have been received being the same as that which had formed the subject of the previous charge. On its being contended that the

Digitized by Google

Court had power to try the accused a second time under sub-section 4 of section 403 of the Criminal Procedure Code, inasmuch as a charge of receiving stolen property must be tried by a jury; and that in consequence the Court by which the accused had first been tried was not a Court competent to try the present charge.

Held that the conviction was bad.—

King Emperor *v.* Krishna Ayyar 24 Mad 641 96

Criminal Pro. C.—ss. 418, 589—Opinion of jury of gilt in respect of offence not triable by jury.

Two persons were charged, as first and second accused, before a Court of Session, with robbery (under section 392 of the Indian Penal Code) and first accused was also charged with having caused grievous hurt in the course of the robbery (under section 397). Both offences are triable, and the accused were, in fact, tried by a jury, who, by their verdict, acquitted both of the accused of the charges framed under the sections referred to, but found first accused guilty of voluntarily, causing grievous hurt—an offence which is triable, not by a jury but by assessors. The Sessions Judge acquitted both accused in respect of the charges under section 392 and section 397, but convicted first accused of having voluntarily caused grievous hurt, under section 325. Against that conviction first accused preferred this appeal when it was objected that inasmuch as the trial had been held before a jury, the appeal lay on matter of law only, and not on questions of fact.

Held. Per BENSON, J., that the conviction of the first accused for causing grievous hurt was not one by a jury but by the Judge, who treated the finding of the jury in regard to the grievous hurt as the opinion of assessors. An appeal therefore lay on the facts, as in the case of *Muthusami Pillai* v, *Queen-Empress* (Criminal Appeal No. 215 of 1895, unreported—see judgment in footnote hereto), and in *Empress* v. *Mohim Chunder Rai* (I. L. R., 3 Calc., 765).

Per BHASHYAM AYYANGAR, J—That the effect of section 238 of the Criminal Procedure Code is to invest a jury trying an offence triable by a jury with authority to find, as an incident to such trial, that certain facts only are proved in the trial, which facts constitute a minor offence, and return a verdict of guilty of such offence though such minor offence be not triable by a jury. And that a Sessions Judge may thereupon record judgment convicting the accused of such minor offence although he is not charged with it and tried on such a charge by the Sessions Judge with the aid of the jurors as assessors. The jury having found first accused guilty of causing grievous hurt and the Judge having given judgment convicting him of the same, an appeal lay only on a point of law, as the accused had been convicted in a trial by jury Pattikadan Ummaru *v.* Emperor 26 Mad. 243 232

Criminal Pro C.—s. 421

A Court, when dismissing an appeal summarily under section 421 of the Code of Criminal Procedure, is not bound to write a Judgment in conformity with the provisions of section 367.

King Emperor *v.* Krishnayya. 25 Mad. 534 173

Criminal Pro. C.—s. 421.

Where a petition of appeal signed by a pleader is presented to a Magistrate by the party in person, the appeal cannot be dismissed without giving the pleader a reasonable opportunity to appear.

Where the conviction is based on the evidence of witnesses whose credibility is impeached by the accused on reasonable grounds. the appeal should not be summarily rejected under section 421 of the Code of Criminal Procedure without sending for the records. Rangacharlu *v.* Emperor 29 Mad. 236. 411

Criminal Pro. C.—s. 423.

A Deputy Magistrate has no power, under section 423 of the Code of Criminal Procedure, to reverse an order acquitting an accused person of a charge of theft. The words "reverse the finding and sentence" in clause 1 (*b*) of that section mean reverse the finding upon which a conviction is based, and do not empower the appellate tribunal [or at any rate an appellate tribunal other than the High Court] to reverse or set aside an acquittal. Sami Ayya *v.* Emperor 26 Mad. 478. 255

Criminal Pro. C.—s. 423,

An order under section 31 of the Court Fees Act directing the accused, on appeal against

Digitized by Google

conviction, to pay the costs of the complainant is not an enhancement of the sentence.—

Emperor v. Kasuppana Pillai 29 Mad. 188 408

Criminal Pro. C.—s. 423 (b).

A Magistrate convicted two accused, and, in addition to the sentences which he passed on them, ordered them to pay the Court and process fees in equal shares. The appellate Court acquitted one of the accused and ordered the other accused (whose conviction was affirmed) to pay the whole amount of the Court and process fees :

Held, that the order of the appellate Court was legal under section 423 (d) of the Criminal Procedure Code and did not amount to an enhancement of sentence within the meaning of section 423 (b). Fees ordered to be paid under section 31 (iv) of the Court Fees Act are recoverable as if they were fines imposed by the Court but they are not part of the fine imposed as a punishment for the offence.—

Vemuri Seshanna In re 26 Mad. 421 245

Criminal Pro. C.—ss. 423. (2), 537—Trial by jury—Jurisdiction of High Court.

In a charge against an Inspector of Salt and Abkari of extortion and bribery in a Court of Session, the first witness for the prosecution deposed that when he complained to the accused of delays which were taking place in weighing salt, the accused told him he ought to make the customary present of Rs. 100 or Rs. 50, according to the amount of salt to be weighed. The witness stated that he had refused to pay the bribe at that time, but that on the following day, when the accused stated that the weighing would only be properly proceeded with if the present were made, he consented, and the accused agreed to send his peon (who was charged with abetment) for the money According to the witness, the peon came to his shop and was paid Rs. 50 by his order and in his presence, and in the presence of two other persons who were in the employment of the witness. The prosecution evidence, if true, only showed that these two other persons had witnessed the transaction without taking any part in it. The accountant and the other two persons were called and gave evidence as second, third and fourth witnesses respectively, for the prosecution. Some entries in account books were relied on in support of the oral evidence of the witnesses, but they were challenged by the accused as false entries, and they were in fact, discredited by the High Court. The writer of them was called as the fifth prosecution witness, and they had been made after the alleged transaction was over. The Sessions Judge, in his charge to the jury, warned them against accepting the evidence of accomplices without corroboration in material particulars. He said that the first and second witnesses were certainly accomplices, and that the third, fourth and fifth witnesses had put themselves practically in the same position as accomplices and that their evidence also required corroboration before the jury could act on it. The jury returned a verdict of not guilty, and the Sessions Judge acquitted the accused. Upon an appeal being preferred by the Public Prosecutor against the acquittal, on the ground of misdirection :

Held, that as regards the first and second witnesses, the charge was accurate ; but that the description of the third, fourth and fifth witnesses was a misdirection.

Held further, that it was not obligatory on the High Court, in such circumstances, to order further enquiry or a retrial and that the High Court could consider the evidence and if, after so doing, it formed the opinion that the evidence could not, in any proper view of the case, support a conviction, it would not alter or reverse the order of acquittal.

Emperor v. Edward William Smither 26 Mad. 1 157

Criminal Pro. C. ss. 485, 437—Notice to accused necessity of.

A person charged with having committed criminal breach of trust was discharged, whereupon the complainant petitioned the Sessions Judge, under section 485 of the Code of Criminal Procedure, to direct a retrial of the case. Notice of the application was not given to the accused. The Sessions Judge, acting under section 437, ordered a further enquiry to be made. On a criminal revision petition being preferred by the accused in the High Court against that order.

Held, that it was competent to the High Court to revise the order ; and that, without laying down a general rule that the omission

Digitized by Google

to give notice of such an application renders an order under the section bad, the order must be set aside as it had not been shown that in this case there was any difficulty in giving notice, or that there was any reason why the general rule should not be followed that an order should not be made to a man's prejudice without giving him an opportunity for being heard. Alagirisamy Naidu *v.* Balakrishna Sami Mudaliar 26 Mad. 41 **201**

Criminal Pro C.—ss. 435, 439.

The High Court has no jurisdiction, under sections 435 and 439 of the Code of Criminal Procedure, to revise an order passed by any Court other than a Criminal Court under clause (*b*) or (*c*) of sub-section (1) of section 195 of the Code of Criminal Procedure, according sanction to institute a prosecution; or an order passed under sub-section (6) of section 195 revoking or refusing to revoke a sanction which has been given or granting a sanction which has been refused.

It may be open to the High Court, under section 622 of the Code of Civil Procedure, to revise such proceedings of a Civil Court, in cases which come within the terms of that section. Chennanagoud 26 Mad. 139..**225**

Criminal Pro. C—s. 436

Charges under sections 304 and 147 of the Indian Penal Code were brought by the Police against certain accused in the court of a Deputy Magistrate, who took all the evidence for the prosecution but went on furlough without passing any order of committal or otherwise. His successor, considering the evidence insufficient to support the charges, altered them to charges under sections 325 and 147 of the Indian Penal Code, and after hearing evidence for the defence acquitted the accused. The Sessions Judge considering the alteration in the charges improper at such a stage ordered a fresh inquiry into the offence:

Held, that the Sessions Judge had exercised a jurisdiction not conferred upon him by law and that his order for a fresh inquiry must be set aside. Queen-Empress *v* Hanumantha Reddi 23 Mad 225 **21**

Criminal Pro. C.—ss. 439, 476.

Where a Court has taken action under section 476 of the Code of Criminal Procedure, the High Court, as a Court of Revision, has no power to interfere, under section 439.

The reasons for the decision in *Queen-Empress* v. *Srinivasulu Naidu*, (I. L. R., 21 Mad, 124, are not applicable to the amended Code. Eranholi Athan *v.* King-Emperor 26 Mad. 98 **213**

Criminal Pro C.—s. 476.

Though an order passed after records have been called for, for any of the purposes specified in section 435 of the Code of Criminal Procedure may be a "Judicial proceeding" for the purposes of section 476 (as to which the Court gave no ruling), where a District Magistrate called for such records in his executive capacity to see whether an application for an enquiry into the conduct of a police constable should be granted and passed an order thereon sanctioning his prosecution.

Held, that there was no judicial proceeding within the meaning of section 476 and that the order must be set aside.—Sangilia Pillai *v.* The District Magistrate of Trichinopoly 25 Mad. 659 **180**

Criminal Pro C—ss. 476, 435, 437.—Madras Act III of 1869,

The High Court has power to revise proceedings under section 476 of the Code of Criminal Procedure when such proceedinge are null and void for want of jurisdiction.

Madras Act III of 1869 does not authorise the issuing of summons in a departmental inquiry for bribery.

The pendency of an appeall by the accused, who had paid the fine imposed on him, would not give any Court authority or power to arrest him or to take recognizances from him for appearing at any further enquiry.

The presenting of a petition imputing improper motives to a Magistrate who is illegally detaining a person to take recognizances from him to enforce his attendance for the foregoing purpose will not justify any action by such Magistrate under section 476 of the Code of Criminal Procedure as the offence is not committed in the course of a *judicial proceeding*, nor is it brought to his notice in the course of such proceeding. Suryanarayana Row *v.* Emperor 29 Mad. 100. **388**

Digitized by Google

Criminal Pro. C.—ss. 476, 478, 403.

The power to direct a prosecution under s. 476 of the Code of Criminal Procedure is conferred on the Court and not on the individual Magistrate who tried the case. Such power is not ousted by the dismissal, without adjudication, of a complaint by the party in respect of the same offence under a sanction previously given by the Court. Runga Ayyar v. Emperor 29 Mad 331 **413**

Criminal Pro. C.—ss. 517-523.

When a person charged before the Magistrate with criminal breach of trust in respect of certain jewels died before trial and before any evidence was recorded and the alleged owner of the jewels, which were recovered by the Police from the pledgees and sent to the Magistrate along with the charge sheet, applied to be put in possession of them under sections 517 and 523 of the Code of Criminal Procedure after enquiry as to their ownership :

Held, that section 517 of the Code of Criminal Procedure did not apply to the case.

Held further, that as there was no evidence or finding about ownership, section 523 of the Code of Criminal Procedure did not apply and that the Magistrate was not bound to hold an inquiry simply to determine the ownership of the jewels. Kuppammall In the matter of 29 Mad. 375 **416**

Criminal Pro. C.—s. 528.

An order for the transfer of a case, made at the request of the magistrate on whose file the case stands, and not on the application of a party, is an exception to the general rule that an order for transfer should not be made under section 528 of the Code of Criminal Procedure without notice to the other side. Queen-Empress v. Kuppumuthu Pillai 24 Mad. 317...**68**

Criminal Pro C.—s. 528.

A District Magistrate has no power to cancel an order made by a Sub-Divisional Magistrate directing the transfer, under section 528 of the Criminal Procedure Code, of a case from the file of one Sub-Magistrate to that of another Sub-Magistrate, and to direct the re-transfer of the case to the file of the Sub-Magistrate from whom it was transferred.—Raghunatha Pandaram v. Emperor 26 Mad 130 **222**

Criminal Pro. C.—s. 528 Regulation IV of 1821,

The jurisdiction which a District or Sub-Divisional Magistrate has, under section 528 of the Code of Criminal Procedure, to transfer a Criminal case from the file of a Village Magistrate is limited to the cases (namely those relating to petty thefts) which a village Magistrate is empowered by Regulation IV of 1821 to try and punish.—Sevakolandai v. Ammayyan. 26 Mad. 394 **238**

Criminal Pro. C. s. 530—Penal Code —ss. 193, 194.

Certain witnesses made statements in a preliminary enquiry before a Magistrate, in a case of alleged murder, and contradicted those statements at the trial before the Court of Sessions. The latter then sanctioned their prosecution for giving false evidence in a judicial proceeding, an offence punishable under section 193 of the Indian Penal Code, and triable by a Magistrate of the first class. The Deputy Magistrate, by whom they were tried, convicted them, and the accused appealed, the appeals being transferred to another Sessions Court for hearing. The Sessions Judge held that inasmuch as the false statements had been made in connection with a charge of murder, the offence for which the accused should have been tried fell under section 194, Indian Penal Code, and that, in consequence, they could be tried only by Court of session and not by a Magistrate of the first class He considered their trial by a First-class Magistrate to be void under section 530 of the Code of Criminal Procedure, and set aside their conviction, committing one of them for trial by a Court of Session on a charge under section 194 of the Indian Penal Code, and making no order in respect of the other accused as he considered the imprisonment already undergone was sufficient.

Held, that the order was wrong as the proceedings of the First-class Magistrate were not void within the meaning of section 530 of the Code of Criminal Procedure. King Emperor v. Ayyan and Vellayappa Udayan. 24 Mad. 675. **102**

Criminal Pro. C.—. 545 —Court Fees Act—s. 31.

Digitized by Google

A person who was convicted by a Deputy Magistrate of having caused hurt, was ordered to pay a fine of Rs. 15, and also the complainant's costs of the prosecution. In the month following the conviction the Deputy Magistrate issued a warrant for the collection of Rs. 12-4-0 from the accused, of which Rs. 2-4-0 was levied under section 31 of the Court Fees Act as Court fees paid by the complainant, and Rs. 10 under section 545 of the Code of Criminal Procedure for two fees of Rs 5 each paid by the complainant to the medical officer for a certificate and for giving evidence in the case. Objection having been made to the recovery of these sums, the case was referred to the High Court for orders :

Held, that the levy of Court fees was warranted by section 31 of the Court Fees Act, which is not modified by section 545 of the Code of Criminal Procedure.

Held also, that the Deputy Magistrate's order passed under section 545 of the Code of Criminal Procedure for the payment of expenses incurred in the prosecution was unsustainable, and such expenses could only be awarded to the complainant out of the fine levied from the accused and not in addition to it. Queen-Empress *v.* Yamana. Rao 24 Mad. 305 76

Criminal Pro. C.—s. 552.

Certain persons were convicted of having committed criminal trespass on a piece of land, under section 447 of the Indian Penal Code. There was no finding that they had used criminal force, or that the complainant had been dispossessed of the land by such force. An order was subsequently made which purported to be under section 522 of the Code of Criminal Procedure, directing the accused to restore possession of the land. On a revision petition being preferred against this order :

Held That as there was no finding that criminal force had in fact been used, or that complainant had been dispossessed of the land by it, and as criminal force was not an ingredient of the offence for which the accused had been convicted, the order was made without jurisdiction.— Batakala Pottiavadu In re 26 Mad. 49 205

Criminal Pro. C. s. 556.

A Deputy Tahsildar made a report concerning A to the Tahsildar, who, in turn, reported the matter to the Deputy Magistrate. The latter authorized the Tahsildar to prosecute A, on such charges as might be capable of being proved in a Criminal Court, and a prosecution was accordingly instituted. The case was tried by the same Deputy Magistrate, and on the objection being raised that under section 556 of the Code of Criminal Procedure that Magistrate was disqualified from trying the accused :—

Held, that he was not disqualified. The act of the Deputy Magistrate was an authorization and not a direction that the accused should be prosecuted.—Queen Empress *v.* Chenchi Reddi 24 Mad. 238 54

Criminal Pro C.—s. 562.

The power of passing orders under section 562 of the Code of Criminal Procedure is not confined to Courts of First Instance. Narayanaswami Naidu *v.* Emperor 29 Mad. 567 425

Evidence Act—s. 24—Jury.

Two days after a dacoity had been committed in a certain village, T. went to the Village Magistrate of that village, who was enquiring into the dacoity and requested him to report that T. had not been concerned in the dacoity. The Village Magistrate replied that there was already a hue and cry against T., but that if T. spoke the truth he would consult the Head constable and arrange that T. should be taken as a witness. T. at first denied all knowledge of the dacoity, but ultimately made a confession. T. was charged with others with having Committed the dcoity, and this confession was deposed to by the Village Magistrate. The Sessions Judge, in his charge to the Jury, made no reference to the relevancy or otherwise of the confession under section 24 of the Evidence Act, and he said that if the confession was true it was enough to warrant the conviction of the accused. The Jury returned a verdict of guilty, and the accused was sentenced. On an appeal being preferred on the ground of misdirection.

Hled, that the Village Magistrate was a person in authority within the meaning of sec. 24 of the Evidence Act, and that as the arrangement promised by him before the confession was made was obviously intended to be one that

Digitized by Google

would save the accused from prosecution if he would confess, the confessipn was irrelevant under that section. *also*, that the misdirection was a material and important one, likely to lead to an erroneous verdict, and that a new trial must take place.—Thandraya Mudaly *v.* Emperor 26 Mad. 38 199

Evidence Act—s, 30—Criminal Pro. C. s, 271.

The trial of an accused person does not necessarily end if he pleads guilty. Under section 271 of the Code of Criminal Procedure, where an accused pleads guilty, " the plea shall be recorded, " and the accused " may be convicted " thereon ; but evidence may be taken in sessions cases as if the plea had been one of " not guilty " and the case decided upon the whole of the evidence including the accused's plea. When such a procedure is adopted the the trial does not terminate with the plea of guilty, and therefore a confession by the person so pleading may be taken into consideration under section30 of the Indian Evidence Act 1872 as against any other person who is being jointly tried with him for the same offence. A trial does not strictly end until the accused has been either convicted or acquitted or discharged.—Queen-Empress *v.* Chiana Pavuchi 23 Mad. 151 1

Evidence Act—s. 114 (b).

The case against an accused, who was tried on a charge of murder, depended entirely upon the evidence of the first witness, who deposed that he had worked for accused prior to and at the date of the murder ; that the woman whom accused was charged with murdering had also worked for accused, and had become *enceinte* by him ; that she had frequently demanded money of accused and at last threatened to disgrace him if he did not pay her ; that on the evening of the murder accused obtained a crow-bar from the witness, and later on, went to where the deceased was sleeping, when the witness heard a cry, and, on secretly approaching the spot, saw accused strike the deceased on the head with a crow-bar ; that witness then ran away ; that accused called him ; that he went to the spot, and accused asked him to put the body in an empty pit some distance off ; that witness refused to help, whereupon accused dragged the body to the pit and threw it in ; that next morning accused threatened to murder the witness if he mentioned what had happened ; that some fifteen days later, after a quarrel with accused, witness ran away and gave information to the brother of the deceased woman and then to the police, who, with some villagers, were taken by witness to the pit, where the body was found and subsequently indentified. The witness stated that he had not given information earlier because he was afraid. The only evidence adduced in corroboration of any part of this witness' evidence was that the brother and sister of the deceased had heard of the relations between accused and the deceased, that the body was found in the pit, and that death was shown to have been caused, at about the time and place stated by the first witness, by fracture of the skull, which might have been caused by a blow from a crow-bar.

On its being contended, on behalf of the accused, that the first witness was an accomplice, or, if not an accomplice in the strict, sense of the term, that he was no better than an accomplice and that his evidence should therefore be corroborated in material particulars, and that in the absence of such corroboration the accused should not be convicted.

Held (per Sir SUBRAHMANIA AYYAR, Offg. C. J., and BHASHYAM AYYANGAR, J., on reference), that the witness was not an accomplice in the crime for which the accused was charged, inasmuch as he had not been concerned in the perpetration of the murder itself. Even assuming that, after the murder had been committed, the witness had assisted in removing the body to the pit, and that he could have been charged with concealment of the body under section 201 of the Penal Code, that was an offence perfectly independent of the murder, and the witness could not rightly be held to be either a guilty associate with the accused in the crime of murder, or liable to be indicted with him jointly. The witness was therefore not an accomplice and the rule of practice as to corroboration had no application to the case.

Per BODDAM, J.—Even if the witness was not an accomplice, having regard to the fact that he was cognizant of the crime for fifteen days without disclosing it and that had a cause of quarrel with the accused at the time when he did disclose it, it would be most unsafe to act

Digitized by Google

upon his evidence unless it was corroborated in some material particular connecting the accused with the crime.

The rule of practice as to the necessity for corroboration of the evidence of an accomplice discussed. Ramaswami Gounden v. Emperor 27 Mad, 271 317

Evidence Act—ss. 114, 133.

Certain persons were charged with the murder of N. The confessional statement of one of them and the evidence of an approver showed that the accused first attacked N, at a spot described as D; that they then carried him from D to a spot described as E; and that from E they carried him to a spot described as F, where he was killed. Three other witnesses deposed to the presence of the accused at D:

Held, that the evidence of the approver was sufficiently corroborated to justify a conviction. King Emperor v. Muhiuddin Sahib 25 Mad, 143. 138

Evidence Act—s. 155 (3)

Two persons made statements to the effect that C and another had robbed them and caused hurt while doing so. One statement was made to their employer, and the other to the Head Constable. C was subsequently charged and these two persons were called as witnesses for the prosecution, but they then denied that C was one of the men who had assaulted them. Their previous statements were filed, but neither the employer nor the Head Constable was called to depose to the terms of the statements which the witnesses were said to have made:

Held, that the former statements referred to, and which implicated the accused, could be used only under section 155 (3) of the Evidence Act for discrediting their evidence and not as substantive evidence against the accused.-Emperor v. Gherath Choyi Kutti 26 Mad. 191 230

Evidence Act s. 167.—see Criminal Pro, C. ss. 233, 234, 235. (1) 112

Extradition Act—XXI of 1879, ss. 4 and 6—Criminal Pro. Code, s. 4—Penal Code, s. 40.

An European British subject was charged and tried before, and convicted by, a First-class Magistrate and Justice of the Peace appointed, under the Extradition. Act, 187, in and for the territories of Mysore. The act for which he was so tried and convicted (namely being in possession of mining materials) constituted an offence under the Mysore Mines Regulation, but was not an offence under the Indian Penal Code. It was contended, in revision, in the Madras High Court that the conviction was wrong on the ground that a Justice of the Peace appointed under the Extradition Act has no authority to deal with an offence committed by an European British subject against a law of the Mysore State.

Held, that the Magistrate had power to try the accused, or to commit him for trial in the Madras High Court.

Per Sir ARNOLD WHITE, C. J.—Section 8 of the Act of 1879 extending to European British subjects in states in India in alliance with His Majesty the law relating to offences and to Criminal procedure for the time being in force in British India ought not to be read so as to restrict the powers of the Governor-General which are declared by section 4 and which may be delegated to his officers under section 6. The word "offences" as used in section 6 of the Act of 1879 is not restricted to offences as defined by section 40 of the Indian Penal Code. Nor is it restricted to any definition of "offence" to be found in the Code of Criminal Procedure, although, as a matter of fact, the present definition of "offence" in the Code of Procedure (section 4 (o)), which is the same as that contained in the General Clauses Act is sufficiently wide to include the wrongful act with which the accused in the present case was charged. Adams v. Emperor 26 Mad. 607 283

Forest Act—(Madras) Act V of 1882,

The word "clearing" as it is used in sec. 21 (*a*) of the (Madras) Forest Act of 1882 means something in the nature of the removal of trees or shrubs. Certain accused were convicted of an offence under the section, but there was no evidence on the part of the prosecution to show that there had been any removal of trees or shrubs by the accused, or that cultivation of the land in question could not have been carried on without such removal.

Held, that there was no evidence that the accused had committed an act prohibited by

Digitized by Google

section 21.—Emperor v. Venkanna Prabhu 26 Mad. 470 252

Jury Case tried by assessors—see Criminal Pro. C. ss. 259 (1) 536 (2). 28

Letters Patent—art 15-Appeal security for keeping peace.

Petitioner had been ordered by a Head Assistant Magistrate to furnish security for keeping the peace, under section 107 of the Code of Criminal Procedure. The order was confirmed on appeal. An application to the High Court to revise the order came before a single Judge and was rejected. This appeal was filed against the last-mentioned order.

Held, that no appeal lay.

Per THE OFG. C.J.—The order requiring security was an order in a criminal trial, and in consequence, the order passed in revision was also an order in a criminal trial.

Per RUSSELL, J,—The order appealed against was not a 'judgment' within the meaning of article 15.—Ramasamy Chetty In the matter of 27 Mad. 510 330

Municipalities Act—s. 63 (2), (3).

By section 63 (2) of the District Municipalities Act, (Madras), 1884, it is enacted that except as provided in sub-section [3] of that section and in section 63-A, a tax may be levied at such rate, not exceeding eight and a half per centum, on the annual value of the buildings or lands or both upon which it is imposed, as the Municipal Council may have notified under section 50; and by section 63 [3], in the case of [a] lands not occupied by buildings and not appurtenant to any building or attached thereto for use therewith as a garden or pleasure-ground or for the pasturage of animals kept for private use, and [b] lands occupied by native huts, the Chairman may, subject to the approval of the Municipal Council and the sanction of the Governor in Council, impose a tax on such lands at an annual rate, not exceeding four annas for every 80 square yards thereof, in lieu of the tax referred to in sub-section [2]. Provided that no tax shall be levied under this sub-section upon lands used solely for agricultural purposes:

Held, that subject to the conditions mentioned a tax levied under sub-section [3] on all lands within a municipality is a legal tax. Queen-Empress v. Allan 24 Mad. 195 61

Municipalities Act s. 63 (3)—Amendment Act—Act III of 1897 s. 49.

By sub-section (3) of section 63 of the Madras District Municipalities Act, 1884, as amended by the Madras District Municipalities Amendment Act, 1897, lands used "solely for agricultural purposes" are exempted from the enhanced rates of taxation that may be imposed in certain cases under that sub-section:

Held, that lands on which potatoes, grain vegetables, &c., are grown, as well as pasture lands, are used "solely for agricultural purposes" within the meaning of the sub-section. King-Emperor v. Alexander Allan 25 Mad. 627 177

Municipalities Act—1884 as amended by Act III of 1897, s. 269.

Money due under a contract entered into with a Municipality for the right to collect tolls in consideration of a money payment does not fall within any of the provisions of section 269 of the District Municipalities Act, 1884, and a contractor who fails to pay what is due under such a contract cannot be convicted and fined under that section. Abdul Azeez Sahib v. Cuddapah Municipality 26 Mad. 475 254

Municipalities Act—ss. 197, 191.

Private property is used as a market when it is used as a public place for buying and selling.

Where a private market had been ordered to be closed, a person using the place for selling fish and flesh after a license had been refused is guilty of an offence under section 197 of the Madras District Municipalities Act, or at any rate, of an offence under section 191. Abu Baker v. the Municipality of Negapatam 29 Mad. 185 406

Municipal Act—1884 s. 307.

By the first clause of section 307 of the City of Madras Municipal Act, 1884, the president of the municipality "shall provide in the streets of the city suitable and sufficient dust-bins for the temporary deposit, of dirt, ashes kitchen refuse and other inoffensive matter excepting building, stable and garden refuse which shall be removed by the owner thereof."

Digitized by Google

By the second clause of the same section "whoever, after such provision has been made, deposits any of the said matters or any building, stable or garden refuse in any street, pavement or verandah of any building" . . . . . is rendered liable to fine. Petitioner having deposited stable refuse in one of the dust-bins provided in accordance with the Act was charged before a Magistrate and fined under the latter clause of the said section ;

Held, that the dust-bin was not a part of the street and that the throwing of stable-refuse into the dust-bin was not a deposit of such refuse in the street so as to constitute an offence under the said section. Perumal *v.* Municipal Commissioners for the City of Madras 23 Mad. 164 9

Municipal Act— 1884, s. 341 — Indian Councils Act, 1861—24 & 25 Vict., cap. 67, s. 42.

The Superintendent of the Government Gun Carriage Factory in Madras having brought timber belonging to Government into Madras without taking out a license and paying the license fees prescribed by section 341 of the City of Madras Municipal Act, was prosecuted to conviction by the Municipal Commissioners:

Held, on revision, that timber brought into Madras by or on behalf of Government is liable to the duty imposed by section 341 of the City of Madras Municipal Act although Government is not Manaed in the section According to the uniform course of Indian Legislation, Statutes imposing duties or taxes bind Government unless the very nature of the duty or tax is such as to be inapplicable to Government.

Per curiam :—Under the Indian Councils Act, 1861, a Provincial Council has, subject to the same restrictions as those imposed by the Act on the Governor-General's Council, power to affect the prerogative of the Crown by Legislation. Bell *v.* The Municipal Commissioners for the city of Madras 25 Mad. 457 142

Municipal Act—1884. s. 341 ; see Criminal Pro C. s. 197. 106

Municipalities Act—1884, Bye-law No. 18, Amendment Act III of 1897.

A bye-law of a municipality had been framed under the powers conferred by an Act of 1884 as amended by an Act of 1897, and was to the following effect ;—" No public drain shall be covered without the permission of the municipal council. " It had come into force in 1890. Prior to its coming into operation an earlier bye-law had substantially the same terms. An occupier of premises, who had covered a drain during the subsistence of the earlier bye-law, was charged with having committed an offence under the later bye-law, and contended by way of defence that he could not be convicted inasmuch as the act complained of had been committed before the passing of the Act under which the complaint was laid. He was convicted by a Bench of Magistrates :

Held, that the conviction was right.

Per, Arnold White, C. J.—The bye-law applies to all drains which existed in a covered state at the time when it came into operation. The word "shall is used throughout the bye-law in the imperative, and not with reference to time, and this is the sense it is used in the bye-law in question.

Per Benson, J.—A bye-law similar in terms to that under which the accused had been convicted having been in existence under the then Municipal Act at the time when the accused first covered the drain in question, the liability then incurred by him continued, under the General Clauses Act (Madras) unaffected by the passing of the present Municipal Act. The contention that the accused could not be convicted because the act complained of was committed before the present Municipal Act was passed, therefore, failed.—Parimanam Pillai *v.* Chairman Municipal Council Ootacamund 23 Mad. 213 16

Municipalities Act—1889, s. 4.

A defendant was charged under section 4 of the Madras District Municipalities Act with allowing offensive matter to flow from his house into a street. The matter flowed into a drain or ditch constructed along the side of the roadway. On the question as to whether any offence had been committed :

Held, that a ' street ' is any way or road in a city having houses on both sides ; and that in consequence this definition excluded the drain or ditch on either side of the roadway ; that

Digitized by Google

the drain was not part of the 'street', and that the offence charged had not been committed.—Venkatrama Chetti *v.* Emperor 28 Mad 17 351

Native Christiaan—Confinement of See Regulation XI of 1816 s. 10 53

Penal Code—Right of private defence of body.

The view that a person should not exercise his right of self-defence if by running away he can avoid injury from his assailant, places a greater restriction on the right of private defence of the body than the law requires. The extent to which the exercise of the right will be justified will depend not on the actual danger but on whether there was reasonable apprehension of such danger—Alingal Kunhinayan *v.* Emperor 28 Mad. 454 378

Penal Code—ss, 97, 101, 104.

The villagers belonging to C walked in a religious procession, through a part of the village of K. carrying with them a vessel containing water which purported to be consecrated. The villagers of K. objecting, obstructed the procession, whereupon the members of it resisted the obstruction, and used some violence, causing grievous hurt to one of the obstructors and hurt to others of them. The members of the procession were charged with and convicted of being members of an unlawful assembly, possessing deadly weapons, and causing grievous hurt and their convictions were upheld on appeal. On rivision ;

Held, that the convictions were wrong. The accused were justified, in the circumstances, in exercising their right of private defence ; and the harm inflicted was not more than appeared to have been necessary for the purpose of self-defence.—Regula Bheemappa *v.* Emperor 26 Mad. 249 236

Penal Code. s. 109—see Criminal Pro. C. secs. 285, 537. 79

Penal Code ss. 109, 161, 384—see Criminal Pro. C. ss. 233, 234, 235 (1) 112

Penal Code s 143—Defence of property.

Paddy belonging to a society, to which the first accused belonged, was stored in a granary in a street. It was found as a fact that this paddy had been in the possession of the first accused for some time prior to 5th November 1899, and was in his possession on that date. Complainant, on 5th November 1899, attempted as treasurer of the society to forcibly take possession of the paddy with his servants, whereupon all the accused resisted him, and maintained the possession of the first accused, some blows being struck. On a charge being preferred against the accused for rioting :

Held, that no offence had been committed.—King-Emperor *v.* Ayya Annasamy Aiyar 25 Mad. 624 175

Penal Code—s. 144.

Two persons were charged with being members of an unlawful assembly armed with deadly weapons for the purpose of committing dacoity. The facts proved were that a crowd of about 100 persons, including the accused, had assembled together, armed with bill-hooks and sticks; and that the crowd had dispersed at once on seeing the police. On these facts the Magistrate assumed that the intention of the members of the crowd was to use criminal force, and, having regard to the weapons with which they were armed, he convicted the accused under section 144 of the Indian Penal Code :

Held, that the Prosecution had failed to show that the common object of the crowd was such as would constitute it an unlawful assembly as defined by section 141 of the Indian Penal Code, and that the accused were entitled to be acquitted. Queen-Empress *v.* Pelimuthu Tevan 24 Mad. 124 39

Penal Code—ss. 153, 296.

By a decree in a civil suit, the Tengalai sect in a certain district were declared entitled to hold certain offices connected with a temple, and as office-holders it was their duty to recite certain hymns in processions. The rights of the Vadagalai sect as ordinary worshippers were not affected by the decree, but the Vadagalais were ordered not to interfere with the Tengalais in the recital of the hymns otherwise than as ordinary worshippers. Subsequently to this decree, a religious procession was being conducted along a public highway. The Tengalais walked in front, chanting the hymns. In the rear at such a distance that the Tengalais were not

Digitized by Google

likely to hear them, the Vaddgalais followed, also chanting hymns. A complaint was in consequence laid by a member of the Tengalai sect, charging the Vadagalais (1) with wantonly giving provocation with intent to cause riot and (2) with voluntarily disturbing an assembly lawfully engaged in religious worship.

Held, that neither offence had been committed.

Per DAVIES, J. (without deciding whether religious processions in public streets in India are "lawful" or not).—The Vadagalais had not exceeded their rights as ordinary worshippers and had not intended to provoke a breach of the peace, and were consequently not guilty of an offence under section 153. Moreover, no "disturbance" had been proved within the meaning of section 296.

Per SUBRAHMANIA AYYAR, J.—The object of section 296 of the Indian Penal Code presumably is to secure freedom from molestation when people meet for the performance of acts in a quiet spot vested for the time in assembly exclusively; and not when they engage in worship in an unquiet place open to all the public as a thoroughfare. The user of a highway for religious worship is altogether wanting in lawfulness. There is no peculiar right known to the law as a right of procession. Though the law accords to members of a procession no recognition in their collective capacity, yet the fact that a number of persons use a highway together for some common purpose does not detract in any way from such use being lawful; but as the circumstances attending a procession may in consequence of their being inconsistent with the paramount idea of passage be of such a character as to render the user by the processionists otherwise than lawful and as carrying on worship on a highway is of that character, it cannot be affirmed that the Tengalais on the occasion in question constituted an assembly engaged in worship lawfully, within the meaning of section 296 of the Indian Penal Code.

Per BENSON, J.—The contention that the Tengalais were not "lawfully" engaged in religious worship because they were engaged in it on a highway, could not be accepted. There is nothing illegal. In India (where highways have from time immemorial been used for the passing of religious processions), in a procession or assembly engaging in worship while passing along a highway. If it were necessary to refer the origin of the use of highways for religious processions to a dedication of the highway to such use, such a dedication could reasonably be presumed, history literature and tradition showing that such processions have formed a feature of the national life from the earliest times, and it being unreasonable to suppose that a dedicator would make a reservation against religious processions, which would be wholly opposed to the sentiment of the community. A religious procession is entitled to the special protection given by the Penal Code to assemblies engaged in religious worship. In the present case, however, no "disturbance" had been proved, and consequently no offence had been committed.

Per BHASHYAM AYYANGAR, J. (at the first hearing, the Chief Justice dissenting).—Inasmuch as the Vadagalais had acted as ordinary worshippers which were not prohibited from doing under the decree, the act complained of was not illegal within the meaning of sections 153 and 43 of the Indian Penal Code. With regard to the charge under section 296, the accused had not been shown, on the facts as found, to have voluntarily caused disturbance to an assembly lawfully engaged in the performance of religious worship. No assembly can be so "lawfully engaged" (within the meaning of that section), on a highway, unless it be established or can be reasonably presumed that the dedication of the highway was subject to such user. User of a highway as a place of worship is not the legitimate user of it as a highway. The conviction was wrong on this ground and on the ground that in fact no disturbance had been proved. Vijiaraghava Chariar v. Emperor 26 Mad. 554 259

Penal Code ss 176, 179 187— see Criminal Pro. C. s. 161 25

Penal Code—s. 182—Criminal Pro. C. ss. 154, 162.

An offence under section 182 of the Penal Code is committed by a person giving false information to a Village Magistrate charging another with having committed an offence. Where such information is given with the view to it being passed on to the Station-house Officer, who, on receiving the information, takes a

Digitized by Google

complaint in writing from such informant the complaint is one taken under section 154 and not under section 162 of the Criminal Procedure Code. Emperor v Gonnalagadda Venkatrayudu 28 Mad. 565 380

Penal Code—s. 187—Criminal Pro. Code —s. 103 (1)

A person was called upon by an Abkari Inspector to attend a search held under section 103 of the Code of Criminal Procedure, and did so. He, however, refused to sign the search list when it was prepared. On a charge being preferred against him under section 187 of the Indian Penal Code of intentionally omitting to assist a public servant in the execution of his duty.

Held, that the accused was not guilty of an offence under section 187. Assuming that a person called upon to attend and witness a search, under section 103 of the Code of Criminal Procedure, is under a legal obligation to attend the search and sign the search list, the "assistance" which a person is bound, by the earlier part of section 187 of the Penal Code, to render is *ejusdem generis* with the various forms of assistance referred to in the latter part of the section. It must have some direct personal relation to the execution of the duty by the public officer. The signing of the search list required by section 103, is an independent duty which is imposed on the witness, whereas the word, "assistance," as used in the section, implies that the party who assists is doing something which, in ordinary circumstances, the party assisted could do for himself. In the Matter of Ramaya Naika 26 Mad. 419 243

Penal Code s. 183—See Criminal Pro. C. Act V of 1898 s. 195. 34

Penal Code s. 193—See Criminal Pro. C. ss. 195, 476 20

Penal Code—s. 193—false evidence—Contradictory statements.

On 18th January 1900, the accused deposed before a Magistrate that he had seen P. and others gambling in a certain place. The deposition was read over to the accused, and acknowledged by him to be correct. On 1st February, he was cross-examined in the same case, before the same Magistrate, and he then deposed that he did not know P and had never seen him gambling. He was charged and convicted under section 193 of the Penal Code of having intentionally given false evidence, in that he made two contradictory statements, one of which he either knew or believed to be false or did not believe to be true. On the question being raised, on revision, whether the conviction was legal, or whether it was illegal, by reason of the fact that the contradictory statements were made before the same Magistrate and in the course of one and the same trial:

Held, *Per* BENSON, J. (to whom the case was referred).—That the conviction was legal.

Per MOORE, J.—As no rule can be laid down to the effect that the contradictory statements must have been made at different inquiries or trials, (to render a person liable to conviction) the conviction could not be held to be illegal and should, consequently, not be interfered with in revision.

Per BHASHYAM AYYANGAR J.—The conviction was bad in law. No statement made by a witness in a deposition can be regarded as a completed statement until the deposition is finished, and corrected if necessary; for till then, every statement is liable to be retracted, corrected, varied or qualified, and until his *viva voce* examination is finished neither the whole nor any portion of his deposition becomes evidence. The whole deposition must be read and construed as one, and if a later statement in it is contradictory to or at variance with a prior statement, the statement made by the witness must be taken to be the earlier statement as subsequently modified, or the subsequent statement itself, if it intentionally contradicts and thus retracts the earlier.—In the matter of Palagan 26 Mad. 55 206

Penal Code—s. 193.

A was convicted of giving false evidence in a judicial proceeding. It was proved that after his evidence had been recorded, his deposition upon which the assignments of perjury were based was read over to him by the Court clerk, a place where neither the Judge nor vakils were present.

Held, that the conviction could not be sustained. The deposition upon which the prosecution was based not being properly taken in accordance with law, should not have been

Digitized by Google

admitted in evidence. Kamatchinathan Chetty v. Emperor 28 Mad. 308 375

Penal Code s. 193—Oaths Act X of 1873, ss. 4, 5—Criminal Procedure Code—s. 164.

A Magistrate taking statements under section 164 of the Code of Criminal Procedure is acting in discharge of duties imposed on him by law and is empowered to administer an oath under sections 4 and 5 of the oaths Act. An investigation under Chapter XIV of the Code of Criminal Procedure is a stage of a judicial proceeding and a person making on oath a false statement in the course of such investigation commits an offence under section 193 of the Penal Code. Suppa Tevan v. Emperor 29 Mad. 89 381

Penal Code ss. 193, 194: see Criminal Pro. C. s. 530 102

Penal Code—ss. 211, 182 -Criminal Pro. Code s. 531.

The word "charges" as it is used in section 211 of the Indian Penal Code, means something different from "gives information." The words "false charge" as there used, must be construed with reference to the words which speak of the institution of proceedings.

Semble, the true test is:—Does the person who makes the statement which is alleged to constitute the charge, do so with the intention and object of setting the criminal law in motion against the person against whom the statement is directd ? Such object and intention may be inferred from the language of the statement and the circumstances in which it is made.

A petition was presented with the object (as the High Court held from its terms) of bringing to the knowledge of the authorities certain matters regarding which the petitioner had received information, in order that there might not be a repetition of an alleged tutoring of witnesses, and not with the object that the authorities should institute criminal proceedings:

Held, that the petition did not amount to a "charge" within the meaning of section 211 of the Indian Penal Code.

To constitute an offence under section 182, it must be shown that the person giving the information knew or believed it to be false, or that the circumstances in which the information was given were such that the only reasonable inference is that the person giving the information knew or believed it to be false. The fact that an information is shown to be false does not cast upon the party who is charged with an offence under the section the burden of showing that, when he made it, he believed it to be true. The prosecution must make out that the only reasonable inference was that he must have known or believed it to be false.

Section 531 of the Code of Criminal Procedure applies to a case where a Magistrate who has authority to commit a case for trial, does so, but has not territorial jurisdiction in the place where the offence to be tried is alleged to have been committed. Rayan Kutti v. Emperor 26 Mad 640 297

Penal Code s. 211.

An accusation of murder made to a Village Magistrate (who, under section 18 of Regulation XI of 1816, has authority to arrest any person whom he suspects of having committed the murder of a person whose body is found within his jurisdiction) is a "charge" within the meaning of section 211 of the Indian Penal Code even though it does not amount to the institution of criminal proceedings and even though no criminal proceedings follow it owing to the police referring it as false on investigation.—Chenna Malli Gowda v. Emperor 27 Mad. 129 314

Penal Code—s. 211 false charge.

A person was convicted, under section 211 of the Indian Penal Code, of having preferred a false charge. It appeared that the accused had stated to a Police officer that certain of the prosecution witnesses had stolen his goats, and that he had made this statement intending to set the criminal law in motion against those persons. The statement had not been reduced to writing in accordance with the requirements of section 154 of the Code of Criminal procedure. On its being contended that there was no evidence of a false charge, within the meaning of section 211 :

Held, (1) that the test is - did the person who makes the charge intend to set the criminal law in motion against the person against whom the charge is made ; (2) that (it being clear from the evidence that the accused did so intend) the fact that the statement made by the accused to the Police officer had not been

Digitized by Google

reduced to writing in accordance with section 154 of the Code of Crimina Procedure did not prevent the statement made from being a false charge within the meaning of that section. Mal lappa Reddi v. Emperor 27 Mad. 127 313

Penal Code—s. 317.

Upon a charge being preferred against a mother of exposure and abandonment of her child, under section 317, Indian Penal Code, the Sessions Judge believed that the accused had left the child at a particular spot with the intention that it should be found and cared for by the owner of a neighbouring house. He acquitted her, holding that the offence charged had not been committed, inasmuch as the child had been deliberately placed where it would be, (as in fact it was), found and looked after :

Held, that the acquittal was wrong. The gist of the offence under section 317 is the exposure or leaving with intention to wholly abandon, and the manner of exposing or leaving, and the consequences likely to ensue are not essential ingredients, though they may be taken into consideration in passing sentence. King Emperor v. Antakke. 24 Mad. 662 100

Penal Code s. 353.

A Police constable, at midnight entered upon the premises of a person who was regarded by the police as a suspicious character, and knocked at his door to ascertain if he was their, whereupon he came out and abused and pushed the constable and lifted a stick as if he were about to hit the constable with it. On a complaint being preferred under section 353 of using criminal force to deter a public servant in the execution of his duty :

Held, that the offence had not been committed. The constable was not engaged in the execution of his duty as a public servant and was technically guilty of house trespass, and his action was calculated to cause annoyance to the inmates of the house, and was insulting to the accused, who was justified in causing the slight harm which he had inflicted on the constable. The latter could not be regarded, under section 99, as acting in good faith under colour of his office as his action was not authorized by any police circular or order. Dorasamy Pillai v. Emperor 27 Mad. 52 304

Penal Code ss. 361, 363, 366.

S, a girl of the age of eight years, lived ordinarily under the guardianship of her father. A sister of S was married to a nephew of one K and with her husband, lived in the house of K. S, with her father's knowledge and consent visited her sister in K's house and had remained there for about a month when four brother's (being cousins of S) came to K's house one night and took S to their own house, which was close by, and S. was at once married to one of them. The father of S was not asked for his consent, and it was known by the nephews and by K that the father objected to such a marriage. K was present at the marriage and consented to it hoping to reconcile the girl's father to it subsequently. The father, however, sought the aid of the police, to whom S was given up by her cousins after having been detained by them in their house for thirty-six hours. The four cousins were then charged, under section 366 of the Indian Penal Code, with kidnapping S from lawful guardianship with intent that she might be compelled to marry one of them. The charge was framed in general terms and did not state from whose guardianship the kidnapping was alleged to have taken place. The trial was however, conducted on the footing that the kidnapping was from the guardianship of K, the accused were acquitted, on the ground that K was at the time the lawful guardian of the girl and it had not been shown that she had been taken without K's consent. Upon an appeal being preferred by Government against that acquittal.

Held, that the accused had been rightly acquitted of the charge of kidnapping S from the guardianship of K ; but that the question whether they were guilty of kidnapping S from the guardianship of her father had not been and ought to be tried. The word " include " in the explanation to section 361 of the Indian Penal Code is not intended to limit the protection which the section gives to parents and minors, but rather to extend that protection by including in the term " lawful guardian " any person lawfully entrusted with the care or custody of the minor. The fact that a father allows his child to be in the custody of a servant

Digitized by Google

or friend for a limited purpose and for a limited time does not determine the father's rights as guardian or his legal possession for the purposes of the Criminal law. If the facts are not inconsistent with a continuence of the father's legal possession of the minor the latter must be held to be in the father's possession or keeping even though the actual possession should be temporarily with a friend or other person.— Jagannadha Rao *v.* Kamaraju 24 Mad. 284 61

Penal Code—s. 373.

In a charge against a dancing girl under section 373 of the Indian Penal Code for having purchased a young girl with intent that she would be used for the purpose of prostitution or knowing it to be likely that she would be so used, evidence was given of the fact of purchase for a consideration and that numerous other dancing girls residing in the neighbourhood were in the habit of obtaining girls and bringing them up as dancing girls or prostitutes, and that there were no instances of girls brought up by dancing girls ever having been married. On its being contended that there was no evidence of intent to support a conviction under section 373 of the Indian Penal Code :

Held, that there was evidence before the Court to support the conviction. Queen Empress *v.* Papa Sani. 23 Mad. 159 6

Penal Code—s. 379—Theft.

Stones, when quarried and carried away are "things severed from the earth " (within the meaning of section 378, explanation I of the Indian Penal Code) and are "movable property." (within the meaning of section 22) and as such are capable of being the subject of theft.

A person who quarries and carries away stones from land in the possession of another commits theft. Suri Venkatappayya Sastri *v.* Madpla Venkanna. 27 Mad. 531 332

Penal Code s. 379—Theft—Shell-fish.

"Chanks" [popularly included among shell-fish, but really large molluses] are found buried in beds of sand or in the sandy crevices of coral reefs in Palk's Bay,—a large bay landlocked by British dominions fore ight-ninths of its circumference and containing numerous islands which form part of the districts to which they are adjacent on the shores of India and Ceylon. It was shown by evidence that this bay (as well as parts of the adjacent Gulf of Manaar) had been effectively occupied for centuries by the inhabitants of India and Ceylon, respectively ; that the "chanks" found therein had for centuries been the monopoly of the rulers of the country, both in India and Ceylon, and that licenses to gather them had been granted by the sovereign ; and that "chank royalty" was one of the heads of revenue on which permanent assessment of an adjacent zamindari was fixed in 1802. Petitioner, who had leased from the Rajah of Ramnad the "chank beds" five miles off the coast of his zamindari, charged the counter-petitioners with having committed the offence of theft of "chanks" from these beds. On the defence being raised that "chanks" were fish, and were *ferae naturae* and that those in question had been taken from beds in the open sea and had therefore not been taken from the possession of the complainant and could not be the subject of theft :

Held, that the "chanks" in question were capable of being the subject of theft : Annakumaru Pillai *v.* Muthupayal 27 Mad. 551 335

Penal Code—s. 379—Theft.

The petitioner was convicted of theft of certain bamboos which he said he cut on his own puttah land, but which the prosecution alleged he cut on Government poramboke land adjacent to his own. Prior to his conviction, disputes had arisen between the Revenue authorities and the petitioner regarding the ownership of the land. The petitoner contended that he bona fide believed the bamboos to be his property at the time he cut and removed them. The magistrate, finding that the Revenue authorities had taken possession of the land at the time the bamboos were removed convicted the petitioner.

Held, that the conviction was wrong. The questions to be considered were, (1) whether the bamboos did in fact belong to the petitioner or to Government ; (2) whether if they did not belong to the petitioner he bona fide believed they did

It is the province of the Civil Courts to decide questions of ownership of land between

Digitized by Google

Government and private parties, and if the Revenue authorities take summary possession of land as in the present case, they become mere trespassers and there is nothing dishonest in the owner taking possession of his own property. Algarisawmi Tevan v. Emperor 28 Mad. 364 373

Penal Code—s. 379.

Fish in an ordinary irrigation tank are not in the possession of any person so as to be capable of being the subject of theft. Nor does the removal of such fish constitute any other offence. Subba Reddi v. Munshoor Ali Saheb. 24 Mad 81 36

Penal Code—ss. 395, 411.

On the trial of an accused, before a Judge and jury at a Court of Session, for dacoity and receiving stolen property, the Judge, in his charge to the jury, directed them that the fact of a stolen shirt having been found in possession of the accused two months after the dacoity, was sufficient to justify them in convicting the accused of the dacoity:

Held, on appeal, that this was a misdirection. Whether the prossession of the stolen property was recent enough to warrant a conviction for a substantive offence was a matter entirely for the jury and should not have been put to them in the positive way which the Judge adopted. Guzzala Hanuman v Emperor 26 Mad 467 260

Penal Code—ss. 417, 511, 468—Application to University.

S. held a Marticulation certificate which had been issued to him by a University. C. had failed to pass the Matriculation Examination. The Registrar of the University received a letter purporting to be signed by S., stating that his certificate had been lost and requesting that a duplicate might be issued. Enclosed with the letter was what purported to be a certificate by the head-master of a local school, corroborating the statement as to the loss and supporting the application for the issue of a duplicate. This document had not, in fact, been written by the head-master, and S. had not in fact lost his Matriculation certificate. C. was charged with cheating and forgery to commit cheating. The Deputy Magistrate found, on the evidence, that the writer of the application for a duplicate certificate was the accused, and convicted and sentenced the accused on both charges. The Sessison Judge, on appeal; altered the offences to those of attempting to cheat and forgery to commit cheating and reduced the sentence. Subject to these modifications he dismissed the appeal. On a revision petition being filed in the High Court:

Held, that the charge of cheating must fail, inasmuch as there was no proof that the deception practised by the accused on the Registrar of the University had caused harm or damage to him or to the University which he represented. Nor was it shown that the accused, in applying for the duplicate certificate, had any intention of causing wrongful gain to himself or wrongful loss to the University, to whom he had paid a fee greater than the cost price of the certificate. The charge of forgery also failed, for, assuming that accused had fabricated the head-master's certificate it was not shown that he had done so fraudulently or dishonestly and with intent to cause damage or injury to the public or to any one. The question before the court was not as to his intended use of the certificate subsequently. Even if he had such an intention this mere preparation did not amount to an attempt to commit an offence within the meaning of section 511 of the Indian Penal Code. King-Emperor v. C. Srinivasan. 25 Mad. 726 183

Penal Code—s. 424.

Where a distraint is made under the Rent Recovery Act for arrears of rent, there is no presumption that it is legally made, and if persons are charged with having dishonestly removed property to avoid it, the prosecution must prove that it was a legal distraint. In the absence of such proof, persons who have resisted the distraint or have removed their property to avoid it, cannot be convicted of an offence, inasmuch as they had a right of private defence of their property unless the distraint was legal. King-Emperor v. Gopalasamy 25 Mad. 729 186

Penal Code—s. 424.

If ryots holding land on varam tenure remove crops for the purpose of protecting them from injury or damage owing to delay or refusal on the part of the Zamindar to perform his part in the harvesting or division, such a removal would not be dishonest within the meaning of section 424 of the Indian Penal Code. But where it is proved that the crops have been removed dishonestly, or fraudulently, an offence is committed under section 424, even though the Zemindar, under the terms of the tenancy

Digitized by Google

acquires no property in the share due to him until the ryots have delivered it to him. Subudhi Rautho v. Balarama Padi. 26 Mad 481 257

Penal Code ss. 465, 471—Forgery.

In order to obtain admission to the Matriculation Examination of the Madras University as a private candidate, V was required to produce to the Registrar a certificate signed by the head master of a recognized high school that he was of good character and had attained his twentieth year. V fabricated the headmaster's signature to such a certificate and forwarded it to the Registrar:

Held (SUBRAHMANIA AYYAR and DAVIES, JJ., dissenting that V was guilty of forgery.

Per Sir ARNOLD WHITE, C. J.—The offence of forgery is complete if a document, false in fact, is made with intent to commit a fraud although it may not have been made with any one of the other intents specified in section 463. It was not necessary having regard to the wording of section 24 that the accused should intended to cause both wrongful gain to himself and wrongful loss to the University. Both intentions, however were present in this case. Moreover, the false document had been made with intent to support a "claim or title" within the meaning of those words as used in section 463. A claim to be admitted to a University examination is a "claim" within the meaning of section 463. It was more clearly so in the present case as the accused had a claim" to be exempted from the production of an attendance certificate, upon satisfying certain conditions precedent. An intended deprivation of property is not an essential element of an intention to defraud.

Per BENSON. J.—Those decisions which proceed on the ground that an act is not fraudulent unless it causes or is intended to cause loss or injury to some one would seem to take too narrow a view of the meaning of the word "fraudulently" as used in the Code. The act of the accused was fraudulent not merely by reason of the advantage which he intended to secure for himself by means of his deceit, but also by reason of the injury which must necessarily result to the University and through it to the public from such acts if unrepressed.

Per SUBRAHMANIA AYYAR.—The document was not made fraudulently within the meaning of sections 464 and 463 of the Code. Deprivation of property, actual or intended, does not constitute an essential element in regard to offences falling under sections 465 and 471 of the Indian Penal Code; but the deception must involve some loss or risk of loss to an individual or to the public. It is not enough to show that the deception was intended to secure an advantage to the deceiver.

Per DAVIES. J.—It had not been shown that the accused in making the document had either of the intentions necessary to constitute it a false document within the meaning of section 464. A mere intention to deceive does not necessarily imply an intention to defraud or to cause wrongful loss to one person or wrongful gain to another. A person to be defrauded must suffer some harm or damage or injury and there was no evidence that the Registrar, as representing the University had been deprived of nothing and, on the other hand, had profited by the application by the accued Moreover the intention of the accused was to subject himself to examination, which could not be deemed a thing of value, if he failed, it ended in nothing, if he passed, he became entitled to a certificate not in consequence of the false writing but on his own merits. Kotamraju Venkatrayadu v. Emperor 28 Mad. 90 355

Penal Code—ss 478, 480—trademark—Criminal Procedure Code, ss 227, 233. 234.

A person selling soap not manufactured by P in a box which bears the name of P as a soap manufacturer, uses a false trademark and is guilty of an offence under section 480 of the Indian Penal Code. It is not necessary to constitute an offence under section 478 that a trademark in the sense in which the word is used in the English Patents, Designs and Trademarks Acts should have been acquired: and the mark is none the less a false mark because it appeared on the box and not on the goods.

Under sections 233 and 234 of the Code of Criminal Procedure, a person cannot be charged with more than three offences at one trial and the defect cannot be cured, after the accused had pleaded and the case had closed, by amending the charges so as to reduce it to three offences Although the words in section 227 of the Code of Criminal Procedure are wide enough to warrant a Court in altering a charge by striking out one of the charges at any time before judgement, the section does not warrant the striking out of a charge for the purpose of curing an illegality already committed, and after the mischief which the Legislature intended to guard against had been done. Manavala Chetty v. Emperor 29 Mad. 569 426

Digitized by Google

Penal Code—s. 498.

Whether a man has been convicted of enticing away a woman, under section 498 of the Indian Penal Code, the woman who was enticed away by him cannot be guilty as an abettor.

Whether a woman could be convicted of abetting the taking away of herself within the meaning of section 498—Quære. **In Re Balambal** 26 Mad. 463 **248**

Penal Code—s. 500—Criminal P. C. s. 198.

A newspaper published articles which, for the purposes of the point of law to be determined, were assumed to be defamatory. These related to the conduct of certain subordinate officers of the Madras Municipal Commission. A complaint was lodged by the President of the Commission in respect of the alleged defamation, it being contended on behalf of the complainant that inasmuch as by the Madras Municipal Act, the President is responsible for the efficient discharge of their duties by his subordinate officers his conduct and administration had been impugned by the articles.

Held, that assuming for the purposes of the question under consideration that the statements complained of were defamatory of the subordinate officers of the Municipal Health Department, they were not defamatory of the complainant; and that the complainant was not a "persona aggrieved" within the meaning of section 198 of the Code of Criminal Procedure. **H. K. Beauchamp v G. M. J. Moore.** 26 Mad. 43 **202**

Penal Code—s. 500—Defamation.

Accused, who was the trustee of a temple, was convicted of defemation, the alleged defamatory statement being that the complainant, who performed the worship in a temple, had been convicted and sent to jail for the theft of idols belonging to the temple. At the time when the statement was made, an appointment was in question in connection with the temple.

Held, on revision, that accused was justified in making the statement, either in the interest of the temple, or because the statement was no more than a publication of the result of proceedings in a Court of Justice. **Singaraju Nagabhushanam.** 26 Mad. 464 **243**

Police Act XXIV of 1859, s. 44.

A police constable, who, having obtained casual leave, does not return to duty on the expiry of such leave and stays away without obtaining fresh leave, is guilty under section 44 of Act XXIV of 1859 of the offence of 'ceasing to perform the duties of the office without leave.' **Emperor v. Ramaswamy Raju** 29 Mad. 192 **410**

Reformatory Schools Act—Act VIII of 1897, ss. 8, 9, 11, 13. 16—

Periods of detention allowable.

A District Magistrate before whom the case of a youthful offender came, under the provisions of section 9 of the Reformatory Schools Act, 1897, found the accused to be thirteen years of age, sentenced him to six months' rigorous imprisonment, and directed that in lieu of undergoing that sentence he should be detained in a Reformatory school for a period of five years, unless he should attain the age of eighteen years at an earlier date:

Held, that the order was wrong, inasmuch as it failed to fix the exact period of detention.

Semble, that in some cases it may not be necessary to ascertain the exact age of the offender. If he be not over fifteen, a period of three years may be rightly fixed; if not over eleven, a period of seven years may be fixed without further enquiry. But in cases in which enquiry is necessary in order to fix the period, as when the offender is over eleven, and the Magistrate wishes to make the period as long as possible, he must find, as well as he can, the exact age of the offender, and is not at liberty to leave the decision of the question to the Reformatory officials.

The effect of the notification published by Government regulating the periods for which youthful offenders may be sent to Reformatory schools in the Madras Presidency, is to fix a minimum period of five years for all cases in which such a period is legally possible; namely, in all cases where the offender is not over thirteen at the date of conviction. It was not intended to prevent the Magistrate from fixing a period short of five years, but short of three years, in the case of a boy over thirteen. **Queen-Empress v. Rama.** 24 Mad. 13 **31**

Regulation XI of 1816, s. 10—Confinement of Native Christian in stocks.

By section 10 of Regulation XI of 1816, heads of villages are given summary powers of punishment in cases of a trivial nature, such as using abusive language, and if the offenders "shall be of any of the lower castes of the people on whom it may not be improper to inflict so degrading a punishment," they may be put in the stocks. A person, who was a Mala, or Hindu Pariah, by birth, and who had become a convert to Chris-

Digitized by Google

tianity, was convicted of having used abusive language and sentenced to two hours' confinement in the stocks under the said regulation. His profession was that of a weaver, but he, in fact, worked as a cooly. On the question of the legality of the sentence being referred to the High Court;

Held, that to render a person liable to confinement in the stocks under the regulation there must be a concurrence of two circumstances, viz.,(1) he must be a person belonging to one of the lower castes of the people, and (2) he must be a person on whom from his social standing or otherwise it may not be improper to inflict so degrading a punishment. That the test is not what is the offender's creed, but what is his caste.

Semble, that a person who has changed his creed but continues to belong to his caste may be within the purview of the regulation if the caste is of the nature therein referred to; but if he abandons his caste he cannot longer be said to "belong to one of the lower castes of the people" and punishment by confinement in the stocks would no longer be legal. Rittigadu *v.* Konda Reddi. 24 Mad. 271 58

Revival of Proceedings—see. Criminal P. C. s. 259 377

Revival of Proceedings—see. Criminal P. C. s. 203 372

Right of Private defence—see Penal Code. 378

Stamp Act—Act II of 1899. s. 33.

Complaint having been made against a person for having committed offences under sections 64 (c) and 68 (c) of the Stamp Act of 1899, the Magistrate issued a search warrant, under which certain documents were seized and impounded under section 33 (2) of the Act. On its being contended that his action in impounding them was illegal, because the documents did not come before him in the performance of his functions within the meaning of section 33 [1].

Held, that the word "comes" is sufficiently wide to include the production of documents under a search-warrant. King-Emperor *v.* Balu Kuppayyan 25 Mad. 525 171

Stamp Act—1 of 1879, ss, 61, 67.

Two letters were written to petitioner in which the writer recommended him to advance sums of money to the bearers of the letters and bound himself to repay those sums, if lent, in case default on the part of the borrowers. The loans were made by petitioner, who kept the letters. A prosecution having been subsequently commenced against petitioner under section 67 of the Stamp Act, 1879, for defrauding Government of stamp revenue by an illegal device, and he having been convicted on the ground that when the loans were granted the documents became letters of guarantee and as such liable to stamp duty:

HELD, that the execution of a document which on its face required to be and was not stamped, could not be said to be an act "contrivance or device not specially provided for by this Act or any other law for the time being in force"; and that punishment for the Act of the executant of such a document, if it were punishable at all, was provided for under section 61 of the Stamp Act, 1879, and it could not therefore be dealt with under section 67.—Also that the act of a person receiving an unstamped document might amount to abetment of an offence having regard to section 61 of Stamp Act. 1879 and to the definition of an "offence" in section 40 of the Indian Penal Code, and if so, would be an act provided for by any other law for the time being in force," and so not within the terms of section 67 of the Stamp Act. Queen-Empress *v.* Somasundram Chetti 23 Mad 155 3

Stamp Act—Act II of 1899. s. 69

—Court Fees Act VII of 1870 (as amended by Act XII of 1891), s. 34.

A person who had been convicted of stealing two stamps was charged, under section 69 of the Stamp Act, 1899, with having sold them, he not being a licensed vendor of stamps:

Held, that the words "sells or offers for sale," which occur in section 69 of the Stamp Act and in section 34 of the Court Fees Act include the case of a thief who exchanges a stolen stamp for a sum of money, even though the thief cannot give a legal title by the transaction. Queen Empress *v.* Virasami 24 Mad. 319 70

Withdrawal of Complaint—See. Criminal Pro. C. s. 248 27

Whipping—See Criminal Pro. C. ss. 391, 407 249

Digitized by Google

INDEX.

I. L. R. Bombay. Criminal Cases Vols. 24 to 30 (1900 to 1906).

(The references are to the pages of this book Bombay series.)

Abetment, see Penal Code secs. 108 A 372 3

Abkari Act (Bombay Act V of 1878), sections 3 (9), 62 Medicated article—Intoxicating drug—Cocaine.

The term "medicated article" as used in section 62 of the Bombay Abkari Act (Bombay Act V of 1878), applies to something which is manufactured and by that manufacture is imbued with certain medicinal properties. It does not therefore include cocaine, which is a medicine *per se*.

The word "intoxicating" as used in section 3, clause 9 of the Bombay Abkari Act (Bombay Act V of 1878), cannot be confined to its derivative meaning, namely, poisonous: the word must be taken to be used in its popular sense, which would include the effects produced by cocaine.

Emperor v. Jamsetji Cawasji Cama. 27 Bom. 551 **122**

Accomplice—Evidence—Corroboration—Bribery—Evidence Act (I of 1872), sections 114, ill, (b), and 133—Indian Penal Code (Act XLV of 186 0), section 161.

It is generally unsafe to convict a person on the evidence of accomplices unless corroborated in material particulars. But, in considering whether this general maxim does or does not apply to a particular case. it must be remembered that all persons coming technically within the category of accomplices cannot be treated as on precisely the same footing : the nature of the offence and the circumstances in which the accomplices make their statements must always be considered. No general rule on the subject can be laid down.

A person who gives bribes is an accomplice of the person who receives them; and, while it is usually unsafe to convict a public servant of receiving bribes on the uncorroborated evidence of persons who say they have given them, the question as to the amount of corroboration depends on the circumstances of each case.

King-Emperor v. Malhar Martand Kulkarni 26 Bom. 193. **81**

Accomplice—secs. Criminal Pro. Cs. 337, 338. **257**

Act XI of 1846—secs. 3 & 4. see Jurisdiction **52**

Act (XLVIII of 1860) (Bombay Town Police Act); see prevention of cruelty to Animals Act sec. 3 **100.**

Act XIV of 1874 (scheduled Districts Act) sec. 7 : see Jurisdiction **52.**

Act XIV of 1890 (Prevention of cruelty to animals) sec. 3---see Prevention of cruelty to animals Act sec. 3 **100.**

Aden Courts Act (II of 1864), sections 17, 20, 22, 23—Criminal Procedure Code (Act V of 1898), sections 447, 449 —Resident's Court at Aden—Sessions Court —Transfer of case to the High Court —Jurisdiction of the High Court to transfer a case to itself from the Court of the Resident at Aden— Letters Patent, clause 29.

It is not competent to the Resident at Aden, to whose Court as a Court of Session a case is committed under section 447 of the Criminal Procedure Code, 1898, to transfer the case to the High Court, under the provisions of section 449 of the Code, on the ground that the offence cannot be adequately punished by him.

The powers of the Court of Session conferred upon the Resident at Aden by the Aden Courts Act (II of 1864) are not merely such as are defined in the Criminal Procedure Code, 1898; but such as are provided expressly in the Act itself. And section 449 of the Code of Criminal Procedure, 1898, cannot affect those provisions.

The High Court of Bombay can, under clause 29 of the Amended Letters Patent, transfer to itself a case pending in the Court of Session at Aden.

Emperor v. Robert Comley and others. 29 Bom. 575. **224**

Arms Act (XI of 1878), Sec. 22—Master and servant---Master's liability for the criminal acts of his servant.

Digitized by Google

Where the manager of a licensed vendor of arms, ammunition and military stores sold certain military stores without previously ascertaining that the buyer was legally authorized to possess the same.

Held, that the licensee was liable to punishment under section 22 of the Indian Arms Act (XI of 1878), though the goods were not sold with his knowledge and consent.

The principle---"Whatever a servant does in the course of his employment with which he is entrusted and as a part of it is his master's act" ---is applicable to the present case.

Queen-Empress *v.* Tyab Alli 24 Bom. 423. 11.

Assessors, trial with the aid of, held in fact by jury---see criminal P. C. secs. 269, 418. 60

Assessors, trial with the aid of one assessor only see---criminal P. C. secs. 284, 285 & 537. 69.

Breach of Peace—see Criminal Pro. Code secs. 145 & 526. 37

Bribery : see Accomplice. 81

Charge to jury—Sessions Judge—Misdirection--Inadmissible evidence—Criminal Procedure Code [Act V of 1898], sections 418, 423 [2]

Where a charge to the jury by the Sessions Judge is, upon the whole, favourable to the accused, and most of the points of importance in favour of accused are more or less dealt with in the charge, the mere fact that some of the points are not so amplified as they might have been does not amount to a misdirection.

Before the High Court can interfere with the verdict of a jury on the ground that the evidence of accused's confession was wrongly admitted, it must be satisfied, *firstly*, that the verdict is erroneous ; *secondly*, that the erroneousness was caused either by the Judge's misdirection to the jury as to that evidence or by a misunderstanding on their part of the law as to it as laid down by the Judge.

Where material evidence which ought not to be admitted is admitted and the jury are placed in possession of it, there is an error in law in the trial under section 418 of the Criminal Procedure Code [Act V of 1898], and there is a misdirection of law when the Judge tells the jury that it is evidence which they can consider and on which they can, if they think proper, convict the accused. The fact that after putting the jury in possession of the inadmissible evidence the Judge in his charge goes also to point out circumstances which would justify the jury in disbelieving the wrongly admmitted evidence does not make the misdirection less a misdirection.

Where evidence which the law says shall not be admitted is let in with other evidence legally admissible, and where the former is of a matarial character, it whould be mere speculative refinement to hold that the jury must have, in convicting the accused, relied upon the latter and rejected the former.

Emperor v. Waman Shivram Damle. I. L. R. 27 Bom. 626. 125

Compensation : see Criminal P. C. sec. 250 20

Compensation : see Criminal Pro. Code secs. 4 (h), 250. 76

Confession, of an accused while in Police custody : see Evidence Act sec. 24. 46

Confession, retracted: see Evidence Act secs. 24, 30 and 33. 33

Contradictory statements: see Penal Code sec. 193. 174.

Criminal Procedure Code—see Evidence Act. sec. 24. 46.

Criminal Procedure Code (Act V of 1898), Sec. 4 (h), Chap. XV, Part B, Secs 191, 195, 196, 198, 199, and Sec. 345—Penal Code (Act XLV of 1860), Sec. 499, Explanation I—Defamation of wife—Complaint by husband —Aggrieved party.

Held by the Full Bench (Ranade, J., dissenting) that under the provisions of the Criminal Procedure Code (Act V of 1898) a husband is entitled to be complainant where the alleged offence is defamation, imputing unchestity to his wife.

Chhotalal Lalkubhai *v.* Nathabhai Bechar and another 25 Bom. 151. 27.

Criminal Procedure Code (Act V of 1898), sections 4 (h), 250—Complaint—Report ot Police officer—Complaint by a Police officer in a non-cognizable case--. False complaint---Compensation.

There is no section in the Criminal Procedure Code 1898, which empowers a Police offic-

Digitized by Google

er to make, of his own motion, any report to a Magistrate in a non-cognizable case ; hence, where he files a formal complaint in such a case, he cannot be said to 'make a report' and his complaint falls within the definition of 'complaint' in section 4 (*h*) of the Criminal Procedure Code, 1898.

Where a Police officer appears before a Magistrate and makes a formal complaint of a non-cognizable offence, which is found to be false, the Magistrate can order him, under section 250, of the Criminal Procedure Code, to pay compensation to the accused.

King-Emperor *v.* Sada. I. L. R. 26 Bom. 150. **76.**

Criminal Procedure Code (Act V of 1898), Secs. 144, 145, 435 and 439—Dispute about right to perform service in a public temple—Notice—High Court—High Court's criminal revisional jurisdiction.

A Magistrate professing to act under section 145 of the Criminal Procedure Code (Act V of 1898) is bound to follow the proper procedure. He must set forth the grounds on which he is satisfied that there is a dispute likely to cause a breach of the peace. He is bound to issue notices to all parties concerned so as to give them an opportunity to put in their respective claims. And his order should not interfere with the rights of the parties as determined by previous decisions of the Civil Court.

A dispute relating to the right of performing religious service in a public temple when it is likely to cause a breach of the public peace, falls under section 145 of the Criminal procedure Code (Act V of 1898).

The High Court ordinarily has no jurisdiction to interfere with an order under Chapter XII of the Criminal Procedure Code (Act V of 1898), which is not a proceeding within the meaning of section 435 of the Code ; but when the Magistrate exceeds his jurisdiction under section 144 or 145, the High Court has power to interfere under its revisional jurisdiction (section 439).

A dispute arose between certain classes of priests attached to a Hindu temple, about the right of performing a certain religious service. On the complaint of one of the parties, the Magistrate of the district, purporting to Act under section 145 of the Code of Criminal Procedure (Act V of 1898), passed an *ex-parte* order prohibiting the other party from taking any part in the said service, although both parties had been previously declared by the Civil Court to be entitled to officiate at the service.

Held, that the order was illegal, and opposed to the provisions of section 145 of the Code.

In Re Pandurang Govind and others I. L. R. 24 Bom. 527 **14**

Criminal Procedure Code (Act V of 1898), Secs. 145 and 526---Transfer of a case--- Criminal case---Bias of Judge---Magistrate's powers under Sec. 145---Breach of peace---Rights of the parties.

The provisions of section 526 of the Criminal Procedure Code (Act V of 1898) do not give any power to direct the transfer of any proceedings initiated under section 145 of the Code. Such proceedings do not constitute a "criminal case" within the meaning of section 526 of the Code. A criminal case means a case arising out of, and dealing with, some crime already committed. It does not include proceedings taken for the prevention of crime.

Under section 145 of the Code a Magistrate is not at liberty to go into the merits of the claims of any of the parties to the dispute, to a *right* to possess the subject thereof. He can decide only the fact of possession at the date of the order requiring the parties to put in their statements.

The parties cannot be called upon to furnish a statement of their rights, nor can the Magistrate take, as the basis of any action he may finally decide upon, any conclusion at which he may arrive, or at which he may have arrived, as to the respective titles of the parties.

In Re Pandurang Govind Pujari and others. I. L. R. 25 Bom. 179. **37**

Criminal Procedure Code sec. 188---see PenalCode secs. 108 A, 372. **3**

Criminal P. C.S. 195—Small Cause Court—Registrar of Small Cause Court—Sanction to prosecute granted by Registrar—Revocation of sanction - - Chief Judge can revoke it as a public officer—Jurisdiction of Small Cause Court to revoke the sanction—Presidency Small Cause Courts Act (XV of 1882) section 35.

The Registrar of the Court of Small Causes has authority, under section 195, clause 1) (*a*) of the Criminal Procedure Code (Act V of 1898),

Digitized by Google

to grant a sanction for the prosecution of an offence under section 182 of the Indian Penal Code (Act XLV of 1860) as the public officer concerned.

It is competent to the Chief Judge of the Court of Small Causes, to whom the Registrar is by law subordinate, acting as a public servant, to revoke the sanction granted by the Registrar. But it cannot be revoked by the Small Cause Court composed of one or more Judges.

In the matter of Goverdhandas Meghji I. L. R. 27 Bom. 130. **116**

Criminal Procedure Code (Act V of 1898), Secs. 193 and 35—Sanction to prosecute—Joinder of charges—Trial for more than one offence—Offences falling under two definitions.

The accused was committed for trial before a Sessions Court on a charge of abetment of dacoity under section 116 of the Indian Penal Code (Act XLV of 1860). In the course of the trial the Assistant Sessions Judge added an alternative charge under section 511 of the Code and sentenced the accused under sections 395, 116 and 511 of the Indian Penal Code (Act XLV of 1860).

In appeal the Sessions Judge held that the evidence disclosed the offence of an attempt to commit the offence of collecting arms, &c., with intention of waging war against the Queen, under section 122, and as no charge under that section could be framed for want of the sanction of Government under section 196 of the Criminal Procedure Code (Act V of 1898) the accused could not be brought to trial at all. He, therefore, reversed the conviction and acquitted the accused.

Held, (reversing the order of acquittal), that the mere fact that no charge for the graver offence under section 122 of the Indian Penal Code (XLV of 1860) could be framed for want of Government sanction, did not render the trial for the minor offence of attempting or abetting dacoity either irregular or illegal.

Per FULTON, J. :—According to the 2nd clause of section 235 of the Criminal Procedure Code (Act V of 1898), if the accused abetted an offence under section 122 of the Penal Code, and by the same act also attempted or abetted the offence of dacoity, he could be tried for each of these offences; but as that section is controlled, as regards the offence against the State, by the provisions of section 196 of the Criminal Procedure Code, its operation in this case is restricted to the minor offence for which the accused could legally be charged and tried.

Queen-Empress v. Anant Puranik. I. L. R. 25 Bom. 90 **21**

Criminal Pro. C sec. 209—see Revisional Jurisdiction of High Court. **111**

Criminal Procedure Code (Act V of 1898), sections 222, 239—Successive breaches of trust—Joinder of charges—Joint trial—Same transaction—'Transaction' meaning of.

Where the accused persons were jointly in charge of trust funds, so that one could not act without the connivance of the other, and each of them misappropriated sums of money from the trust funds to his own use, thus evidently carrying through their object in concert, the fact that they carried out their scheme by successive acts done at intervals, alternately taking the benefits, did not prevent the unity of the project from constituting the series of acts one transaction, *i. e.*, the carrying through of the same object which both had from the first act to the last: and there was no objection to their being tried jointly at one trial.

Section 222 of the Criminal Procedure Code (Act V of 1898) clearly admits of the trial of any number of acts of breach of trust committed within the year as amounting only to one offence. The section does not require any particular formulation of the accusation, but only enacts that it is sufficient to show the aggregate offence without specifying the details. It dispenses with the necessity of amplification; it does not prohibit enumeration of the particular items in the charge.

Section 239 of the Criminal Procedure Code (Act V of 1898) admits of the joint trial when more persons than one are accused of different offences committed in the same transaction. It suffices for the purpose of justifying a joint trial that the accusation alleges offences committed by each accused to have been committed in the same transaction, within the meaning of section 239. It is not necessary that the charge should contain the statement as to the transaction being one and the same. It is the tenour

Digitized by Google

of the accusation and not the wording of the charge that must be considered as the test.

In section 239 of the Code, a series of acts separated by intervals of time are not excluded, provided that those jointly tried have throughout been directed to one and the same objective. If the accused started together for the same goal, this suffices to justify the joint trial, even if incidentally, one of those jointly tried has done an act for which the other may not be responsible.

The foundation for the procedure in section 239 is the association of two persons concurring from start to finish to attain the same end. No doubt if it were attempted to associate in the trial a person who had no connection whatever with the transaction at a time when one or more of the series of the acts alleged had been done then that would be outside the provisions of the section.

"Transaction" means "carrying through" and suggests not necessarily proximity in time ---so much as continuity of action and purpose.

Emperor *v.* Datto Hanmant Shahapurkar. I. L. R. 30 Bom. 49 **227**

Criminal Procedure Code (Act V of 1898), sections 233, 239—

Joint trial of different accused---Receiving stolen property at different timee and from different persons---Same transaction---Indian Penal Code (Act XLV of 1860), section 411.

A theft was committed of certain property including ornaments'. S was one of the persons who received the stolen property from the thieves. S disposed of the property to several persons, and being indebted to J he gave a portion of the property to J in satisfaction of his debt. K was found to have in his possession a portion of the property identified as stolen in the same theft, but there was nothing to show when he received it and from whom. Under these circumstances the three persons S, J and K were tried together at one trial on charges of receiving stolen property knowing it to be stolen:

Held by RUSSELL and BATTY, JJ., that that the three offences against the three accused S. J and K were distinct offences which could not be regarded as offences committed in the same transaction within the meaning of section 239 of the Criminal Procedure Code, and that the trial of the three accused together was in contravention of the provisions of section 233 of the Code and was therefore illegal.

Per BATTY, J. :---"The offence punishable under section 414 of the Indian Penal Code is that of voluntarily assisting in disposing of stolen property and therefore must necessarily form part of the same transaction as the receipt by the person to whom it is so disposed of. It necessarily involves manifest criminality in both persons at one and the same time when both offences are committed."

"The words of section 239 of the Criminal Procedure, 1898, are, to say the least of it, ambiguous, if intended to include in the same transaction a series of acts one or more of which had been done at a time before the parties to the subsequent acts had anything to do with that transaction. The illustrations to the section seem to suggest that the persons to be jointly tried must have been associated from the first in the series of acts which form the same transaction."

"The inevitable result appears to be that that the proceedings of the Magistrate were illegal and a nullity . . . There has been no legal trial. There has therefore been no legal acquittal and there is therefore neither appeal against acquittal nor acquittal to reverse, and the question whether the accused should new be legally tried is a question not for judicial decision but for the consideration of the authorities with whom it rests to proceed with a prosecution." Emperor *v.* Jethalal Hurlochand 29 Bom 449 **212**

Criminal Procedure Code (Act V of 1898), sections 234 and 235—

Number of charges—Same transaction.

The fact that offences are committed at different times does not necessarily show that they may not be so connected as to fall within section 235 of the Criminal Procedure Code (Act V of 1898). The occasions may be different, but there may be a continuity and a community of purpose. The real and substantial test by which to determine whether several offences are so connected as to form the same transaction depends on whether they are so related to one another in point of purpose, or as causes and effect, or as principal and subsidiary acts, as to constitute one continuous action.

Digitized by Google

The accused was tried at one trial for three offences: (1) for having in his possession on the 9th October, 1902, certain steneil plates for the purpose of counterfeiting Hubbock and Company's trade-mark on two kegs of paint (section 485 of the Indian Penal Code), (2) for having, on or about the 7th October, 1902, sold 12 kegs of paint to which a counterfeit trade-mark was affixed (under section 486 of the Indian Penal Code), and (3) for having in his possession for sale on or about the 9th October, 1902, certain kegs of paint purporting to be Hubbock's paint having a counterfeit trade-mark (under section 485). He appeals, contending that the trial was illegal, inasmuch as he had been charged at one trial with offences which were not connected together so as to form the same transaction, under section 235 (1) of the Criminal Procedure Code (Act V of 1898.)

Held, dismissing the appeal, that the trial was not illegal. There was a community and also a continuity of purpose in the possession and the sale—the possiession of the instruments was the cause, the possession of the kegs and their sale the effect, and both the possession and the sale had one intention and aimed at one result namely, that of deceiving buyers into purchasing what was not the genuine article of Hubbock and Company. Emperor *v.* Sherufalli Allibhoy. 27 Bom. 135 **119**

Criminal Procedure Code (Act V of 1898), Sec. 250—Application for an order that a person should give security to keep the peace—Refusal of application—Compensation under Section 250 of Criminal Procedure Code (V of 1898).

To justify the application of Section 250, a person must be accused before a Magistrate of an offence triable by a Magistrate.

A applied to a Magistrate of the First Class to order B to give security to keep the peace (Section 107, Criminal Procedure Code, 1898). The Magistrate after inquiring into the matter discharged B under section 119 of the Criminal Procedure Code and directed A to pay B Rs. 50 as compensation under section 250 of the Code.

Held, that the award of compensation was illegal. The institution of proceedings under section 107 of the Criminal Procedure Code was not an accusation of an offence triable by a Magistrate within the meaning of section 250 of the Code. In Re Govind Hanmant 25 Bom. 48 **20**

Criminal Procedure Code (Act V of 1898), Section 57, 177, 110—Security for good behaviour—Witness—Magistrate—Summons—Refusal to summon—Procedure.

Section 257 of the Criminal Procedure Code (V of 1898) is imperative in its terms. It leaves to a Magistrate no discretion to refuse to issue process to compel the attendance of any witness, unless he considers that the application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice; such ground however, must be recorded by him in writing. The descretionary power of refusing to summon any particular witness is vested in the Magistrate, but the order of refusal must be such as to show in writing the ground of refusal as applied to each individual. Emperor *v.* Purshottam Kara and four others, 26 Bom 418 **88**

Criminal Procedure Code (Act V of 1898), sections 269 and 418—Offence triable with the aid of assessors tried in fact by a jury—Trial by jury—Appeal on a matter of fact—Practice—Procedure.

Under section 418 of the Criminal Procedure Code (V of 1898) no appeal lies on matters of fact where an accused person is convicted by a jury on a charge which ought to have been tried with the aid of assessors.

An accused person was charged with and tried for offences under sections 302, 304 and 325 of the Penal Code (Act XLV of 1860). Under the first of these charges he was triable by a jury. Under the latter two he was triable with the aid of assessors He was, however, tried for all three offences by a jury who found him guilty on the third charge. The Judge accepted the verdict and sentenced the accused to four years' rigorous imprisonment. The accused appealed.

Held, by a Full Bench that under Section 418 an appeal lay in this case on matters of law only and not on matters of fact.

Digitized by Google

Per Jenkins C. J.—The words in section 418 of the Criminal Procedure Code, 1898, "when the trial was by jury" mean "when the trial in fact was by jury" and not "when the trial should have been by jury." King-Emperor *v.* Parbhushanker 25 Bom. 680 **60**

Criminal Procedure Code (Act V of 1898), sections 284, 285 and 537—Trial with assessors—Trial with the aid of one assessor only—Legality of such trial—Assessors.

In a case triable by a Court of Session with the aid of assessors, one of the assessors being ill, the trial commenced and ended with only one assessor.

Held, that there was no legal trial that the proceedings must be set aside and a new trial directed.

Section 537 of the Criminal Procedure Code (Act V of 1898) had no application to such a case, as the Court was not properly constituted.

King-Emperor *v.* Jayram 25 Bom. 694 **69**

Criminal Procedure Code (Act V of 1898), section 292—Act X of 1882 sections 289, 292—Adducing evidence--Documents put in during cross-examination by the accused of witnesses for the Crown---Righ of reply.

During the cross-examination of a witness for the Crown certain documents were put in evidence by Counsel for the accused which were not part of the record sent up to the Court by the Committing Magistrate. No witnesses were called for the defence. The Crown claimed the right of reply.

Held, that as the documents put in during the cross-examination of a witness for the Crown were tendered and relied upon by the defence as distinct from the evidence actually tendered by the prosecution and submitted for cross examination, they must be regarded as evidence adduced by the accused, and that therefore the Crown had the right of reply. Emperor *v.* Bhaskar Balwant Bhopatkar 30 Bom. 421. **247**

Criminal Procedure Code (Act V of 1898), sections 303, 304—Judge—Jury---Misunderstanding the law---Verdict mistaken or ambiguous---Powers of the Judge to question the jury.

Section 304 of the Criminal Procedure Code (Act V of 1898) obviously contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury. It has application where there is no accident or mistake in the delivery of the verdict; and the mistake lies in the misunderstanding of the law by the jury. If such a mistake results in an erroneous verdict, it can be corrected only by the Judge disagreeing with the jury and referring the case under section 307 of the High Court.

PER CURIAM:---"There is no provision in the Code of Criminal Procedure (Act V of 1898) which empowers the Judge to question the jury as to their reasons for a unanimous verdict when there is nothing ambiguous in the verdict itself, and no lurking uncertainty in the minds of the jury themselves regarding it. Section 303 of the Code limits the power of the judge to question to cases in which it is necessary to ascertain what the verdict of the jury is---that is, where the verdict being delivered in ambiguous terms or with uncertain sound their meaning is not clear."

Emperor *v.* Kondiba Dhondiba Powar and others. 28 Bom. 472 **158**

Criminal Procedure Code (Act V of 1898), Secs. 337, 338—Accomplice—Pardon—Grant of conditional pardon—The pardoned accomplice giving full and true story of the crime, but retracting it in cross-examination before the Sessions Court—Order of Sessions Court to Committing Magistrate to withdraw the pardon—Forfeiture of pardon—Trial of accused for the offence—Commitment—Conviction on his plea of guilty—Irregularity—Illegality-Practice-and Procedure.

The accused was one of several persons accused of murder. He accepted a tender of pardon made to him by the Committing Magistrate on the conditions set out in section 337 of the Criminal Procedure Code. He was examined as a witness for the Crown before the Committing Magistrate, and he made a full and true disclosure of the whole of the circumstances within his knowledge relating to such offence. He repeated them in his examination-in-chief before the Sessions Judge, but recoiled from his statements in cross-examination. At the conclusion of the trial, in which the accomplices were convicted of murder, the Sessions

Judge sent the pardoned accomplice in custody to the Committing Magistrate with an order directing that he should be committed for trial for the same murder. The Magistrate accordingly, withdrew the pardon and committed the accused to the Sessions Court to take his trial for the murder aforesaid. The Sessions Judge convicted the accused of murder on what was described as his plea of guilty and was sentenced to transportation for life. On appeal.

Held, by Aston, J., that the Sessions Judge had no authority under the Code of Criminal Procedure to order the accused to be committed for trial for the murder in respect of which a pardon had been tendered; and further, that the accused's trial was conducted with material irregularity which seriously prejudiced the accused and occasioned a failure of justice.

Held, by Beaman, J., that the Sessions Judge, who presided at the first trial. had no power to make the order purporting to have been under section, 339 of the Criminal Procedure Code, directing the commitment of the accused on the ground that he had forfeited his pardon and that the procedure adopted was both wrong and illegal.

Per Aston J.—It is open to a pardoned accomplice, if placed on trial as an accomplice who has *forfeited* the pardon already accepted by him, to plead in bar of trial that he did comply with the condition on which the tender of pardon was made, and such plea in bar of trial would have to be gone into and decided before the accused is called on to enter his plea in defence to the charge of having committed the offence in respect of which the pardon was tendered.

Section 339 of the Criminal Procedure Code does not enact that a person who has accepted a tender of pardon, renders himself liable to be tried for the offence in respect of which pardon was tendered, if he gives false evidence; what the section says is that he renders himself so liable (or forfeits the pardon) if by giving false evidence he has not complied with the condition on which the tender was made.

Per Beaman J. :---At the termination of the trial in which the pardon was given, the accomplice must be discharged by the court. Then if so advised, the Crown may re-arrest and proceed against him for the offence in respect of which he was given a conditional pardon. When put upon his trial for that offence, he may plead to a competent Court his pardon, in bar. And that is a plea that the Court would be bound to hear and decide upon before going further and putting him on his defence. In deciding it the Court would have to raise the issues whether he had or had not complied with the conditions of the pardon, whether he had or had not made a full and true disclosure of the whole facts. And where after having admittedly done that he had at later stage recanted, that recantation amounted to giving false evidence within the meaning of section 339 of the Criminal Procedure Code, and worked a forfeiture of the pardon.

Emperor *v.* Kothia valad Navalya Bhil 30 Bom. 611. **257**

Criminal Procedure Code (Act V of 1898), Sections 337 and 339—

Criminal Procedure—Pardon tendered and accepted—Evidence given and pardon withdrawn by magistrate—Forfeiture of pardon must be proved—When may forfeiture be declared and pardon withdrawn—Practice.

A committing Magistrate, having under section 337 of the Criminal Procedure Code (Act V of 1898), tendered a pardon to one of three accused persons, examined him as a witness. Subsequently, however, the Magistrate, under section 339 of the Code, withdrew the pardon on the ground that the accused had wilfuly concealed a certain fact connected with the offence, and he committed him along with the other accused for trial at the Court of Sessions, where he was found guilty. In giving judgment the Sessions Judge expressed his opinion that the withdrawal of the pardon by the Magistrate was illegal, (1) because such withdrawal could not be made until the close of the trial and should be made by the Court of Sessions and (2) because the fact, the alleged concealment of which was the ground of the withdrawl had not been proved. The accused, however, was found guilty and sentenced. On appeal to the High Court---

Held, that the conviction and sentence should be set aside on the ground that it had not been proved that the pardon had been forfeited under section 339 of the Criminal Procedure Code (Act V of 1898). The alleged fact, the concealment of which was the ground for withdrawing the pardon, had not been proved. If

Digitized by Google

the pardon which had been granted had not been forfeited under section 339, it was still in force and the accused should be discharged.

As the law stands the question in such cases is whether the accused has forfeited his pardon by some act of his own. The question is one of fact in which the Magistrate may hold one opinion and the Sessions Judge another as may happen in the case of any other question of fact in issue in the case. The Sessions Court has to determine for itself on the evidence whether the pardon has been forfeited; for if not, the accused, who has accepted such pardon, cannot be tried.

Quære,--Whether the examination at the committal proceedings before the Magistrate of a person who has accepted a pardon satisfies clause 2 of Section 337 of the Code which provides that every such person shall be examined as a witness "in the case" or whether such person must be examined as a witness at the "trial." King-Emperor *v.* Bala and Narayan 25 Bom. 675 **57**

Criminal Procedure Code (Act V. of 1898), sections 337 and 494—Withdrawal of prosecution---Discharge---Acquittal---Evidence---Discharged persons called as witnesses-Competent witness-Practice.

Where the Public Prosecutor with the consent of the Court withdrew from the prosecution of two out of several accused persons tried jointly for an offence under section 4 of the Gambling Act (Bombay Act IV of 1887), and the two accused were thereupon discharged under section 494 of the Criminal Procedure Code (Act V of 1898) and then examined as witnesses for the prosecution.

Held, (WHITWORTH, J. dissenting) that the persons so discharged were competent witnesses.

Queen-Empress *v.* Hussein Haji, 25 Bom. 422. **42**

Criminal Pro. C. s. 342—see Gambling Act (Bom. Act IV of 1887) secs. 4, 5, 6, 7. **141**

Criminal Procedure Code (Act V of 1898), section 350—Sessions Judge --Magistrate—Trial—Evidence recorded part---ly by another Judge—Consent of the prisoner—Jurisdiction.

Under the Code of Criminal Procedure (Act V of 1898) a Sessions Judge is not authorised to try a case partly on evidence not recorded by himself ; and he cannot do so although the prisoner has given his consent to such a trial.

Section 350 of the Criminal Procedure Code applies solely to Magistrate. King-Emperor *v.* Sakharam Pandurang and another 26 Bom. 50. **73**

Criminal Pro. C. secs. 418, 423 (2)—see Charge to jury. **125**

Criminal Pro. C. Secs 423, 439—see Revisional Jurisdiction of High Court. **111**

Criminal Pro. C secs. 435, 439—see Penal Code s. 193. **160**

Criminal Procedure Code sec 435—see Jurisdiction, High Court's Criminal Revisional. **12**

Criminal P. C. ss. 439, 195, 476 Practice—Procedure—Sanction to prosecute---Stay of criminal proceedings pending disposal of civil suit---High Court---Revision.

The High Court is competent, in the exercise of its revisional power under section 439 of the Criminal Procedure Code (Act V of 1898), to interfere with an order made by a subordinate Court under section 476 of the Criminal Procedure Code (Act V of 1898) directing the prosecution of any person for the offence referred to in that section.

The High Court in this case refused to stay criminal Proceedings directed by a subordinate Court under section 476 of the Criminal Procedure Code (Act V of 1898) until an appeal in the civil suit in connection with which the criminal charges were made had been decided.

In re Bal Gangadhar Tilak 26 Bom. 785 **107**

Criminal Pro. C. ss. 447, 449—see Adon Courts Act II of 1864 ss. 17, 20, 22 & 23 **224**

Criminal Procedure Code ss. 495 (cl. 4) & 537—see Gambling **90**

Criminal Procedure Code (Act V of 1898), sec. 517—Disposal of stolen property on conviction of the thief---Babashahi coin---Legal tender---Customary coin.

A witness for the prosecution in a case of theft produced a sum of money in Babashahi (Baroda) coin (part of the stolen property) which the accused had paid to him in satisfaction of a debt. The accused was convicted, and at

Digitized by Google

the close of the trial the Court, under section 517 of the Criminal Procedure Code (Act V of 1898), ordered the money to be restored to the complainant from whom it had been stolen.

Held, that the order was right. The stolen coins were not current coin of the realm and was neither by Statute nor by the law of merchants in British India a legal tender. The property in them did not therefore pass by mere delivery but remained in the complainant.

In Re Mathur Lalbhai. 25 Bom. 702 **70**

Criminal Pro. Code sec Act 593—Procedure in Magistrate's Court--Information filed against an accused, but no summons issued---Case must be disposed of by Magistrate although no summons applied for by complainant---Search warrant--Property seized by police under warrant---Claim by third party--Inquiry by Magistrate as to claim of third party.

Where an information is filed against a person, the Magistrate is bound to dispose of the case, and if no evidence is offered against the person accused, he must be discharged. The complainant, by omitting to take out a summons against such person, cannot keep a charge hanging over him for an indefinite time. The summons is merely the means of procuring the attendance of the accused, but if he appears of his own accord without a summons, he is entitled to require that the complaint shall either be proceeded with or dismissed.

Where property is seized under a search warrant, the Magistrate must proceed to make enquiry so as to enable him to dispose of it. If a third party appears and alleges that the property seized is his and is not the subject-matter of the offence charged, the Magistrate is bound to hear that party, and, if necessary, restore the property to its owner.

Magistrates must take care that the proceedings in their Courts are conducted with such reasonable expeditions as will prevent the parties from being improperly harassed by undue delay.

In the matter of Lakshman Govind Nirgude 26 Bom. 552 **94**

Criminal Trespass—See Penal Code Ss. 441, 448 **98**

Cruelty to Animals Act (Act XI of 1890), section 3 —Police, Bombay Town (Act XLVIII of 1860), section 21—Railway Company—Master and servant—Criminal liability of master for his servant's acts—Goods yard of a railway—Public place.

The G. I. P. Railway Company carried twenty seven head of cattle from Talegaon to Bombay. These cattle were put in one truck by their owner under the supervision of the Company's goods clerk at Talegaon, and were so allowed to be put by the Company's servants at Talegaon, in spite of a circular issued to them by the Traffic Manager to prevent the overcrowding of cattle. When the cattle were detained at the goods yard of the Company at Wadi Bundar, they were found suffering from the effects of overcrowding. The Bombay Society for the Prevention of Cruelty to Animals prosecuted the Railway Company under section 21 of Act XLVIII of 1860 and section 3 *(b)* of the Act for the Prevention of Cruelty to Animals (Act XI of 1890). The Presidency Magistrate, who tried the case, referred to the High Court the following two questions:

(1) Is the Company liable, under the above circumstances, for the acts of the owner of the cattle and the goods clerk at Talegaon under section 3 (*b*) of Act XI of 1890, though they may have no knowledge as to how the animals were carried?

(2) Is the Wadi Bunder goods station a place accessible to the public, when the Company's orders are that men on business alone should be admitted there?

The High Court answered the first question in the negative and the second in the affirmative.

Act XI of 1890 is aimed at the individual who actually practises the cruelty, and it was not intended by the Legislature to make a master penally liable for the act of his servant done in the course of the servant's employment, and certainly not when the act is done contrary to the orders of the master. Cawasji Merwanji Shroff *v.* The Great Indian Peninsula Railway Company 26 Bom. 609. **100**

Evidence—See Criminal Pro. Code secs. 337 & 494. **42**

Evidence Act ss. 11, 54: see Gambling Act ss. 4. 5. 6. 7. **141**

Evidence Act See 24—Confession of an accused while in custody of the police—

Digitized by Google

Duty of Magistrate when such confession is made—Sessions Judge—Duty of—Criminal Procedure Code (Act V of 1898), section 164 (3).

When an accused person has been in custody of the Police and has made a confession, it is important that the Magistrate before recording such confession under section 164 of the Criminal Procedure Code (V of 1898) should ascertain how long the accused has been in custody. If there is no record of that fact, it is the duty of the Sessions Judge, before holding the confession relevant under section 24 of the Evidence Act (I of 1872), to send for the Magistrate and satisfy himself on the point.

Queen—Empress v. Narayan. 25 Bom. 543 **46**

Evidence (Act I of 1872), Secs. 24, 30 and 33—Deposition of a deceased witness—Admissibility of such deposition in subsequent proceedings—confession.

A confession duly recorded and certified under section 164 of the Criminal Procedure Code (Act V of 1898) is admissible in evidence against the person making it unless shut out by the provisions of section 24 of the Indian Evidence Act (I of 1872.)

A mere subsequent retractation of a confession which is duly recorded and certified by a Magistrate is not enough in all cases to make it appear to have been unlawfully induced.

The law in India is not identical with the law in England on the relevancy and admissibility of confessions.

Where a witness for the prosecution was examined before a committing Magistrate, but was not cross-examined, and then died before the case came on for trial to the Sessions Court, and his deposition was tendered in evidence at the trial.

Held, that the deposition was admissible under section 33 of the Evidence Act (I of 1872).

Queen-Empress v. Basvanta 25 Bom. 168 **33**

Evidence Act s. 32—Dying declaration—Indian Penal Code (Act XLV of 1860), sec. 396.

Appellant was convicted and sentenced to transportation for life on a charge of dacoity. The most material evidence for the prosecution was the statement, in the nature of a dying declaration, made to the jamadar of police by one Fakiria Shimpi, who received wounds during the dacoity and who died before the trial commenced.

The Assistant Surgeon, who made the *Post-mortem* examination on the deceased, was not called, being on leave, but the Civil Surgeon, on a perusal of the notes left by the Assistant Surgeon, gave evidence that the cause of death of the deceased was pneumonia aggravated by a stab. In the notes themselves no cause of death was given, and there was no evidence as to how the pneumonia was aggravated. No explanation was given as to how the opinion was formed that the pneumonia was aggravated by the injury, and there was nothing in the notes to support it.

Held, that the statement of the deceased ought not to have been admitted in evidence in the absence of evidence to show that his death was caused or accelerated by the wounds received at the dacoity, or that the dacoity was the transaction which resulted in his death.

Imperatrix v. Rudra 25 Bom. 45 **18**

Evidence Act sec. 114 ill. (b), 133—see Accomplice. **81**

Evidence Act sec. 134—see Penal Code sec. 193. **160**

Factories Act (XV of 1881), sections 12, 15 (1) (e) (1)—Fencing Machinery—Manager—Occupier—Liability.

The accused who was the manager of a ginning factory at Dhulia resided in a part of the premises on which the factory stood. He was charged under section 15 [1] [e] of the Indian Factories Act [XV of 1881] with having neglected to fence certain machinery in the factory and he was convicted and sentenced by the Magistrate. On appeal, the Sessions Judge reversed the conviction and sentence and acquitted the accused. On appeal by the Government of Bombay against this order of acquittal :—

Held, that the accused was not liable to conviction under section 15 [1] [e] of the Indian Factories Act [XV of 1881], since the manager of a factory cannot be said with truth to have been the occupier thereof.

Emperor v. Rampratap Magniram. 29 Bom. 423. **209**

False Evidence—see Penal Code sec. 193. **160**

Digitized by Google

Gambling Act (Bombay Act IV of 1887), sections 3, 4 (a)—Instrument of gaming—Single page of paper used for registering wagers.

The expression "instruments of gaming" as defined in section 3 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) includes a single page of paper used for registering wagers. Emperor *v.* Lakhamsi Malsi. 29 Bom. 234. 204

Gambling—Bombay Act IV of 1887, sections 3, 4 and 5—Instruments of gaming—Books and telegrams—Game—Procedure—Police officer investigating offence not to conduct prosecution—Criminal Procedure Code (Act V of 1898), sections 495 (clause 4) and 537.

The accused was partner in a shop at Surat in which he ostensibly carried on the business of cloth selling, but in which he also actually carried on a *Satta* or wagering business. The wagers were made with regard to the last unit of the figures denoting the prices for which opium was sold at Calcutta on a given day. Information as to these sales was received by telegraph from Calcutta. The firm kept books in which the wagers where recorded. The accused was convicted and sentenced under sections 4 and 5 of Bombay Act IV of 1887.

Held by Candy and Fulton, JJ. (confirming the conviction under section 4). that the books kept by the firm for the purpose of recording the wagers were instruments of gaming within the definition of section 3 of Bombay Act IV of 1887.

Held by Candy, J., that the telegrams received and used for the purpose of determining the result of the bets were also within the definition.

Held, also, (setting aside the conviction under section 5) that the waging with which the accused was charged was not a "game" and the presumptions under section 7 and clause 2 of section 5 of the Act did not apply.

A Police Inspector, who has taken part in the investigation into an offence, is not qualified to conduct the prosecution of the person charged with that offence (Criminal Procedure Code, Act V of 1898, section 495, clause 4). Emperor *v.* Tribhovandas Brijbhukandas 26 Bom. 533. 90

Gambling (Act IV of 1887), sections 3, 4, 12—Gambling in a machwa—public place—Bombay Harbour.

The accused, fourteen in number, chartered a *machhwa* (boat), and, having got it anchored in the Bombay Harbour a mile away from the land, carried on gambling there. For this they were convicted of an offence under section 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) for gaming in a pubic place:

Held, that the accused were not guilty of an offence under section 12 of the Act, since they cannot be said to be gambling in a public place.

PER BATTY J.:—The word "place" which is patent of many different meanings, must necessarily, in each instance in which it is used by the Legislature, be construed with reference to the intention to be inferred from the context. Thus in section 12 of the Bombay Prevention of Gambling Act (Bom. IV 1887 or in section 3 of 36 and 37 Vict., C. 38, in connection with such words as roads, streets and thoroughfares, it has a very different meaning from that which it bears in section 4 of the Act, and from that given to it in connection with section 3 of 16 and 17 Vict,, C. 119, by judicial decisions.

The mischief aimed at in section 4 of the Act is a mischief clearly distinct from that aimed in section 12 of the Act. In the former, the mischief aimed at is the practice of individuals making a profit by providing a spot of their own selection known as a place where gambling is to be carried on, and making a livelihood by attracting people to a place which they would not otherwise frequant. In the latter, the offence is not that the individual members are making a profit at all but simply that they are carrying on their gambling with such publicity that the ordinary passer-by cannot well avoid seeing it and being enticed---if his inclinations lie that way—to join in or follow the bad example openly placed in his way. In the one case comparative privacy for profit, in the other the bad public example and accessibility to the public, would seem to constitute the gravamen of the offence.

Section 12 of the Bombay Prevention of Gambling Act (Bom Act IV of 1887) aims at gambling in a public place or thoroughfare, ordinarily with no intervening obstruction to the public view, where there is voluntary publicity.

Digitized by Google

Emperor v. Jusub Ally 29 Bom. 886 206

Gambling Act (Bombay Act IV of 1887), sees 4, 5, 7—Common gaming house - Jamatkhana of the Borah community.

The accused were found playing for money with cards in a building ordinarily used as a *jamatkhana*, but accessible to such members of the Borah community as have no place to live in and are too poor to afford the rent of a room. This place was frequented by the petitioners and others and instruments of gaming were found there when the accused were arrested. The Magistrate convicted the accused of offences under sections 4 and 5 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887).

Held, that it was open to the Magistrate to rely on the presumption which under section 7 of the Act might be drawn that this place was used as a common gaming house unless the contrary was made to appear by the evidence before him; there was, therefore, no ground to interfere in revision with the convictions under section 5 of the Act.

Held, further, that no presumption arose under section 7 of the Act that the place was "kept" by any person as a common gaming house; the conviction under section 4 was therefore wrong.

In order to constitute an offence under section 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), of keeping a common gaming house, it is necessary to show, in the first place, that the person charged with that offence is the owner, or occupier, or a person "having the use" of the place alleged to be kept as a common gaming house. It is not sufficient to show that the accused used the place in question for the purpose of gaming there.

Emperor v. Walia Musaji 29 Bom. 226. 202

Gambling Act (Bombay Act IV of 1887), sections 4, 5, 6, 7—keeping a common gaming house—Applicability of presumption under section 7 to cases under section 4—Warrant under section 6—Delay in executing the warrant—Previous conviction—Criminal Procedure Code (Act V of 1898), section 342—Evidence Act (Act I of 1872), sections 11, 54.

On the 19th May, 1903, a warrant was issued by the Commissioner of Police at Bombay, under section 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) for the arrest of accused 1. In execution of this warrant, when, on the 7th June, 1903, the police entered the room of accused 1, no actual play was seen by the raiding party, but there were found playing cards on the ground, and ten persons, including accused 1, were found sitting in a circle. Upon these facts the Magistrate convicted the accused of keeping a common gaming house, an offence under section 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), by applying to him the presumption created by section 7 of the Act; and taking into consideration the previous convictions of the accued under the Act, he sentenced him to pay a fine of Rs. 500 the maximum amount of fine allowed by the section. On appeal to the High Court.

Held, by Chandavarkar and Aston, JJ. (Jacob, J., dissenting), affirming the conviction, (1) that the presumption created by section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) could be applied to cases falling under section 5 as well as to those falling within the purview of section 4 of the Act.

(2) That the applicability of section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) was affected by the fact that a considerable interval had elapsed between the issue of a warrant under section 6 of the Act and the execution thereof.

(3) That the evidence that the accused had been previously convicted of the same offence was admissible to show guilty knowledge or intention.

Held, by Jacob, J., dissenting, (1) that the presumption created by section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) is sufficient for the purposes of section 5 of the Act. It is also sufficient for the purposes of section 4 (*a*) so far as regards the fact that the house, &c., is so used, but it is not alone sufficient for the purpose of showing that the house was so kept or used by any specified person.

(2) That in a trial for an offence under section 4 (*a*) of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), the evidence that the accused was previously convicted of a

Digitized by Google

similar offence cannot be admitted either under sections 14, 15 or 54 of the Evidence Act (I of 1872).

(3) That the question whether the delay, between the issue of a warrant under section 6 of the Act and its execution, has been reasonable or otherwise is one which must be decided with reference to the circumstances of each case Emperor *v.* Alloomiya Husan. 28 Bom. 129 **141**

Gambling Act (Bombay Act IV of 1887). section 8---power of seizing money 'found therein'---Interpretation.

The power of seizing money found in a gaming house under section 8 of Bombay Act IV of 1887 does not extend to money found on the persons of those who may at the time be in such gaming house. Emperor *v.* Walli Mussaji 26 Bom 641. **105**

Gambling Act (Bom. Act IV of 1887), section 12(1)—Gambling in a railway carriage--Through special train---Public place---Railway track---Public having no right of access except passengers.

The accused were convicted under section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) as persons found playing for money in a railway carriage forming part of a through special train running between Poona and Bombay, while the train stopped for engine purposes only at the Reversing Station on the Bore Ghauts between Karjat and Khandala Stations) of the Great Indian Peninsula Railway.

Held, reversing the conviction, that a railway carriage forming part of a through special train is not a public place under section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887).

Per JENKINS, C. J.:—The word "*place*" in section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887)] is, I think qualified by the word "public" and having regard to its context and its position in that context, it must, in my opinion, mean a *place* of the same general character as a *road or thoroughfare*.... I am unable to regard the railway carriage, in which the accused were, as possessing such characteristics of, or bearing such a general resemblance to, a street or thoroughfare as to justify us in holding that it was a public place within the meaning of section 12 of the Act, with which alone we are concerned.

Per RUSSELL, J.—The adjective "public" [in section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887)] applies to all the three nouns—street, place or thoroughfare, and it is clear that the railway line certainly cannot be described as a "public street or thoroughfare" inasmuch as it is not and cannot be used by the public in the same way as they are in the habit of using "public streets" and thoroughfares." Emperor *v.* Hussein Noor Mahomed 30 Bom. 348 **238**

General Clauses Act sec 3: see Municipal Act (Bom. Act III of 1887) ss. 410, 24 **231**

Jurisdiction—Scheduled Districts--Reference and appeal---Act No. XI of 1846---Scheduled Districts Act XIV of 1874.

The Collector of Khandesh, in his capacity of Political Agent for the Mehwasi Estates, convicted the accused of murder committed at a village in the Scheduled Districts, and sentenced him to transportation for life. He then forwarded the proceedings to Government for confirmation. The accused also appealed to Government against the conviction and sentence. The Government thereupon directed the Political Agent to submit the proceedings to the High Court under rule 35 of the Rules promulgated in 1855 under section 3 of Act XI of 1846. The appeal presented by the accused was also forwarded to the High Court. The question arose as to whether the High Court had jurisdiction to dispose of the reference.

Held, that the High Court had jurisdiction. Imperatrix *v.* Ratnya 25 Bom. 667. **52**

Jurisdiction, High Court's Cr. Revisional---Order in Council dated 4th November, 1867---Criminal Procedure Code (Act V of 1898), Sec. 435---Jurisdiction.

The High Court at Bombay has no criminal revisional jurisdiction over the proceedings of Her Majesty's Consul within the dominions of the Sultan of Muscat. In Re Rattansee Purshottum 24 Bom. 471. **12**

Jurisdiction High seas--Offence com-Code (Act XLV of 1860),---37 and 38 Vict., chapter 27, section 3.

Digitized by Google

A Presidency Magistrate has authority to charge, convict and sentence under the Indian Penal Code (Act XLV of 1860) a person who has committed an offence in a British ship during her voyage on the high seas. The law applicable both as regards procedure and punishment is the Indian law.

King-Emperor *v.* The Chief Officer of the S. S. "Mushtari" 25 Bom. 636. **51**

Jury—Summing up—Defective direction—Contentions placed before the Jury.

A Sessions Judge in summing up is entitled to have regard to the elaboration and skill with which the rival contentions have been placed before the jury by the advocates on both sides, but he should not in doing so omit pointedly to call the attention of the jury to matters of prime importance especially if they favour the accused, merely because they have been discussed by the advocate. Emperor *v.* Malgowda Basgowda 27 Bom. 644 **136**

Jury, power of judge to question—see criminal P. C. secs. 303, 304. **158**

Leterts Patent clause 29—see Aden Courts Act II of 1864 ss. 17, 20, 22 & 23. **224**

Master's liability for criminal act of his servant—see Prevention of cruelty to animals Act sec. 3. **100**

Master's liability for the criminal acts of his servant—see Arms Act sec. 22. **11**

Municipal Act (Bom. Act III of 1888), section 3. clauses (w), (x) and (y), section 461—Building Bye-laws Nos. 40, 42—Street—Construction.

The owner of a large plot of ground abutting on a highway divided the plot into 19 small plots and sold them to different purchasers. These plots were mapped out as abutting on the sides of two parallel roads which were marked out as proposed roads. Each of the purchasers of the plots entered into a covenant with the owner to keep open that portion of the proposed road which stood in front of his plot and to prepare so much of the road. The question arose whether the proposed road was a street within the meaning of the City of Bombay Municipal Act (Bombay Act III of 1888):—

Held, that the proposed road would constitute a street within the meaning of the City of Bombay Municipal Act (Bombay Act III of 1888). Municipal Commissioner for the City of Bombay *v.* Mathurabai. 30 Bom. 558 **250**

Municipal Act (Bom. Act III of 1888), sections 231 and 471—Notice to construct drains.

Accused was convicted and fined Rs. 25 for not complying with a notice issued by the Municipal Commissioner of Bombay under section 231 of Bombay Act III of 1888. The notice required him to make an open drain in the gully on the west of his premises, this drain to be so constructed as to adjoin the west wall of his building.

Held, (reversing the conviction and sentence), that the notice was *ultra vires* inasmuch as it required the accused to construct a drain, adjoining a particular part of his premises.

Held, that on a notice being served by the Municipal Commissioner of Bombay, under section 231 of Bombay Act III of 1888, if negotiations ensue, which are tantamount to a request by the party, served with the notice and a consent by the Commissioner, to reconsider the matter, such negotiations will have the effect of waiving the notice, and it is competent to the Commissioner to issue a fresh notice after the negotiations have closed. Limitation, in this event, under section 514 of the Municipal Act, will not run from the original notice. Emperor *v.* Nadirsha H. E. Sukhia. 29 Bom. 35 **195**

Municipal Act (Bombay Act III of 1888), Sec. 249—Notice to construct urinals in a particular place in the owner's premises—Illegality of such notice.

Accused was convicted and fined Rs. 50 for not complying with a notice issued by the Municipal Commissioner of Bombay under section 249 of Bombay Act III of 1888. The notice required him to construct a urinal of six compartments in the open space inside the entrance gateway to the Cloth Market from Champawady, and a water-closet in the corner of the entrance from 1st Ganeshwady near the fire-engine station.

Held, reversing the conviction and sentence that the notice was *ultra vires*, inasmuch as it required the accused to construct urinals in

Digitized by Google

particular place in his premises. In Re Khimji Jairam 24 Bom. 75 1

Municipal Act (Bom. Act III of 1888), section 249—Place of public resort—Theatre.

A theatre is a place of public resort and as such falls within the purview of section 249 of the City of Bombay Municipal Act (Bom. Act III of 1888). Emperor *v.* Dwarkadas Dharamsey 30 Bom. 392, 245

Municipal Act (Bom. Act III of 1888) sec. 381.

Under section 381 of the Bombay municipal Act (Bom. Act III of 1888) the Municipal commissioner for the City of Bombay issued a notice to the appellant as owner of certain low-lying ground. The notice stated that in the opinion of the Commissioner the ground accumulated water in the monsoon and caused nuisance to the tenants of two chawls situated on the premises. The owner was therefore, required by the notice " to fill in the low-lying ground with sweet earth to the level of the road and slope it towards the new drain on the road side."

As the owner refused to comply with the notice, he was convicted and sentenced to pay a fine of Rs. 15 by the Presidency Magistrate under section 471 of the Municipal Act (Bombay Act III of 1888).

Held, reversing the conviction and sentence that the notice was illegal. The words used in section 381 are "low ground," which is not the same as low-lying ground. And though the section gives power to the Commissioner to require the owner of low ground to cleanse and fill up the same, it does not permit him to issue an order that an indefinite extent of low-lying ground shall be filled up, much less that it shall be filled up to some particular level, or filled up with sweet earth, or that it shall be sloped in a particular direction. Municipal Commissioner for the City of Bombay *v.* Hari Dwarkoji 24 Bom. 125 2

Municipal Act Bom. (III of 1888), section 394,—Storing of oil,—what amounts to "storing.

The wording of section 394 of the City of Bombay Municipal Act requires that the premises, in or order to attract the operation of the section, should be used for the purpose of storing. The phrase "for the purpose" indicates that it must be the intention of those using the premises to store ; that storing must be the object aimed at :—the final cause for which the premises are used. There is nothing in the exemption which sub-section 3 declares in favour of the mills specified to imply that sub-section 1 was intended in the case of premises not so exempted, to include any use to which they might be put which was merely incidental or subsidiary to the paramount purpose to which the premises are devoted. Emperor *v.* Wallace Flour Mill Company. 29 Bom. 103. 198

Municipal Act (Bom Act III of 1888) s 410, 24 s D. (4)—Prohibition of sale of fish except in a market—Onus of proof— City of Bombay, limits of—Bombay General Clauses Act (I of 1904), section 3 (10).

The accused, a fisherwoman, was charged under section 410 (1) of the Bombay City Municipal Act (Bom. Act III of 1888), with selling or exposing for sale, without a license from the Municipal Commissioner, fish intended for human food, on the Chowpatti foreshore, in the City of Bombay. The sale was from a basket, which the accused had placed on the sand, at some distance from the water, between the high and low water mark. The fish sold was fresh fish and was brought from one of the boats then in Back Bay. The Presidency Magistrate acquitted the accused on the grounds that (1) the Bombay City Municipal Act did not apply as the place of sale was outside the limits of the City of Bmobay as laid down in the City of Bombay Municipal Act ; (2) section 410 of the Act had no application because the place was a private market established from time immemorial ; and (3) the sale fell within section 410 (2) of the Act, on appeal, against this order of acquittal, by the Government of Bombay :—

Held, reversing the order of acquittal and convicting the accused, that the accused was not protected by section 410 (2) of the Bombay City Municipal Act (Bom. Act III of 1888), since it was impossible in the present case to say that the fish had been sold from a vessel, when as a matter of fact it had been sold from

Digitized by Google

the basket on the shore, it having been brought from the vessel which was in the water.

Held, also, that the onus of proving that the place in question was a "private market" lay upon the accused.

Held, further, that the Bombay City Municipal Act (Bom. Act III of 1888) applied to the spot in question, because it came within the expression "City of Bombay" as defined by the Bombay General Clauses Act (Bom. Act I of 1904). Emperor *v.* Budhoobai 30 Bom. 126 231

Offence committed out of British India—see Penal Code ss. 108A, 372 3

Penal Code—see Jurisdiction High seas 51

Penal Code (Act XLV of 1860), sec. 108 A, 372—Disposing of a minor for immoral purposes—Abetment—Offence committed out of British India—Jurisdiction—Offence not triable except with the certificate of Political Agent or sanction of Government—Criminal Procedure Code (Act V of 1898), Sec. 188.

A minor girl under the age of sixteen years was taken by accused No. 1, under direction of the accused No. 2, from Sholapure to Tuljapur (in the Nizam's territory), and there dedicated to the goddess Amba, with intent or knowing it to be likely that the minor would be used for purposes of prostitution.

The District magistrate of Sholapur convicted accused No 1 of an offence under section 372 and accused No. 2 of abetment of the offence under sections 372 and 108 A of the Indian Penal Code, and sentenced them each to six months' rigorous imprisonment.

Held, that as the offence of the disposal of the minor took place out of British India, the Magistrate had no jurisdiction to try the offence in the absence of a certificate of the political Agent or the sanction of the Local Government as required by section 188 of the Code of Criminal Procedure (Act V of 1898).

Held, also, that accused No. 2 was not guilty of abetment, and section 108A of the Indian Penal Code had no application to the present case.

Mere intention not followed by any act cannot constitute any offence, and an indirect preparation which does not amount to an act which amounts to a commencement of the offence does not constitute either a principal offence or an attempt or abetment of the same.

The intention of either of the accused while they were staying at Sholapur did not constitute any offence, and their removal with the girl to Tuljapur did not by itself constitute an abetment. Queen-Empress *v.* Baku 24 Bom. 287 8

Penal Code sec. 161—see Accomplice 81

Penal Code (Act XLV of 1860), section 193—Criminal Procedure Code (Act V of 1898), sections 435, 439—Perjury—Contradictory statements—Power of the High Court to interfere in revisional jurisdiction.

Where the accused was convicted and sentenced under section 193 of the Indian Penal Code (Act XLV of 1860) of giving false evidence in a judicial proceeding and where the charge was based on the allegation that in two depositions, one given on the 3rd December, 1896, and the other on the 23rd March, 1901, the accused had made two contradictory statements, and the case for the prosecution was that on that ground, though it could not be proved which of the alleged contradictory statements was false, the accused's conviction should be upheld.

Held (by *Jenkins C. J.*, reversing the conviction and setting aside the sentence in revisional jurisdiction,) that to convict an accused of giving false evidence, it is necessary to show not only that he has made a statement which is false, but that he also either knew or believed it to be false or did not believe it to be true.

Where it is sought to establish guilt solely on contradictory statements, although the Court "may believe that on the one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury; for their are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong and swear to the reverse without meaning to swear falsely either time."

Where the conviction is based on merely the statements contained in the charge without examining the whole of the deposits, the conviction is an error of law.

Where the conviction of the accused for perjury in such a case was sustained by additional

Digitized by Google

evidence, namely, the statements of the brother of the accused not made on oath at the trial of the case.

Held that the statements were inadmissible and, if relied on, would vitiate the judgment.

The admission in evidence of a statement made by the accused having no real bearing on the case but showing only at the most that the accused in other matters had been untruthful, would be highly improper.

The controling power of the High Court "is a discretionary power, and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances which vary greatly. This discretion ought not to be crystallized, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the Legislature has committed to them. This discretion, like all other judicial discretions, ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case."

Per Chandavarkar, J:—In the case of perjury arising out of contradictory statements the Court dealing with them should not convict unless fully satisfied that the statements are from every point of view irreconcilable, and if the contradiction consists in two statements opposed to each other as to matters of infernce or opinion on which a man may take one view at one time and a contrary view at another, there, can be no perjury, unless on oath he has stated *facts* on which his first statement was based and then denied those *facts* on a subsequent occasion.

Where the sole and whole question is—are the statements forming the subject of the charge so contrary that one or the other of them must be necessarily false?—the answer to that question depends upon the construction to be put upon the two depositions from which the statements are taken and their construction, as indeed the construction of any document, is a question of law not of fact.

It is not correct to say that the law as laid down in the Criminal Procedure Code (Act V of 1898) gives the High Court no power to go into evidence in revision. The Bombay High Court has, as a matter of practice, held that it will not go into evidence as a rule, but will interfere only under special circumstances. or were there is an error of law.

The accused in a criminal case is merely on the defensive and, unless there is any positive admission of a fact by him, any omission on his part to explain what indeed can be explained without his explanation should not be pressed against him.

Per Aston, J. (contra);—The rule of practice is that the High Court ordinarily refrains from opening questions of fact, when no appeal lies, except on some ground of law and in order to remedy a clear miscarriage of justice.

Where the question before the High Court exercising its powers of revision under section 439 of the Criminal procedure Code (Act V of 1898) is one of appreciation of evidence, the rule of practice adopted is to refuse to disturb a conviction when there is legal evidence, oral or documentary, to sustain it.

"Under the law of British India, it is not necesary that the charge should allege which of two contradictory statements upon oath is false, but it is sufficient (unless indeed some satisfactory explanation of the contradiction should be established) to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time and directly contradictory statement at another." It is not the duty of the Court of first instance (and far less of a Court of appeal or revision) to supply *ab extra* an explanation which the accused himself has not suggested or an intention or knowledge which the accused has not claimed. Emperor *v.* Bankatram Lachiram. 28 Bom. 533. **174**

Penal Code section 193—Criminal Procedure Code sections 435, 439—Evidence Act (I of 1872)—Assignment of perjury—Proof—Misreading of documentary evidence—Fundamental errors in principle—Revisional jurisdiction.

According to the Criminal law in England from which the Indian system is largely drawn the assignment of perjury must be proved by two witnesses, or by one witness and the proof of other material and relevant facts confirming his testimony. This "is not a mere technical rule but a rule founded on substantial justice." The Indian Evidence Act (1 of 1872) does not

Digitized by Google

provide that there must be corroboration to support a conviction, but in ordinary cases and where the provisions peculiar to Indian law do not apply, a rule which is founded on substantial justice may well serve as a safe guide to those who have to administer the criminal law in India.

Where with reference to an adoption the accused made a statement and where no other expression would with equal propriety have been used to express the corporeal act of giving and taking in adoption), it is antagonistic to the first principles of criminal jurisdiction to explain away to the prejudice of the accused that statement which in its legitimate sense indicated a corporeal giving and taking.

Per Jenkins, C. J.:—A conviction for perjury cannot stand where the onus has been wrongly placed: explanations have been demanded from the accused when no occasion for them existed; and the rule that there must be something in the case to make the oath of the prosecution witness preferable to the oath of the accused has not been satisfied.

For silence to carry incriminating force in a case like the present there must have been circumstances which not only afforded the accused an opportunity to speak, but naturally and properly called for the declaration which is said to be absent. Emperor *v*, Bal Gangadhar Tilak 28 Bom. 479 **160**

Penal Code s. 411:—see Criminal P. C. secs, 233, 239. **212**

Penal Code sections 441, 448—House-trespass.

The accused No. 1, who held a decree against a certain judgment-debtor, went with his son, accused No. 2, and a Civil Court bailiff to execute a warrant. Finding the door of the Judgment-debtor's house shut, they entered his compound by passing through the complainant's house without his consent and notwithstanding his protest.

Held, that the accused's act amounted to criminal trespass, for when they trespassed on the complainant's house notwithstanding his protest, they must, as reasonable men, have known that they would annoy him.

There is no presumption that a person intends what is merely a possible result of his action or a result which though reasonably certain is not known to him to be so; but it must be presumed that when a man voluntarily does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result. Emperor *v*. Lakshman Raghunath. 26 Bom. 558 **98**

Penal Code secs. 478, 482:—see Trade mark. **85**

Penal Code sec. 499 Expl. I: see Criminal Pro. C. sec. 4 (h), chapter XV, Part B secs. 191, 195, 196, 198, 199 and 345 **27**

Railways Act (IX of 1890), Sec. 110—" Compartment ".

Per Jenkins, C. J., and Candy, J.:—Good sense requires that to the word "compartment" in certain sections of the Indian Railways Act (IX of 1890) the quality of complete separation should be attributed, and it is with that force that it is used in section 110.

Per Ranade, J.:—The word "compartment" is used in section 110 of Act IX of 1890 in the same sense in which it is used throughout the Act, and does not necessarily mean a completely partitioned division. In Re Dadabhai Jamsedji 24 Bom. 293 **6**

Revisional Jurisdiction: see Penal Code s. 193 **174**

Revisional Jurisdiction of High Court—Criminal Procedure Code sections 423, 439—Criminal Procedure Code s. 209—Practice—Procedure—Sufficient ground for committing for trial, what is.

Under sections 439 and 423 of the Criminal Procedure Code, the High Court has jurisdiction to set aside an order of discharge passed by a Presidency Magistrate. if such preliminary be necessary, and to direct that a person improperly discharged of an offence be arrested and forthwith committed for trial.

The fact, that by section 439 of the Criminal Procedure Code (Act V of 1898) the High Court in its revisional jurisdiction may exercise all the powers given to it as a Court of Appeal (by section 423), except (see paragraph 4) the power of converting a finding of acquittal into one of conviction, seems to point to the conclusion that all other powers not expressly exclud-

Digitized by Google

ed may be exercised by the High Court as a court of Revision.

The words in section 209 of the Criminal Procedure Code "sufficient ground for committing" mean, not sufficient ground for convicting, but refer to a case in which the evidence is sufficient to put the accused on his trial, and such a case arises when credible witnesses make statements which if believed, would sustain conviction. It is not necessary that the Magistrate should satisfy himself fully of the guilt of the accused before making a commitment. It is his duty to commit when the evidence for the prosecution is sufficient to make out a prima *facie* case against the accused, and he exercises a wrong discretion if he takes upon himself to discharge an accused in the face of evidence which might justify a conviction. Emperor *v.* Varjivandas alias Kalidas Bhaidas 27 Bom. 84. 111

Salt Act (Bombay Act II of 1890), section 47—Removal of Salt—Ingredients of the offence.

To support a conviction under section 47 (*a*) of the Bombay Salt Act (Bombay Act II of 1890) it is not necessary to prove dishonest intention on the part of the accused; since the wording of the clause does not in express terms or by necessary implication make intention or knowledge an essential ingredient of the offence. What is prohibited by the Act is the removal of salt in contravention of any licence or permit and that shows that such removal is prohibited in itself. Emperor *v.* Maganlal Dulabhai 28 Bom. 346. 156

Scheduled Districts Act sec. 3: see Jurisdiction. 52

Security for Good behaviour: see Criminal P. C. ss. 257, 177, 110 88

Security to keep peace: see Criminal Pro. Code sec. 250 20

Stay of Criminal Proceedings pending disposal of suit: see Criminal Pro. C. ss. 439, 195, 476. 107

Trade mark---Unauthorised publication---Penal Code sections 478, 482---Merchandise Marks Act (IV of 1889), sections 4, 6.

The complainant, as a descendant of one Shri Chandu, had for many years prepared calendars bearing the name of "Shri Chandu Panchang" at Jodhpur and had sent each year a copy of such calendar to publishers in different parts of India, and from the copy so furnished these publishers, issued and published calendars bearing the name "Shri Chandu Panchang," thus denoting them as calendars prepared in Jodhpur by the descendants of Chandu. The defendant, a publisher in Bombay, prepared a calendar and put the name "Shri Chandu Panchang" on the outside, although the calendar was not prepared by the descendants of Shri Chandu. The complainant thereupon filed an information against the defendant under section 482 of the Indian Penal Code (Act XLV of 1860) and section 6 of the Merchandise Marks Act (IV of 1889.)

Held (1) that the defendant had committed no offence under section 482 of the Indian Penal Code (Act XLV of 1860), for the title "Shri Chandu Panchang" did not come within the definition of 'trade mark' given in section 478 of the Code:

(2) That the defedant's act did not fall under section 6 of the Merchandise Marks Act (IV of 1889), as it was not alleged that the defendant's calendars differed as to text from the complainants or were compiled on different principles; the allegation was simply that they were unauthorized. Radha Krishna Joshi *v.* Kissonlal Shridhar 26 Bom. 289. 85

Trial by jury:—see Criminal Pro. Code secs. 269, 418. 60

Whipping Act (VI of 1864 as amended by Act III of 1895), section 4—Dacoity--Penal Code 395.

Under section 4 of the Whipping Act as amended in 1895, a sentence of whipping in addition to imprisonment is not legal in the case of a conviction of dacoity which was committed prior to the previous conviction of a similar offence. King-Emperor *v.* Babya Bhiva 25 Bom. 712. 72

Withdrawal of Prosecution:—see Criminal Pro. C. secs. 337. 494. 42

(End.)

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google